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CALIFORNIA REPORTER

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SECOND SERIES



44 Cal.2d 689

Dorothy Louise SWYCAFFER, Respondent,
v.

Joe W. SWYCAFFER, Appellant.
L. A. 22807.

Supreme Court of California.
In Bank.

June 16, 1955.

Action by wife for divorce, the husband filed counterclaim for annulment. The wife filed stipulation that action could proceed to trial on cross-complaint for annulment as a default matter without any further notice to her but subsequently filed petition for modification of child custody provision of the decree. The Superior Court, San Diego County, John A. Hewicker, J., granted an order of modification and the husband appealed. The Supreme Court, Shenk, J., held that where cross-complaint did not raise issue as to child custody, portion of decree awarding custody of child to cross-complainant was void.

Order and modification affirmed.

Opinion, 271 P.2d 585, vacated.

1. Marriage ⇐60(7), 64

Where husband's cross-complaint alleged that for purpose of inducing cross-complainant to consent to marriage cross-defendant fraudulently represented that she was not pregnant by any other man and that she concealed from cross-complainant fact that she was pregnant by some man other than cross-complainant, cross-complaint was sufficient to advise trial court of facts regarding cross-complainant's right to custody of child and finding of fraud was not supported by record. West's Ann.Code Civ.Proc. §§ 420, 426a.

285 P.2d—1

Cal.Rep. 285-286 P.2d—1

2. Judgment ⇐252(1)

Statute providing that relief granted to plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint is applicable to relief granted on a cross-complaint. West's Ann. Code Civ.Proc. §§ 442, 580.

3. Divorce ⇐292

Where wife's complaint for divorce was withdrawn and wife stipulated that trial could proceed on husband's cross-complaint for annulment as a default matter without notice to her and cross-complaint did not mention question of custody of child, portion of decree awarding custody of child to cross-complainant was void. West's Ann.Code Civ.Proc. §§ 442, 580.

4. Divorce ⇐292

The award of child custody is of such independent importance that a defaulting litigant is entitled to conclude that child custody will not be determined unless specifically included within prayer, especially where pleading on which relief is granted contains an express allegation that there are no children of marriage and that child in question is not in fact child of marriage. West's Ann.Code Civ.Proc. §§ 442, 580; West's Ann.Civ.Code, §§ 84, 138.

Vernon F. Bennett, San Diego, for appellants.

No appearance for respondent.

John R. Sorbo and John T. Holt, San Diego, amici curiae on behalf of respondent.

SHENK, Justice.

This is an appeal from an order modifying an annulment and custody decree.

The plaintiff, Dorothy, had been married to one Kent. She separated from Kent who commenced divorce proceedings against her in Oklahoma. Kent informed Dorothy that he was obtaining his divorce from her on July 1, 1950. Dorothy married Joe, the defendant, on July 7, 1950. At the time of that marriage Dorothy was pregnant. Kent did not secure his divorce from Dorothy until July 28, 1950. Dorothy and Joe separated on July 15, 1952. During the period they lived together a boy was born to Dorothy. Dorothy filed a complaint against Joe in the San Diego Superior Court seeking a divorce, custody of the child, and an order for the child's support. Joe answered and cross-complained. The cross-complaint sought an annulment on the ground that Dorothy was married to Kent at the time the ceremony between Dorothy and Joe was performed, and that at the time of that purported marriage Dorothy was pregnant by another man. On October 7, 1952, Dorothy with the knowledge and consent of her attorney signed a stipulation that her complaint for divorce might be withdrawn and that the action could proceed to trial on the cross-complaint for annulment as a default matter without any further notice to her. The matter was heard as uncontested on October 17, 1952. The trial judge did not read the pleadings in which Joe alleged that Dorothy was pregnant by another man at the time of their purported marriage. There was no allegation or prayer in the cross-complaint concerning the custody of the child born to Dorothy. At the hearing Vernon F. Bennett, Joe's attorney, produced an agreement signed by Dorothy and Joe in which Joe agreed to care for and support the child born to Dorothy and Dorothy agreed to give up all of her rights to the child as against Joe. Joe testified that a child had been born during his marriage to Dorothy and that she had consented to his having permanent custody of the boy. Nothing was mentioned concerning the child's paternity, and the only ground for annulment referred to at the hearing was Dorothy's marital status at the time of her purported marriage to Joe. The court made findings and conclusions in favor of

the cross-complainant. It found that at the time of the purported marriage between Dorothy and Joe, Dorothy was married to another man; and that, at that time, Dorothy was pregnant by another man. The trial court signed a decree granting Joe an annulment and also awarding permanent custody of the child to Joe.

In December, 1952, Dorothy, through the attorney who represented her in the annulment action, John T. Holt, filed an application for an order to show cause why the annulment judgment should not be modified by striking therefrom the provision with reference to the custody of the child. The order was issued and a hearing was had before the same judge who granted the annulment decree. At that hearing Dorothy stated that she had dismissed Holt as her attorney. She asked that the action be dismissed. The court refused to dismiss it and appointed Holt as *amicus curiae*. Testimony was taken in which the above stated facts were established. The court then issued an order in which it reaffirmed its determination that at the time Dorothy purported to marry Joe she was married to Kent and was pregnant by another man, and that Joe was entitled to an annulment. However, the court further found that: " * * * Vernon F. Bennett, attorney for the defendant, Joe W. Swycaffer, knowingly and willfully deceived and defrauded the Court herein into awarding its decree [as to the custody provisions]." The court then ordered the custody provisions stricken from the decree on the ground that the custody issue was not within the pleadings.

Joe contends that the finding that Bennett, his attorney, practiced fraud on the trial court cannot stand as a matter of law. He argues that the cross-complaint stated in several places that Dorothy was pregnant by another man; that the trial judge was charged with knowledge of the contents of the pleadings; that no statement was made in contradiction of the pleadings at the annulment hearing, and that the trial judge improperly found that he was the victim of fraud.

Section 420 of the Code of Civil Procedure provides that: "The pleadings are

the formal allegations by the parties of their respective claims and defenses, for the judgment of the court."

Dorothy stipulated that Joe might take a default judgment based upon his cross-complaint. That cross-complaint was the only pleading before the court at the time the decree was rendered. Paragraph 3 of the second cause of action of the cross-complaint alleged: "That for the purpose of inducing * * * cross-complainant to consent to said marriage and go through said marriage ceremony * * * cross-defendant falsely and fraudulently represented to * * * cross-complainant * * * that she was not pregnant by any other man and that she was physically competent to marry * * * cross-complainant and that she concealed from * * * cross-complainant her real physical condition, namely: That of pregnancy by some other man than * * * cross-complainant." Paragraph 4 of that cause of action alleged: "That * * * cross-defendant was not at said time physically competent to marry * * * cross-complainant, but was at the time of said marriage to * * * cross-complainant married to another man and was in a state of pregnancy by some other man than * * * cross-complainant." Paragraph 3 of the third cause of action of the cross-complaint alleged: "That the statistical facts required by Section 426a of the Code of Civil Procedure are as follows: * * * 5. That no children were born the issue of this marriage."

[1] Under the circumstances of this case the allegations of the cross-complaint should be a sufficient record at immediate hand to advise the trial court of the facts claimed to have been fraudulently withheld or not disclosed by Bennett. Bennett was entitled to rely on the assumption that the trial court was aware of those facts in refutation of the asserted inference of fraud against him; and there is otherwise no sufficient showing of fraud on his part.

The finding of fraud against him is therefore not supported by the record and should be stricken therefrom.

[2,3] It is apparent from the judgment roll in the annulment proceeding that the

portion of the decree awarding custody of the child to Joe is void. Section 580 of the Code of Civil Procedure provides: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint * * *." This section is applicable to relief granted upon a cross-complaint. Code Civ.Proc. § 442. An examination of the cross-complaint discloses that nowhere is the question of child custody mentioned. The decree recites that Joe personally appeared in the action; that Dorothy "filed her appearance"; and that she stipulated that a trial could proceed on the cross-complaint without notice to her. In *Burnett v. King*, 33 Cal.2d 805, at page 808, 205 P.2d 657, at page 659, 12 A.L.R.2d 333, it was stated: "It is a settled rule, and has been clearly stated in many recent authorities, that a default judgment by the court that exceeds the demand or gives relief where no demand is made therefor is void as in excess of the court's jurisdiction * * *. The essence of the policy underlying section 580 of the Code of Civil Procedure, *supra*, is that in default cases, defendant must be given notice of what judgment may be taken against him—a policy underlying all precepts of jurisprudence and protected by our constitutions. If a judgment other than that which is demanded is taken against him, he has been deprived of his day in court—a right to a hearing on the matter adjudicated."

[4] Joe contends, however, that the matter of custody is so germane to the issue of annulment that a defendant must anticipate that an award for custody would be made. He argues that child custody is analogous to alimony and support orders. See *Bowman v. Bowman*, 29 Cal.2d 808, 178 P.2d 751, 170 A.L.R. 246; *Miller v. Superior Court*, 9 Cal.2d 733, 72 P.2d 868; *Karlslyst v. Frazier*, 213 Cal. 377, 2 P.2d 362; *Parker v. Parker*, 203 Cal. 787, 266 P. 283; *Cohen v. Cohen*, 150 Cal. 99, 88 P. 267. These cases are analysed in detail in *Burnett v. King*, *supra*, 33 Cal.2d 805, 205 P.2d 657, 12 A.L.R.2d 333, and need not be re-examined here. Suffice it to say that the award of custody is of such independent importance that a defaulting defendant is

entitled to conclude that child custody will not be determined unless specifically included within the prayer. Especially is this true where, as in the present case, the complaint or cross-complaint on which the relief is granted contains an express allegation that there are no children of the marriage and that the child in question is not in fact the child of the marriage.

Nor do Civil Code Sections 84 and 138 confer power on the Superior Court to make the award here in question. Section 84 provides: "A judgment of nullity of marriage does not affect the legitimacy of children conceived or born before the judgment, and the court may during the pendency of the action, or at the time the judgment is rendered or at any time thereafter make such order for the custody, care, education, maintenance and support of such children during their minority as may seem necessary or proper. * * *" "Section 138 as amended in 1951 similarly provides: "In actions for divorce or for separate maintenance the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody of such minor children as may seem necessary or proper and may at any time modify or vacate the same." These provisions must be deemed to confer jurisdiction generally with regard to the matters to which they relate. They do not affect Code of Civil Procedure Section 580, supra, in such a way as to confer jurisdiction to grant the custody of children where the matter of custody is not included within the pleadings. Moreover, even if Sections 84 and 138 were so construed as to repeal Code of Civil Procedure Section 580 by implication, that construction could not apply to the present case because the child here involved is neither the child of the parties, Section 84, nor the child of the marriage, Section 138.

It is apparent from the facts above set forth that the portion of the annulment decree awarding the custody of the child to Joe was in excess of the relief demanded in the cross-complaint and is void. Dorothy could therefore properly attack that portion of the decree in this proceeding.

The trial court found in this proceeding that: " * * * it had no power or jurisdiction [in the annulment action] to award the child referred to herein to * * * Joe * * * for the further reason that * * * said child was not an issue within the pleadings of the above case * * *." This finding is justified by the record and is sufficient to support the order.

The findings concerning the alleged fraud of the attorney Vernon F. Bennett are stricken from the record. Code Civ. Proc. § 956a. The conclusion of the trial court that the custody portions of the annulment decree are ineffective is correct. The order of modification is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR and SCHAUER, JJ., concur.

SPENCE, J., concurs in the judgment.



134 Cal.App.2d 104

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Calvin Jack SIZELOVE and Raymond Howard Hall, Defendants and Appellants.

Cr. 5339.

District Court of Appeal, Second District,
Division 2, California.

June 24, 1955.

Defendants were convicted of burglary. The Superior Court, Los Angeles County, Joe Raycraft, J., rendered judgment on the verdict, and defendants appealed. The District Court of Appeal, Moore, P. J., held that admission of one defendant's testimony that defendants had been engaged together in bad check passing and trial court's failure to instruct jury that to justify conviction, facts must not only be entirely consistent with theory of defendant's guilt, but entirely inconsis-

ent with any other rational conclusion, were not prejudicial errors.

Judgment affirmed.

1. Burglary §41(1)

Evidence was sufficient to sustain convictions of burglary.

2. Criminal Law §369(2)

In criminal prosecution, evidence tending, logically and by reasonable inference, to establish any fact material to People's case or any fact urged as defense, is competent, though it may connect defendant with a crime not included in accusation.

3. Criminal Law §370, 371(1, 12), 372(1)

In criminal prosecution, evidence tending to establish defendant's intent, guilty knowledge, motive, and common scheme, plan or system is admissible, though it may connect defendant with crime not included in accusation.

4. Criminal Law §369(2)

In burglary prosecution, one defendant's testimony, on examination by prosecuting attorney, that defendants had been engaged together in bad check passing, was properly admitted to show that defendants were likely to hatch perfidious schemes and rebut defense that they innocently entered burglarized home by mistake in quest of whiskey while on drinking spree; proof that they had mutual interest in taking what did not belong to them being essential to overcome such defense.

5. Criminal Law §371(6)

In burglary prosecution, one defendant's testimony, on examination by prosecuting attorney, that defendants had been engaged together in bad check passing, was properly admitted after People proved that defendants forcefully entered a residence at night, threw its contents into disorder and fled through shattering glass to escape capture; evidence of their previous joint criminal venture being relevant on question of their continued criminal intentions.

6. Criminal Law §369(2)

To render admissible, in criminal prosecution, evidence of previous criminal act

by defendant, such act need not be identical with crime charged.

7. Witnesses §345(1)

A witness may always be impeached by showing his conviction of a felony.

8. Criminal Law §673(3, 5)

In burglary prosecution, admission of one defendant's testimony, on examination by prosecuting attorney, that defendants had been engaged together in bad check passing, was not error prejudicial to defendant, in view of trial court's instruction to jury, limiting application of such testimony to impeachment of witness and purpose of showing fact and nature of defendants' acquaintanceship at time of such check passing.

9. Criminal Law §1144(15)

The jury are presumed to have exercised their reason and obeyed trial court's instruction limiting application of defendant's testimony, on examination by prosecuting attorney, as to criminal act committed by defendant before crime charged.

10. Criminal Law §1134(1)

Where evidence of defendants' guilt of crime charged was so bountiful as to compel belief therein, correctness of trial court's rulings need not be considered on appeal from conviction.

11. Criminal Law §1186(4)

A judgment of conviction should not be set aside on ground of error in admission of evidence or instruction to jury, unless entire record clearly shows that error resulted in miscarriage of justice. West's Ann.Const. art. 6, § 4½.

12. Criminal Law §1186(4)

In burglary prosecution, trial court's failure to give, on its own motion, instruction to jury that to justify conviction, facts must not only be entirely consistent with theory of defendants' guilt, but entirely inconsistent with any other rational conclusion, was not error prejudicial to defendants, in view of instruction given jury, convincing evidence of defendants' guilt and their failure to deny that they broke into burglarized house or to question sufficiency of evidence of their burglarious entry. West's Ann.Const. art. 6, § 4½.

13. Criminal Law §1144(15)

On appeal from judgment on verdict of conviction, jury are presumed to have heeded trial court's instruction to acquit defendants, if jury heard evidence susceptible of any reasonable interpretation pointing to defendants' innocence.

14. Criminal Law §814(17)

In burglary prosecution, instruction of jury as if only circumstantial evidence was introduced was unnecessary in view of evidence that defendants were seen on burglarized premises, admitted their entry thereon, and were apprehended while trying to escape therefrom.

15. Burglary §41(1)

In burglary prosecution plea that defendants forced entrance into burglarized home by mistake for purpose of imbibing owner's liquor imported further proof of defendant's guilt, as jury could have reasonably inferred that such plea was intentionally fabricated for purpose of deceiving court and concluded that defendants had no honest explanation and plea did not jibe with evidence of disheveled and ransacked condition of furniture and cabinets in home and rifling of purse therein by burglars.

Richard A. Haley, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., James C. Maupin, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

[1] From convictions of burglary and from the order denying their motions for a new trial, appellants seek a reversal on the grounds of asserted errors in rulings during the conduct of the trial and in refusing to give an instruction in the language proposed by them. While in their notice to the clerk they included the insufficiency of the evidence as a basis for appeal, it was not mentioned in their brief. Good reason: they were apprehended while attempting to escape and admitted having entered the home of Richard Koon in Lakewood. Defendant

Hall besought his captor for a "break" to escape. Sizelove carried a putty knife with a blade about an inch long, and bore a cut over his shoulder blade which he declared had been caused by the bite of a dog. The Koon window was crashed out, the screen over a front window had been ripped off, the screen on the service porch was pried loose, the window was standing ajar, and the kitchen cupboards were open. The dresser drawers and the closet door were open and purses, combs and feminine accessories were scattered about the rooms. Hall said to Deputy Conway: "I sure pulled a boner this time * * * that caper.¹ I sure pulled a foolish trick going in that house."

The defense at the trial was based upon testimony of both men who maintained that (1) they were drunk and (2) they were under the mistaken impression that they were "returning" to the house next door. But neither man was intoxicated when arrested and the lady next door had no engagement for them to return, and did not expect them.

[2-5] Because prior convictions of felonies were charged against both men, the prosecuting attorney inquired of Sizelove the duration of his acquaintance with Hall and then "as a matter of fact, you and he were engaged together in bad check passing in the latter part of 1953." Objection was interposed on the ground that "this witness' character is not on trial at this time." The objection having been overruled, the witness answered: "That is correct."

Appellants now contend that the ruling was prejudicial; that there is no relationship between the burglary charged and the issuance of the fictitious checks in 1953; that it was an attempt to prove the burglary by evidence of a prior conviction and that such proof has no tendency to prove some material fact about the burglary. Such contention is error. It is the law that evidence which tends logically and by reasonable inference to establish any fact material to the People's case or to any fact urged as a defense is competent although it may connect the defendant with a crime not

1. A caper in burglarious circles means a burglary.—Officer Conway.

included in the accusation. *People v. Woods*, 35 Cal.2d 504, 509, 218 P.2d 981; *People v. Morani*, 196 Cal. 154, 158, 236 P. 135. Such evidence is admissible when it tends to establish intent, guilty knowledge, motive, a common scheme, plan or system. (*Ibidem*.) In the case at bar, the evidence showed that appellants were likely to hatch perfidious schemes. It served to rebut the defense that appellants were bent on a drinking spree and for that reason innocently sauntered into the Koon home in quest of whiskey. Proof that the men had mutual interests in taking what did not belong to them was essential to overcome the defense of mistake. After proving that appellants had by force entered a residence at night time, thrown its contents into disorder and fled through shattering glass to escape capture, evidence of their joint criminal venture in 1953 was relevant on the question of their continued, criminal intentions.

[6] The contention that the criminal act involved in the offered evidence must be identical with the crime charged is without support. *People v. Schneider*, 126 Cal.App. 749, 14 P.2d 1018, 15 P.2d 540, is not authority for appellants' contention on that point. It involved acts which did not constitute violations of the Penal Code. Therefore, they were not proof of criminal intent.

[7-9] But for two other reasons, the ruling was correct. (1) It is always competent to impeach a witness by showing that he has been convicted of a felony. (2) The court's instruction, limiting the application of the evidence to impeachment and to the "limited purpose of showing that these two defendants were acquainted and the nature of this acquaintanceship in 1953, but for no other purpose" avoided prejudice. The jury are presumed to have exercised their reason and to have obeyed the instruction, *People v. Rogers*, 71 Cal. 565, 568, 12 P. 679; *People v. Nakis*, 184 Cal. 105, 114, 193 P. 92.

[10-12] Appellants contend further that prejudice was committed by the court's failure to give on its own motion an instruction that to justify a conviction, the facts must not only be entirely consistent with the theory of guilt but must be entirely incon-

sistent with any other rational conclusion. Appellants cite, in support of such contention, *People v. Bender*, 27 Cal.2d 164, 163 P. 2d 8. It does not support their thesis. The court in the instant case directed the jury as follows:

"If the evidence in this case is susceptible of two constructions, or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of a defendant, and the other to his innocence, it is your duty under the law, to adopt that interpretation which will admit of a defendant's innocence and rejects that which points to his guilt.

"You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to a defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt."

Thus, the Supreme Court had, in the *Bender* decision, already announced an even stronger rule, contrary to the contention of appellants. Moreover, the evidence of guilt is so bountiful as to compel the belief in appellants' guilt. Such being true, it is supererogation to argue the correctness of the court's rulings. No judgment shall be set aside on the ground of improper admission of evidence or error in instruction unless it is clearly apparent from the entire record that the error complained of has resulted in the miscarriage of justice. Const. Art. VI, § 4½. Where there is no denial of breaking into the house and appellants do not question the sufficiency of the evidence of their burglarious entry and there is abundant proof of the charge, it must be apparent that the court's ruling did not result in an unjust verdict.

[13, 14] The jury are presumed to have heeded the court's instruction that they were bound to acquit appellants if they heard evidence that was susceptible of any reasonable interpretation pointing to the innocence of

appellants. Under the facts proved, it was not necessary to instruct as if only circumstantial evidence had been introduced. *People v. Carson*, 74 Cal.App.2d 834, 843, 169 P.2d 677. Appellants were seen on the premises, admitted entering the house, and were apprehended trying to escape.

[15] The juvenile plea that appellants forced their entrance into the Koons home by mistake and for the purpose of imbibing their liquor is of such texture as to import further proof of their guilt. It would have been a reasonable inference for the jury that such a plea was intentionally fabricated for the purpose of deceiving the court and to conclude that appellants had no honest explanation. It does not jibe with the disheveled and ransacked condition of the furniture and cabinets of Mr. Koon and the rifling of the purse by the burglars. *People v. Wayne*, 41 Cal.2d 814, 823, 264 P.2d 547.

The judgment and the order denying the motion for a new trial are affirmed.

McCOMB and FOX, JJ., concur.



133 Cal.App.2d 705

Paul A. PALMER, Plaintiff and Respondent,

v.

Phillip L. WAHLER and Margaret Wahler,
Defendants and Appellants.

Civ. 8548.

District Court of Appeal, Third District,
California.

June 20, 1955.

Action to recover fee due under alleged oral contract whereby plaintiff undertook to and procured buyer for standing timber in which defendants had an undivided interest. The Superior Court, Shasta County, Albert F. Ross, J., gave judgment for plaintiff. Defendants appealed. The District Court of Appeal, Finley, J. pro

tem. held that evidence was sufficient to support findings that defendants had entered into oral agreement to pay fee to plaintiff, and to support finding that defendants were owners of one-half interest in timber rights sold.

Judgment affirmed.

1. Brokers $\S$ 86(1)

In action to recover fee under oral agreement whereby plaintiff was to receive fee if he found buyer for standing timber in which defendants owned an undivided interest, evidence was sufficient to support finding that defendants agreed to pay commission for finding of buyer.

2. Appeal and Error $\S$ 1001(1), 1010(1)

An appellate court cannot be placed in the jury box beyond the point of determining that there is sufficient evidence to support the verdict of a jury or the finding of a trial judge.

3. Brokers $\S$ 82(3)

In action to recover commission allegedly due under oral agreement of defendants to pay commission if plaintiff found buyer for standing timber in which defendants had an interest, where defendants admitted in their answer that they were owners of one-half interest in timber, trial court properly denied defendants' motion to amend their answer to show that a third party had acquired a portion of their interest.

4. Pleading $\S$ 258(3)

A motion to amend an answer, which would have effect of depriving a plaintiff of part of his remedy through no fault of his own, is properly denied if it appears that the applicant to amend had knowledge and ample time to correct any inaccuracies in his pleading before trial.

5. Appeal and Error $\S$ 494

In action to recover commission allegedly due under oral agreement of defendants to pay commission if plaintiff found buyer for standing timber in which defendants had an interest, where trial court clearly indicated that defendants' motion to amend answer was denied, and no prejudice was shown to have resulted, fact

that record disclosed no formal denial of such motion before end of trial was immaterial.

6. Brokers ⇨42, 43(1)

Oral agreement whereby plaintiff was to receive fee for merely introducing a prospective buyer to owners of standing timber, was a "finders agreement" and did not fall within purview of statute of frauds and the real estate licensing act regardless of whether standing timber be considered as realty or personalty and although plaintiff was not licensed real estate broker, he was entitled as a matter of law to payment of commission for finding buyers. West's Ann.Civ.Code, § 1624, subd. 5; West's Ann. Bus. & Prof.Code, § 10136.

See publication Words and Phrases, for other judicial constructions and definitions of "Finders Agreement".

7. Woods and Forests ⇨1

Where standing timber is purchased separately from the land for the purpose of severance, as to those claiming under or by reason of the contract of sale such timber must thereafter be considered as goods or personal property. West's Ann.Civ. Code, §§ 658, 660.

8. Frauds, Statute of ⇨72(3)

Where owners of standing timber on land had no interest in land upon which it stood, and time in which they could enter to remove timber was limited by terms of grant, the estate which was subject matter of contract for sale of standing timber was one for years, subject to defeasance at expiration of fixed term, and was similar in nature to an interest created by an oil and gas lease for years which is a chattel real and not "real estate" within meaning of statute of frauds. West's Ann.Civ.Code, § 1624, subd. 5.

See publication Words and Phrases, for other judicial constructions and definitions of "Real Estate".

9. Logs and Logging ⇨3(7)

Contract for sale of standing timber made by sellers who had no interest in land upon which timber stood, was a contract of sale within statute providing that where "industrial growing crops and things * * *

forming part of the land * * * are agreed to be severed * * * under contract of sale," things sold under such contract, are to be treated as goods under sales act. West's Ann.Civ.Code, §§ 658, 660.

10. Woods and Forests ⇨1

A sale of timber for the purpose of cutting and removing it from the land would amount to a constructive severance rendering timber personal property until such time at least as there should be, if ever, a reuniting or merger of the ownership of the land and the timber again into common ownership. West's Ann.Civ.Code, §§ 658, 660.

Blewett, Blewett, Macey & Garretson, Stockton, R. P. Stimmel, Redding, for appellant.

Carlton & Shadwell, Redding, for respondent.

FINLEY, Justice pro tem.

In this action, tried before a jury, plaintiff was awarded a money judgment on an alleged oral contract whereby, for a fee, he undertook to and did procure a purchaser of standing timber in which defendants owned an undivided interest. Defendants have appealed from the judgment and urge the following points of reversal:

"I. The evidence produced at the trial of the action by the plaintiff is insufficient either (A) to support the verdict of the jury and the judgment of the court finding that defendants were indebted to plaintiff by reason of an oral agreement entered into between them to pay a commission to plaintiff, or (B) that the defendants were the owners of a one-half interest in and to the timber rights sold and therefore liable to pay a commission based on one-half of the timber rights sold.

"II. The alleged oral agreement between the plaintiff and the defendants, being an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission, is invalid because there

is no note or memorandum thereof in writing and subscribed by the defendants, the parties to be charged, as required by the statute of frauds, Section 1624, subdivision 5 of the Civil Code of the State of California.

"III. Plaintiff failed to state a cause of action for recovery of a commission because of his failure to allege and prove that he was a duly licensed real estate broker at the time the alleged cause of action arose, as required by Section 10136 of the Business and Professions Code of the State of California and the trial court erred in refusing to consider this question at any stage of the proceedings, or to submit it to the jury."

The facts of the case are as follows: After a trial in the superior court for Trinity County in 1949 it was adjudged that one Fred Kohle owned an undivided one-half interest in certain timber in the Mad River and Hetinshaw Valleys in Trinity County, and that Philip L. Wahler and Margaret Wahler, his wife, owned the other undivided one-half interest. Thereafter, in August of 1949, Fred Kohle conveyed one-half of his undivided one-half interest to Alvin M. Cibula, an attorney at law in Shasta County. In December of 1950 Fred Kohle advised plaintiff of his interest in this timber and promised that if plaintiff would find a buyer who would consummate a deal for the purchase of the timber, a commission would be paid to him. Kohle was not authorized to speak for any one but himself, as no partnership existed between the co-owners, and at the time Kohle and his attorney, Cibula, were dealing at arm's length with the Wahlers and their attorney, R. P. Stimmel, whom the Wahlers contend also owned an undivided interest in the timber. It is alleged by plaintiff that defendants subsequently joined in the agreement to pay him a "finders" commission; that he produced a buyer named Dolan who, after some negotiations with the parties, did cause a corporation formed by him to purchase the timber, but that defendants thereupon refused to pay plaintiff the commission agreed upon.

There is no conflict between plaintiff on the one hand and Kohle and Cibula on the other regarding the transaction. They agree that plaintiff was promised as his commission all that a purchaser would pay over and above \$6 per thousand for all pine timber and \$4 per thousand for all fir timber. They contend that defendants agreed to this arrangement. Defendants argue that they were not parties to any such agreement and, furthermore, that even though in their answer they admitted ownership of an undivided one-half interest in the timber, their attorney, Stimmel, on July 7, 1949, acquired a 15 per cent interest in their one-half interest which in June of 1951 was increased to 20 per cent.

[1,2] The evidence is conflicting as to just what, if any, the arrangement was between plaintiff and defendants. Kohle, Cibula and plaintiff testified regarding several telephone conversations carried on by each of them with defendants, and it is claimed that defendants, as a final arrangement, assented to the payment of a commission to plaintiff of \$2 per thousand on all the pine timber sold. Defendants deny any such assent or agreement, but the jury found against them and in favor of plaintiff on the issue, and a review of the record discloses ample testimony of sufficient substantiality to support the finding. We so hold, and beyond this we are not required to go. *Trancoso v. Trancoso*, 96 Cal.App. 2d 797, 216 P.2d 172. It would serve no useful purpose to set forth here the supporting testimony. Numerous excerpts from the record appear in the briefs of both parties, but an appellate court cannot be placed in the jury box beyond the point of determination that there is sufficient evidence to support the verdict of a jury or the finding of a trial judge. In re *Estate of Moramarco*, 86 Cal.App.2d 326, 194 P.2d 740; *Smythe v. Schacht*, 93 Cal.App.2d 315, 209 P.2d 114; *Trancoso v. Trancoso*, supra; *Consolidated Pipe Co. v. Gries*, 103 Cal.App.2d 901, 230 P.2d 385.

[3-5] On the point that defendants were not owners of a one-half interest in the timber, the fact that they were such owners was admitted in their answer, and

their motion to amend near the end of the trial was properly denied by the trial court. Attorney Stimmel was not made a party to the action, and we can only assume that he was not made so on account of this admission on the part of defendants which was relied upon by plaintiff. The trial court properly took the position that, under the circumstances, this question of ownership was between the Wahlers and their attorney, Mr. Stimmel, and with this we agree. It would, in light of the facts disclosed, have been unfair to plaintiff for the trial court to have granted defendants' motion to amend their answer at the late date it was made. If allowed, such an amendment would, in effect, have unjustifiably amended away a part of plaintiff's remedy through no fault of his own. Such a motion is properly denied if it appears that the applicant had knowledge and ample time to correct any inaccuracies in the pleading before trial. *Manha v. Union Fertilizer Co.*, 151 Cal. 581, 91 P. 393; *Hancock v. Hubbell*, 71 Cal. 537, 12 P. 618; *McGushin v. Arnold*, 21 Cal.App.2d 271, 68 P.2d 733. The fact that the record discloses no formal denial of defendants' motion before the trial ended is of no substantial importance. The court clearly indicated that the motion was denied which is sufficient in the absence of a showing that prejudice resulted. *Hewel v. Hogen*, 3 Cal.App. 248, 84 P. 1002. A formal written ruling was later made and filed.

[6] Referring to appellants' points II and III above, respondent contends that the type of agreement with which we are here concerned is a finders agreement, and that it falls neither within the purview of the statute of frauds nor the real estate licensing laws. There is no substantial evidence that plaintiff was asked or employed to do other than find a buyer, or that he handled or participated in the negotiations for sale after he had found and introduced the buyer, Dolan, to the owners of the timber. The only evidence of plaintiff's participation in the negotiations is in connection with the payment of his commission. There is no evidence that he participated in any other phase of the transaction. There is evidence that during the negotia-

tions the timber owners called him by telephone and secured his consent to a waiver of any commission on the fir timber sold, but that is all. This involved the relationship between the timber owners and plaintiff but not the terms of the contract between the owners and the buyer.

The question of the enforceability of an oral finders agreement by one not holding a real estate license was recently passed upon in the case of *Crofoot v. Spivak*, 113 Cal.App.2d 146, 248 P.2d 45, which was an action brought to collect money alleged to be due for the procuring and introducing of a buyer for defendant's mill and timber properties. Plaintiff admittedly had no license to sell real estate, and defendant asserted this as a defense to the action. At pages 147-148 of the decision in 113 Cal. App.2d, 248 P.2d 45, we find this language:

"Reduced to its simplest proportions, this appeal has to do with the question of whether or not a license is required before one can collect on a promise to pay compensation for introducing a prospective purchaser to a property owner desiring to sell his properties, nothing more being done than the bare act of introduction. We think it unnecessary in the decision of this case to follow appellant through his discussions of the proper interpretation of the pertinent licensing acts because we think the case is controlled by the decision in *Shaffer v. Beinhorn*, 190 Cal. 569, 213 P. 960, decided in 1923. Therein defendant, a licensed real estate broker, entered into an agreement with plaintiffs promising that if the latter would find anyone interested in the purchase of the property which the broker had for sale, to whom the broker would be able to negotiate a sale, or would introduce to him anyone to whom he would be able to make a sale, he would pay plaintiffs a certain percentage of his broker's commission. Plaintiffs did introduce such a prospective purchaser to whom the defendant broker negotiated a sale. It was held the complaint stated a cause of action and did not show that the plaintiffs were acting as real estate brokers with-

in the meaning of the Real Estate Brokers Law. * * * The trial court, upon substantial evidence, found particularly that the promise upon which plaintiff sued was a promise to pay for an introduction and required no further act on the part of respondent to raise the liability sued upon. The trial court also found that respondent did no more than was called for, that is, did nothing but introduce the prospective purchasers to the appellant who himself thereafter conducted the negotiations resulting in the sale of his property without any act or aid by respondent. The cited case was decided, as noted, some twenty-nine years ago and in the intervening time successive legislatures have met and have made no amendments to the pertinent language of the enactment which would change the scope of the legislature's definition of who was a real estate broker as that definition was contained in the act current at the time the Supreme Court made its decision. Under such circumstances we think it clear that the legislature has acquiesced in the interpretation of the statute as given and that no justification could be found for any different interpretation now. As pointedly observed by the trial judge in his memorandum opinion, no license is required for the simple act of introducing one person to another—yet."

The Crofoot case was decided in September of 1952 by this court. In December, 1952, the decision in *Hooper v. Mayfield*, 114 Cal.App.2d 802, 251 P.2d 330, wherein statements appear indicating a contrary view, came down from Division Two of the First Appellate District. In May of 1954 there appeared on this subject the highly illuminating case of *Freeman v. Jergins*, 125 Cal.App.2d 536, 271 P.2d 210, wherein Division Three of the Second District was divided, Mr. Justice Vallee rendering a dissenting opinion. In the majority opinion by Mr. Justice Shinn, and in the dissent, the question of the validity of a "finders" agreement was thoroughly and ably discussed. In the majority opinion,

Hooper v. Mayfield, supra, was distinguished and the rule, originally announced in *Heyn v. Philips*, 37 Cal. 529, and followed in *Shaffer v. Beinhorn*, 190 Cal. 569, 213 P. 960, *McKenna v. Edwards*, 19 Cal. App.2d 327, 65 P.2d 810, and in *Crofoot v. Spivak*, supra, was approved and followed. It therefore appears that the law in California as originally announced by our Supreme Court in *Heyn v. Philips*, supra, and followed by that court in the *Shaffer* case is that a so-called "finders agreement" falls neither within the purview of the statute of frauds nor the real estate licensing acts. We hold that the agreement with which we are here concerned is such an agreement, and, therefore, regardless of whether the timber be considered as realty or personalty, the plaintiff, although not a licensed real estate broker, and acting under an oral agreement only, was entitled as a matter of law to the payment of his commission.

[7] Going further, it would seem that the enforceability of plaintiff's contract need not rest solely upon the determination of this point. In California, under the provisions of Civil Code, sections 658 and 660, standing timber purchased separately from the land under a contract for severance, thereby becomes personalty for all purposes depending upon the contract of purchase. As pointed out by both parties in their briefs, the legal status of standing timber is not uniform throughout the several states, and in California there are no decisions directly upon the point involved here. However, the language of Civil Code, sections 658 and 660, is in our opinion quite clear and explicit, and regardless of what the rule is elsewhere, we are satisfied that as to those claiming under or by reason of a contract of sale, the California rule is that where standing timber is purchased separately from the land for the purpose of severance, it must thereafter be considered as "goods" or personal property. See also *Davis v. McFarlane*, 37 Cal. 634.

[8] Here neither the appellants nor their co-owners in the timber had any interest in the land upon which it stood. The time within which they could enter and remove the timber was limited by the terms

of the grant to December 31, 1954. Therefore the "estate" which was the subject matter of the contract of sale was but one for years and was subject to defeasance at the expiration of a fixed term. It was similar in nature to an interest created by an oil and gas lease for years which has been held to be a chattel real and not "real estate" within the meaning of section 1624, subd. 5, of the Civil Code. *Dabney v. Edwards*, 5 Cal.2d 1, 53 P.2d 962, 103 A.L.R. 822.

[9,10] There are several provisions in the contract between the buyer and sellers here dealing with the question of severance of the timber and the mode of payment therefor in the event that the rate of severance exceeded the apparent expectation of the parties when the stipulated periodic payments were fixed. Although the necessity for severance is not dictated or required by actual terms of the contract, it is the unquestionable purpose thereof, and forfeiture in the event of nonseverance is made a specific condition. It would therefore be entirely unrealistic to say that the contract was not one according to the terms of which "industrial growing crops and things attached to or forming part of the land * * * are agreed to be severed * * * under the contract of sale * * *" as provided in Civil Code, sections 658 and 660. Further, it would seem only logical that aside from the provisions of these code sections, a sale of timber for the purpose of cutting and removing it from the land would amount to a constructive severance until such time at least as there should be, if ever, a reuniting or merger of the ownership of the land and the timber again into common ownership. *Peterson v. Gibbs*, 147 Cal. 1, 7, 81 P. 121; *Kingsley v. Holbrook*, 45 N.H. 313, 86 Am.Dec. 173 and note; *Hoit v. Stratton Mills*, 54 N.H. 109, 20 Am.Rep. 119; *Purner v. Piercy*, 40 Md. 212, 17 Am.Rep. 591 and note.

We recognize the marked difference of opinion in the various jurisdictions with respect to the status of standing timber sold separate from the land. See 7 A.L.R.2d 517. What its status should be in California in the event that it is not sold for severance is not involved here. We there-

fore expressly limit this decision to rights, or obligations originated by or depending upon the contract of sale in a situation where trees or timber are sold separate from the land and where severance from the land is the express or obvious purpose of the sale.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



134 Cal.App.2d 208

John S. DINSMORE, Mildred D. Dinmore
and Trustom R. Dinmore, Plaintiffs and
Appellants,

v.

BRIDGEVILLE LUMBER CO., a corpora-
tion, Defendant and Respondent.

Civ. 8666.

Sac. 6505.

District Court of Appeal, Third District,
California.

June 28, 1955.

Rehearing Denied (Civ. 8666) July 19, 1955.

Action by vendor to obtain specific performance of option to repurchase real property. The Superior Court, Humboldt County, Delos A. Mace, J., entered judgment denying specific performance and vendor appealed. The District Court of Appeal, Van Dyke, P. J., held that where option gave vendor right to repurchase at any time from May 7, 1951 to May 7, 1952 for \$100, the same timberland he had sold for \$7,000 in April 1946, but purchaser had right to remove standing timber until expiration of option period notwithstanding earlier exercise of option, and vendor exercised option in May, 1951 when \$25,000 worth of timber was standing on land and demanded immediate conveyance of land, vendor had not exercised his contract rights and was not entitled to specific performance.

Affirmed.

1. Evidence $\S$ 450(8)

Where under 1946 option purchaser agreed to reconvey to vendor "at any time after the 7th day of May, 1951 and before the 7th day of May, 1952," for payment of \$100, the same timberland purchaser acquired for \$7,000, option was uncertain in its terms as to time purchaser was obligated to reconvey if vendor exercised option and as to right of purchaser to remove timber up to May 1, 1952 notwithstanding an earlier exercise of option, and parol evidence was admissible to explain entire transaction.

2. Evidence $\S$ 429

Where option gave vendor right to repurchase same timberland he had sold for \$7,000, for only \$100 six years later, parol evidence of the entire transaction was admissible in order that the court might determine whether or not the option agreement was fair and reasonable and therefore a proper subject of an equitable decree of specific performance.

3. Specific Performance $\S$ 121(9)

In action for specific performance of option to repurchase for \$100, the same timberland optionee had sold six years earlier for \$7,000, evidence sustained finding that optionor was to have full option period to remove timber standing on the land before being required to reconvey, notwithstanding earlier exercise of option.

4. Specific Performance $\S$ 51

Option to repurchase for \$100, the same timberland optionee had sold for \$7,000, when construed to permit optionor to remove standing timber until expiration of one year option period notwithstanding earlier exercise of option, was equitable and subject to specific performance.

5. Specific Performance $\S$ 97(3)

Where option gave vendor right to repurchase at any time from May 7, 1951 to May 7, 1952 for \$100, the same timberland he had sold for \$7,000 in April 1946, but purchaser had right to remove standing timber until expiration of option period notwithstanding earlier exercise of option, and vendor tendered \$100 in May, 1951 when \$25,000 worth of timber was stand-

ing on land and demanded immediate conveyance of land, vendor had not exercised his contract rights and was not entitled to specific performance.

Ben Van Tress, Eureka, for appellants.

Huber & Goodwin, Eureka, for respondent.

VAN DYKE, Presiding Justice.

Plaintiffs and appellants brought this action against defendant and respondent to obtain specific enforcement of a contract to convey real property and incidental relief. Prior to April 20, 1946, appellants were the owners of 680 acres of timber land in Humboldt County. On that day a contract was entered into with respondent, whereunder they agreed to sell the land to respondent for the sum of \$7,000 and to convey when the purchase price had been paid. On the 7th of May following another contract was entered into by the parties. This is the contract which the appellants herein seek to have specifically enforced. Stated in substance, that contract was as follows: In consideration of One Dollar the respondent agreed to convey to appellants, by quitclaim deed, "at any time after the 7th day of May, 1951 and before the 7th day of May, 1952", for a payment of \$100, the same property which respondent was then purchasing under contract from appellants. The parties refer to this document as an option and we will so refer to it. The writing contains no explanation on its face as to why property costing \$7,000 and being currently purchased at that price from appellants might thus be conveyed back to them for \$100 some five or six years later. The parties proceeded under the purchase and sale agreement. Respondent paid for the land and received a grant deed therefor from appellants, which deed was absolute in form and contained no reference to the outstanding option contract.

By their complaint the plaintiffs alleged the execution of the foregoing agreements and the execution of the deed to respondent. In an apparent attempt to explain the whole transaction, appellants alleged that, as owners of the subject property, they first en-

tered into an oral contract with respondent wherein it was agreed that they would sell the property to respondent, give it a period of five years to remove the timber therefrom and that after the five year period all rights of respondent in and to the property and timber would revert to appellants; that to carry out the terms of that oral contract the parties executed the purchase and sale agreement whereunder respondent was to obtain title to the property and the later option agreement whereunder appellants for the sum of \$100 could re-purchase the subject land. They alleged the fairness of the re-purchase agreement under the circumstances, and that in all respects it was fairly arrived at.

On June 1, 1951 appellants recorded the option agreement, tendered to respondent \$100 in money and demanded a deed. Later they began this action. They alleged respondent's refusal to convey; that on January 11, 1949, respondent had made an agreement with one Thomsen, selling the timber on the land to him, with the right to enter and remove the same for a period extending to March 1, 1952; that Thomsen had begun to remove the timber and was at the time the action was filed still cutting and removing the same and making payments therefor to respondent; that as of June 1, 1951 there was still standing on the property and being cut and removed by Thomsen timber worth more than \$25,000. They asked that the court compel the respondent to convey the property to them; that respondent be declared to be a trustee for their benefit of all money received from Thomsen after June 1, 1951, and that respondent be required to assign and deliver to them the Thomsen agreement, together with all moneys received thereunder after said date.

The court found that there was no antecedent oral agreement between the parties limiting respondent to five years to remove the timber on the property; that when the option agreement was executed none of the parties intended or expected that appellants would be entitled to any but cut-over land thereunder; that the \$100 purchase price provided for in the option was not fair, adequate, reasonable or equitable under the

circumstances and that the parties never contemplated that appellants would be "entitled to get back an alleged \$25,000.00 worth of timber, or any timber" for such consideration and did not bargain therefor. Further the trial court found that the option agreement, properly construed, gave to respondent a one-year leeway period to insure the removal of the timber on the subject land. The court concluded that appellants were not entitled to specific enforcement of the option agreement and adjudged that they take nothing as against respondent. From that judgment this appeal was taken.

It appears from the record that the main point of dispute between the parties was as to the time at which respondent was to convey the land back to appellants if appellants elected to pay \$100 therefor. Appellants insist that they could demand and be entitled to a conveyance at any time during the year period between May 7, 1951 and May 7, 1952; that at any time in that period which they chose to select they could tender the \$100, demand a deed and effect an equitable conversion as of that date, entitling them not only to conveyance of the legal title, but to an accounting of any receipts from the property which the respondent thereafter acquired. On the contrary, respondent contended that the parties intended the reconveyance would carry cut-over land only and that if, during the year appellants elected to take the property, respondent would have the balance of the year period to clear it of timber and to reconvey the land when that was done. When on June 1, 1951, and while the land still contained much valuable timber, appellants gave notice of their election to purchase and tendered the purchase price, respondent, acting in accordance with its interpretation of the option agreement, placed a deed in escrow with the title company, quitclaiming the property to appellants, but with instructions that the deed was to be delivered to appellants "on or after May 1, 1952, upon the receipt of the sum of \$100.00 for the benefit of" respondent. Respondent alleged that thereby it did "conform with and perform all matters required of defendant under the said option agreement."

[1,2] Over the objection of appellants the trial court took testimony concerning the entire transaction between the parties eventuating in the two written agreements and the deed from appellants to respondent. This it was entitled to do for two reasons: The option was uncertain in its terms relating to the time when respondent was obligated to convey if during the period from May 1, 1951 and May 1, 1952 appellants elected to buy; it was further uncertain as to the right of respondent to take timber up to May 1, 1952 notwithstanding an earlier election to buy. The court was also entitled to examine into these same matters to determine whether or not the option agreement was fair and reasonable and, therefore, the proper subject of an equitable decree of specific performance. Mr. Maurer, president of respondent corporation, testified as follows: That he negotiated the purchase of the timber land from appellants; that respondent paid for the land and obtained a deed; that appellants requested an option to buy the property back some three weeks after the original contract for the sale to respondent had been executed; that appellants asked the land be reconveyed to them after the timber had been all removed; that one of the appellants who had been doing the negotiating pointed out to him and he agreed that since respondent was operating a timber and sawmill enterprise it was only interested in timber and that when the timber was gone the land would be of no use to respondent, whereas it would be of some use to appellants for grazing purposes; that on that basis he at first agreed to an option on the basis of \$500 to be paid for the cut-over lands and submitted the proposition to appellants; that appellants objected to that price as being excessive in view of the fact that the land would be of little value with the timber removed; that he then agreed for respondent to accept the sum of \$100 and to reconvey the land after the timber had been removed; that when the option was given respondent had scheduled as of that time no immediate logging operations on the land but had intended to log it in the future; that during negotiations for the option there was a general discussion as to the condition the property would be in when it

was turned back and it was definitely understood, and that he had so stated to appellants, that the reconveyance would be of the land only without any timber; that it had been stated between the parties that respondent would have one year within which to remove any timber standing after May 1, 1951, and that such was his understanding.

[3] Upon these disputed constructions of the contract the court found that the agreement should be construed as giving to the respondent the full period from May 7, 1951 to May 7, 1952 to remove the timber from the land before being required to reconvey the land to appellants. We think the evidence fully supports the trial court's construction of the ambiguous provisions of the contract as to the time when and the conditions under which the reconveyance to appellants was to be made and that in solving that uncertainty it was made clearly to appear that appellants could not by making a demand for an earlier conveyance effect an equitable conversion so as to charge respondent with the duty to account for and turn over to them all proceeds from the logging of the lands from the date of notice of their election to purchase and demand for a conveyance.

[4,5] The trial court specifically found that the contract was not under the circumstances a fair one and the proper object for equitable remedy of specific performance. If, however, the contract, properly interpreted, did not bind respondent to convey the property until the end of the year's leeway period and permitted it to complete the removal of the timber, then the record will not support a finding that so construed the contract was inequitable. Respondent's own evidence and its conduct belie such a claim, for, when appellants elected to buy, tendered the price and demanded a deed, respondent promptly deposited the required quitclaim deed conditioning delivery only upon the lapse of that period. Appellants have given no intimation that they would accept the conveyance of the land with the timber off. Their demand that the land with \$25,000 worth of standing timber be turned over to them for the sum of \$100 ap-

pears to be unconscionable, but such considerations are beside the mark for, taking the contract as construed by the court, they have never elected to exercise the contract rights given them and were, therefore, entitled to no relief. Treating that contract as an option, their tender and demand did not square with the offer; treating as a conditional contract to convey, their tender and demand did not meet the condition.

The judgment is affirmed.

SCHOTTKY, J., and FINLEY, J. pro tem., concur.



134 Cal.App.2d 182

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Martin Luther HUFF, Defendant and
Appellant.
Cr. 1027.

District Court of Appeal, Fourth District,
California.

June 27, 1955.

Rehearing Denied July 7, 1955.

Hearing Denied July 27, 1955.

Prosecution for crimes of issuing check without sufficient funds and for conspiracy to commit such offense. The Superior Court, San Diego County, John A. Hewicker, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Barnard, P. J., held that trial judge's questioning of defendant and personal comments on evidence during charge to jury exceeded permissible limits and were such as to deprive defendant of fair trial.

Reversed and remanded for new trial.

1. Criminal Law §656(1)

A judge may comment on the evidence, including the credibility of witnesses but this privilege has inherent limitations and comment must not be of a nature which

would invade the province of the jury. West's Ann.Const. art. 6, § 19; Pen.Code, § 1127.

2. Criminal Law §656(1)

Rule permitting judge to comment on evidence and credibility of witnesses requires that such comments be fair, temperate, judicial, dispassionate, and free from apparent contentiousness, partisanship or advocacy. Pen.Code, § 1127.

3. Criminal Law §656(1, 2)

In prosecution for crimes of issuing check without sufficient funds and for conspiracy to commit such offense, comments of trial judge on evidence and his questioning of defendant exceeded permissible limits and were such as to deprive defendant of fair trial. Pen.Code, §§ 182, 476a.

Buttermore & Lightner, Wesley B. Buttermore, Jr., San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Judge.

The defendant was charged with issuing a check without sufficient funds in violation of section 476a of the Penal Code, and in a second count with conspiracy to commit that crime in violation of sections 182 and 476a of that code. He was also charged with a prior conviction, which he admitted. A jury found him guilty on both counts of the information, and judgment was pronounced imposing a prison term. He has appealed from that judgment.

On March 20, 1954, the appellant presented a check to an employee of a department store in Pacific Beach, who refused to cash it. The check was for \$120, signed by one James Hall and payable to the appellant. Hall and Huff then went to a paint store where Hall bought paint amounting to about \$10. The proprietor refused to accept the \$120 check but cashed another \$30 check, which was written by Hall. Hall and Huff then went to a dress shop where they were shown some dresses by a Mrs. Brody. They selected a dress, priced at \$24.95, and tendered the \$120 check saying that Huff worked

for Hall and this was his pay for the week. When Mrs. Brody refused to accept the check they left.

Hall and Huff then went across the street to a bar, and secured a blank check from the bartender. In the presence of Huff, Hall wrote a check for \$75 payable to Martin Luther Huff and signed "Mrs. James Hall." Huff then went back to the dress shop and purchased the dress for \$24.95, giving Mrs. Brody the \$75 check and receiving the change. Huff endorsed the check Martin L. Huff. While Huff was in the dress shop Hall kept walking to the entrance of the bar and looking across the street to the dress shop. When Huff returned they left the dress and paint in the bar, and went away together. The dress was later returned to Mrs. Brody. It was stipulated that there was no account in the bank on which the two checks were drawn, either in the name of Mr. Hall or Mrs. Hall. Mrs. Hall testified that she did not sign the \$75 check and that she had reimbursed the dress shop and the paint store for their loss on these checks. Mr. Hall was in jail in Oregon at the time of the trial.

The appellant testified that he had worked for Hall selling fruit for two weeks in March, 1953; that he had recently returned from an ocean fishing trip and was not in need of money; that Hall was trying to buy a truck so he told Hall he would wait for his pay; that he went to see Hall on March 20, 1954, about collecting \$92 which Hall owed him for his labor; that Hall asked him to buy a dress for Hall's wife and gave him a check for \$120, telling him not to pay over \$30 for the dress; that when the dress shop refused to accept the check Hall wrote another check for \$75 payable to him, which he used to purchase the dress from Mrs. Brody; that he asked Hall about the check being signed "Mrs. James Hall"; that Hall said the money was in her account but he, Hall, had authority to sign her name; that Hall told him to tell Mrs. Brody that he had gotten the check from Mrs. Hall, which he did; and that he was ignorant of the fact that the \$75 check was not good. Mrs. Hall testified that Huff worked for her husband for only three days; that Hall did not owe money to Huff; that she kept

the books and paid Huff at the end of each day; and that she wore a size 9 dress, which was five sizes smaller than the one purchased by Huff.

It is not contended that the evidence is not sufficient to support the verdict. It is contended, however, that the appellant was deprived of due process of law because the court's cross-examination of the appellant, his interruption of defense counsel's argument to the jury, and his comments to the jury on the evidence amounted to advocacy for the prosecution.

After the appellant testified as above stated, the district attorney cross-examined him at length. Early in that cross-examination the appellant stated that he returned from a fishing trip on a certain day, and that he worked for Hall the last part of March or the first part of April. The court then interrupted and asked questions taking up three pages of the transcript. These questions related largely to why he could not remember the exact dates when he worked for Mr. Hall. Among other things, the court asked "How do you remember this getting off the fishing boat so accurately and you can't tell how late you worked for Mr. Hall?"

At the conclusion of the district attorney's cross-examination the court questioned the appellant, as disclosed by six pages of the transcript. These questions related largely to the \$75 check. Among other things, he asked the following questions:

"This \$75 check is the second check you had gotten from Hall isn't it?"

"You were sitting at the bar there when this check was written. Did you inquire of him why he didn't sign it 'Mrs. James Hall by James Hall'?"

"You saw your name on the front 'Martin Luther Huff'. Why did you sign it Martin L. Huff on the back?"

"Why didn't you tell him to make it Martin Luther Huff on the front?"

"Were you sort of nervous when you went over and cashed this check?"

"Well, you had been turned down with one check before with that same story, hadn't you?"

"Hall told you to tell them that she signed the check. Did that make you suspicious as to whether or not he had the right to sign her name?

"Why would he tell you that?

"Why didn't you have him give you a check for \$120 and then leave?

"Well, that wasn't any concern of yours, was it? (referring to the statement that Hall wanted him to get a dress for Hall's wife)

"You went through all three of these check episodes to get part of your money?"

While appellant's counsel was arguing to the jury, and while he was arguing that the appellant, not being a lawyer, would not know that the check must be signed in a certain way; and that there might have been some agreement with the bank or a power of attorney on file authorizing Hall to sign for his wife, the court interrupted to say, "If you had a power of attorney, Mr. Buttermore, you would still have to sign it 'so and so by so and so'".

After the conclusion of the arguments and immediately prior to giving his regular instructions, the court made some general remarks which take up 5½ pages of the transcript. So far as material here, these remarks are as follows:

"This is the time for me to give you the instructions on the law applicable to this case. I have nothing to do with determining the facts in this case. It's entirely up to you. After listening to the testimony in this case for the last day, it must be apparent to you at this time that somebody in this case isn't telling the truth. Now, it's up to you to determine who is telling the truth in this case. The only actual victim in the case, of course, is Mrs. Hall. She has testified that she made these checks good. * * * I will instruct you in this case to try only one person. The only person you are supposed to try in a criminal case is the defendant. Determine whether or not he is guilty or whether he is innocent, but don't try other people.

"Now, these intended victims, * * * have been reimbursed. * * * what reason would they have to come in here at this time and under oath to tell you a falsehood? Those people having been the original victims, * * * would immediately reconstruct what happened and think back how the thing happened and they would bear that in mind. * * * I venture to say that if you had ever taken the check for \$75 or \$100 and being victimized, I think the minute you found out from the bank that the check wasn't any good, I think you would immediately be raking your mind to remember everything that happened and why you were taken in, and I don't think you would forget that very soon. * * *

"Mrs. Hall testified that she and her husband never had a bank account. * * * Personally, I think that Mrs. Hall lived out there in the community * * *, and I think that is probably why she made the checks good. One of the checks did have her name on it and * * * to prevent people from pointing the finger at her, why she paid off these checks, and I think it was a noble thing to do. I think it's more than most women would have done if their husband had got in trouble and left town.

"This blue check that we have in evidence, * * * I want you to look at that carefully when you go out, as to how it's endorsed and to whom it's made payable to and the figures on it and the signature, 'Mrs. James Hall'. Now, I asked Mr. Huff when he was on the stand whether it didn't seem peculiar to him that if Mr. Hall had a right to sign his wife's signature to the check, whether it shouldn't have been signed Mrs. James Hall by James Hall in order to clear the bank. That is the way a check is signed. If I have an account and I give somebody power of attorney to sign on that account, they have signed my name by so and so. Of course, what happens, anybody passes one of those checks, so and so by so and so, it always raises in the mind of the person

that is about to accept the check, 'Well, does this man have authority to sign that name?' * * * Mr. Huff did say that he went in and told the people that Mrs. Hall had signed this check. He was right there when the check was made out, and I don't think that I would have done that. Does it seem reasonable to you—and this is for you to determine if a relationship existed between Mr. Hall and Mr. Huff as he said it did a year before and he had ninety some dollars coming—would he wait one whole year, or eleven months, whatever it was, in order to collect that money? Would he wait until a Saturday afternoon when all the banks are closed, to collect that money? Would he, in order to get that money, or only a part of it, go to a store and buy a dress, as he says, for the other man's wife? If somebody owed me money and he had owed it to me for a year, I certainly wouldn't run from place to place and tell people that I was buying a dress for somebody else in order to get them to cash a check. * * *

"* * * you are not to throw away the good sense that you came into the courtroom with, just because you go out to the jury room to deliberate. Please take that good common sense along with you. * * * just put yourself in the place of (the victims and the defendant) * * * What would you have done? And, just be reasonable. That's all we ask you to do, and, determine the true facts in this case, and if you arrive at the true facts, why, you will have no regrets when you leave the jury room."

While the questions asked by the court were not objected to, and the court told the jury that it was not to assume from his questions that he held any opinion as to the matters to which the questions related, and repeatedly told the jurors that they were the exclusive judges of all questions of fact, the questions thus asked may well have had a deciding weight against the defendant. *People v. Byrd*, 88 Cal.App.2d 188, 198 P.2d 561. Moreover, the effect of these ques-

tions would naturally be increased by the comments made immediately preceding the giving of the instructions on the law.

[1,2] While a judge may comment on the evidence, including the credibility of witnesses, Art. VI, § 19, Const.; Penal Code, § 1127, this privilege has its inherent limitations and must not be of a nature which would invade the province of the jury. *People v. Ottey*, 5 Cal.2d 714, 56 P.2d 193. Even an expression of opinion concerning the guilt or innocence of a defendant may not be fatal provided the province of the jury is not invaded. *People v. Eudy*, 12 Cal.2d 41, 82 P.2d 359. However, such comments should be temperately and fairly made and trial courts should be cautious in exercising this power of comment with a view to protecting the rights of the defendant. *People v. Dail*, 22 Cal.2d 642, 140 P.2d 828; *People v. DeMoss*, 4 Cal.2d 469, 50 P.2d 1031. It has been held that it is improper to commend a witness in the presence of the jury because of the undue weight which would thus be given to the testimony of this witness. *People v. Frank*, 71 Cal.App. 575, 236 P. 189. A judge should be careful not to throw the weight of his judicial position in a case, either for or against the defendant. *People v. Mahoney*, 201 Cal. 618, 258 P. 607. The rule is well established that such comments on the evidence "must be fair, temperate, judicial, dispassionate, and free from apparent contentiousness, partisanship or advocacy." *People v. Hooper*, 92 Cal.App.2d 524, 207 P.2d 117, 121. Such comment must be fair and temperate and not argumentative to a degree that makes it characteristically an act of advocacy. *People v. Robinson*, 73 Cal.App.2d 233, 166 P.2d 17; *People v. DeMoss*, 4 Cal.2d 469, 50 P.2d 1031. In *People v. Byrd*, 88 Cal.App.2d 188, 198 P.2d 561, it was held prejudicial to ask a question where, from the form of the question, a jury would necessarily infer that the judge was not only questioning the truth of the defendant's general testimony, but also the truth of his denial of the commission of the crime for which he was on trial as well.

[3] In our opinion, the questioning and comments here exceeded permissible limits,

and were such as to deprive the appellant of the fair trial to which he was entitled. They were argumentative to an unusual degree and, in effect, were strong arguments for a conviction. They bore directly upon appellant's sole defense, and amounted to the advocacy which is not permitted.

The judgment is reversed, and the cause remanded for a new trial.

GRIFFIN and MUSSELL, JJ., concur.



134 Cal.App.2d 28

Allen L. DUFF, Plaintiff and Respondent,

v.

A. TEICHERT & SON, Inc., a corporation,
Defendant and Appellant.

Civ. 8464.

District Court of Appeal, Third District,
California.

June 23, 1955.

Action against paving contractor for injuries sustained by operator of motorcycle when it skidded on accumulation of loose rock and gravel in gutter at entrance to driveway. The Superior Court, Sacramento County, J. O. Moncur, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Schottky, J., held that whether contractor was negligent in sweeping loose rock and gravel from newly paved street into gutter for removal by trucks and allowing it to remain there to a depth of one and one-half to three inches at entrance to driveway and whether motorcycle operator was contributorily negligent were questions of fact for trier of facts.

Judgment affirmed.

1. Judges 7

A retired judge of superior court, properly assigned for service on superior court by chairman of judicial council was

qualified to act as a judge in such court, try case and render judgment under such assignment.

2. Automobiles 306(2)

In action against paving contractor for injuries sustained by operator of motorcycle when it skidded on accumulation of loose rock and gravel in gutter at entrance to driveway, evidence that after paving had been completed and before job had been accepted by county, contractor's employees had returned twice to remove loose rock and gravel and absence of evidence that paving job had been accepted by county prior to accident warranted inference that the sweeping of loose rock and gravel into gutter on day of accident had been done by contractor's employees.

3. Automobiles 308(9)

In action against paving contractor for injuries sustained by operator of motorcycle when it skidded on accumulation of loose rock and gravel in gutter at entrance to driveway, whether contractor was negligent in sweeping loose rock and gravel from newly paved street into gutter for removal by trucks and permitting it to remain there to a depth of one and one-half to three inches at entrance to driveway was a question of fact for the trier of facts.

4. Negligence 122(1)

Defendant has the burden of proving contributory negligence.

5. Negligence 136(9)

Contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists and reasonable men could have drawn that conclusion and none other, and where different inferences may be drawn, one for and one against, the one against will be followed, and before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion.

6. Automobiles 306(8), 308(11)

In action against paving contractor for injuries sustained by operator of motorcycle when it skidded on accumulation of loose rock and gravel in gutter at entrance to driveway, whether motorcycle op-

erator was contributorily negligent was a question of fact for trier of facts, and conclusion that he was not contributorily negligent was supported by substantial evidence.

Gerald M. Desmond, Sacramento, for appellant.

Richard J. Lawrence, Sacramento, for respondent.

SCHOTTKY, Justice.

Plaintiff above named commenced an action against defendant corporation to recover damages for injuries received when the motorcycle on which he was riding skidded, throwing him to the ground. He alleged that his injuries were caused by the dangerous and defective condition of the street and the negligence of defendant. Defendant in its answer denied any negligence and also pleaded contributory negligence on the part of plaintiff. The action was tried by the court without a jury, and judgment was rendered in favor of plaintiff for the sum of \$3,895.50.

Defendant has appealed from said judgment and states the questions involved as follows:

"I. Was the Honorable J. O. Moncur qualified under the Constitution of the State of California to act as a judge and render a judgment in this case?

"II. Was there any substantial evidence to support the finding of fact that the accident and plaintiff's injury were caused by the negligence of defendant?

"III. Did the evidence establish as a matter of law that the accident was caused by the contributory negligence of defendant?"

[1] Since this appeal was filed our Supreme Court, in the case of *Pickens v. Johnson*, 42 Cal.2d 399, 267 P.2d 801 (in which case Judge Moncur was also the trial judge), has decided that a retired judge of the Superior Court, when properly assigned by the Chairman of the Judicial Council, may try a case in the Superior

Court under such assignment. This decision disposes of appellant's contention that Judge Moncur was not qualified to act as a judge in the instant case.

Before discussing appellant's remaining contentions, which involve the sufficiency of the evidence, we shall give a brief summary of the evidence as shown by the record.

Defendant corporation performed some paving work and installed gutters and curbs on Wright Street in a subdivision known as Vienna Woods, in Sacramento County, during 1950, under contract with the county, completing the work in June or July, except that it went back twice thereafter to clean up loose rocks, gravel, and sand. This latter procedure was by hand-sweeping the loose materials into the gutters into piles, and then later shoveling them into trucks for removal.

On the 30th of August, 1950, plaintiff operated his motorcycle on said Wright Street to his residence at number 2641, and turned to proceed into his driveway. As the cycle passed over the gutter, it slipped in an accumulation of rock and gravel therein and fell upon plaintiff's right leg, fracturing same.

Plaintiff and his several witnesses testified that in the morning of the day of the accident, there was loose gravel and rock scattered around the street, but that, when plaintiff returned, most of this material had been accumulated into a layer covering the gutter at a depth of "about an inch and a half, two inches or three inches." One witness, plaintiff's wife, testified she saw a street sweeper go by on the street during the day, but she was not able to say whose sweeper it was or who was operating it or to otherwise identify it.

At the time plaintiff's motorcycle passed over the gravel in the gutter he had completed his turn and was headed approximately straight and was going at a slow speed, approximately 5 to 7 miles per hour, and it was then that the cycle slipped and fell upon his leg.

Plaintiff testified he had known of and had complained of the rocky material in the street in front of his residence for a

period of several months, and further testified that before he passed over the gutter prior to the accident he was aware of the gravel in the street but not in the gutter. Plaintiff had been operating motorcycles since 1939 and was familiar with their operation.

Other evidence will be referred to in the course of this opinion.

Appellant contends that there is no substantial evidence to support the finding that it was negligent and thereby caused respondent's injuries. Appellant argues that the case was tried upon the theory that the negligent act complained of was the sweeping of gravel into the gutter on the day the accident occurred, but that (1) there is no evidence to show that this act was done by appellant or anyone acting for it, and (2) assuming for sake of argument that appellant did sweep the gravel into the gutter in the manner testified to, such act did not constitute negligence in any respect or create a dangerous condition.

Appellant asserts that there is no evidence to show that appellant was in anywise connected with the sweeping of gravel into a layer in the gutter in front of plaintiff's driveway on the day in question prior to plaintiff's operating the cycle over same, because the sweeper was not identified and because witness Ahlgren, superintendent of defendant's street contract work here involved, testified without contradiction that defendant finished its work on this street prior to the accident. However, the record shows the following testimony by Frank Ahlgren, appellant's superintendent of the Vienna Woods job, upon direct examination by appellant's counsel:

"Q. Can you tell me when the job was completed, the paving job? A. On Wright Street?

"Q. Yes. A. That was completed in June because we oiled it before the first of July. Just a minute, I will look it up.

"Q. I am not concerned with the exact date, I just want your recollection as to when the work was completed

and you think it was June or July, is that right? A. Yes.

"Q. Now, so far as the curbs and gutters and the paving of Wright Street or any work on Wright Street, did your company perform any work on that street later than July, 1950? A. We went back twice and cleaned up loose rocks and dust or sand, whatever it was, while we were waiting for the county to accept our job.

"Q. When was it accepted, do you recall? A. No, I don't recall when they accepted the job."

[2] While it does not clearly appear when the job was accepted by the county, it does appear that loose rocks and sand were left in the street after the paving was completed and that appellant went back twice after July, 1950, to clean up loose rocks and dust and sand. It is a reasonable inference from the record that if the paving job had been accepted by the county prior to the accident that fact would have been brought out in the evidence and relied upon by appellant. And it also is a reasonable inference that if the paving job had not yet been accepted by the county the sweeping that was done on the day of the accident was done by appellant's employees.

Appellant next contends that even if the gravel was in the gutter by reason of its acts, no dangerous condition was created by the sweeping of gravel into the gutter to a depth of from 1½ to 3 inches.

Appellant argues that to hold it liable would be to make local governmental units and private construction companies using commonly accepted methods of construction or maintaining commonly used types of highways insurers of any persons who might be injured upon roads in this state which are gravel surfaced or have gravel shoulders or which in the process of construction have loose material upon the surface, provided such persons were injured in slipping or sliding accidents caused by the loose materials. However, it must be borne in mind that appellant could have posted warning signs, could have sooner removed

this rock, and could have seen that the rock when swept into piles in the gutter did not block driveways, and that the surface of the portion of the street in question at the time of plaintiff's injuries was not the normal surface. There was testimony that a month or two prior to the accident the street had been paved by oiling, graveling, and sweeping, but the debris was allowed to remain. Furthermore, this excess sand and gravel was not just the normal surface layer which did not imbed itself in the oil layer underneath, but was such excess accumulated in a relatively thick layer in the concrete gutter where it would be expected to give a loose and unstable footing.

[3] The trial judge stated in his memorandum opinion: "I am satisfied that the defendant was negligent in allowing the gravel to be in the driveway as described in the evidence and that the plaintiff was not guilty of any contributory negligence." We believe that the issue of negligence was one of fact for the trier of facts to determine and that we cannot say as a matter of law that the causing of the gravel to be placed or to remain in the gutter during the course of street construction was not negligence and did not create any danger to users of the street. We are satisfied that the record discloses facts from which the court could properly draw the inference of negligence on the part of appellant.

Appellant's final contention is that the evidence established as a matter of law that the accident was caused by the contributory negligence of plaintiff. In support of this contention appellant states: (1) that plaintiff knew of the loose rock and gravel upon the street for a number of months; (2) that plaintiff further knew on the day of the accident of the accumulation of gravel in the gutter in front of his driveway as he approached, but he proceeded across it on the motorcycle; (3) that plaintiff had been driving motorcycles since 1939 and had owned three of them in that period and was familiar with their operation; and (4) that plaintiff went onto the gravel layer while traveling in a straight line and going at a slow rate of speed, five to seven miles per hour.

There appears to be no dispute as to the correctness of their statements except that respondent testified that he was aware of the gravel in the street but that "When I returned at night the whole collection of rocks and gravel was in the gutter rather than scattered across the street, approximately an inch and a half, two, maybe three inches deep."

[4, 5] The rule as to the defense of contributory negligence is well stated in *Anthony v. Hobbie*, 25 Cal.2d 814, at page 818, 155 P.2d 826, 829, as follows:

"* * * The burden of proving contributory negligence is upon the defendant. 19 Cal.Jur. 697-699. True, contributory negligence may be found by the trier of fact from the plaintiffs' own evidence. But cases in which it can be said that the negligence of plaintiff contributes proximately to the accident as a matter of law are rare. The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion. [Citing numerous cases.]"

[6] Bearing in mind this familiar rule, we do not believe that under the facts shown by the record in the instant case it can be held as a matter of law that the trial court erred in concluding, as he did conclude, that the respondent was not guilty of contributory negligence. We are satisfied that the question of contributory negligence was one of fact for the trial court to determine and that there is substantial evidence in the record from which the trier of the facts could conclude that plaintiff used due care even though an accident did happen and even though plaintiff did

approach and enter into a situation fraught with some peril.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



134 Cal.App.2d 202

Lura Edna COOK, Plaintiff and Appellant,
v.

James A. ROSS et al., Defendants,

Milton L. Yates and Robertson Truck-A-
Ways, Inc., Respondents.

Civ. 8531.

District Court of Appeal. Third District.
California.

June 28, 1955.

Hearing Denied Aug. 17, 1955.

Action arising out of collision between plaintiff's automobile, which was about to make left turn at intersection, first defendant's following automobile and second defendant's oncoming truck. The Superior Court, San Joaquin County, Thomas B. Quinn, J., rendered judgment for plaintiff against first defendant but for second defendant, and plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held, *inter alia*, that where evidence presented jury question as to whether plaintiff, who had signaled for left turn, had right of way over second defendant, failure to give requested instruction on statute relating to duties of drivers faced with an automobile signaling for a turn was error.

Judgment reversed.

f. Automobiles ⇐245(14)

In action arising out of collision in intersection between plaintiff's west-bound automobile, first defendant's west-bound automobile, which was following plaintiff's automobile, and second defendant's east-bound truck, question whether position of second defendant's truck on highway was

such that, if he had proceeded lawfully into intersection, plaintiff's left-turn maneuver would have interfered with him, was for jury.

2. Automobiles ⇐246(47)

In action for injury sustained in accident which occurred when plaintiff's west-bound automobile, which was about to make left turn at intersection, was struck first by first defendant's following automobile and then by second defendant's east-bound truck, wherein evidence presented jury question as to whether plaintiff, who had signaled for left turn, had right of way over second defendant, failure to give requested instruction on statute relating to duties of drivers faced with an automobile signaling for a turn was error. Vehicle Code, § 551(a, b).

3. Automobiles ⇐246(24)

In action arising out of collision between plaintiff's automobile, which was about to make left turn at intersection, first defendant's following automobile, and second defendant's oncoming truck, failure to give requested instruction to effect that when an automobile has actually entered an intersection before another approaches it, and such other does not constitute an immediate hazard, driver of first automobile has right to assume that he will be given right of way, was error.

4. Negligence ⇐62(3)

An original wrongful act may be so continuous that action of third person precipitating disaster will in law be regarded as not independent, but as joining with original act to produce accident.

5. Automobiles ⇐246(57)

In action arising out of collision between plaintiff's automobile, which was about to make left turn in intersection, first defendant's following automobile, and second defendant's oncoming truck, wherein issue was presented whether second defendant's alleged negligence in failing to yield right of way had been cause of original collision between plaintiff and first defendant, requested instruction that an original wrongful act may be so continuous that action of third person precipitating disaster

will be regarded as not independent, but as joining with original act to produce accident, should have been given.

6. Appeal and Error 1067

Automobiles 246(9)

In action arising out of collision between plaintiff's automobile, which was about to make left turn in intersection, first defendant's following automobile and second defendant's oncoming truck, failure to give requested instructions on duty of driver faced with an automobile signaling a turn, on right of way in respect to an automobile which has entered intersection, and on potential continuity of an original wrongful act, was error prejudicial to plaintiff in respect to action against second defendant.

Elizabeth Palmer, Piedmont, Willens & Boscoe by Maxwell M. Willens, Stockton, for plaintiff-appellant.

Miller, Kroloff & Brown, by Richard Belcher, Stockton, for defendants-respondents.

Honey & Mayall, by John J. Hurley, Stockton, for defendant Ross.

VAN DYKE, Presiding Justice.

This action was brought by plaintiff, appellant here, against respondents, Robertson Truck-A-Ways, Inc., a corporation, and its employee driver, Yates; and against James A. Ross. The action arose out of a three-car collision at an intersection of two highways. The case was tried to a jury which returned a verdict of \$40,000 against Ross and a verdict exonerating Robertson Truck-A-Ways, Inc., and Yates. From the judgment entered in favor of Robertson Truck-A-Ways, Inc., and Yates, plaintiff has appealed. Ross did not appeal.

Appellant contends the trial court erred in refusing to give certain instructions which she requested. Following is a statement of facts sufficient for the resolution of the issues posed by these contentions: Highway 50 intersects Van Sosten Road in San Joaquin County; plaintiff was driving west on Highway 50, intending to turn left at its intersection with Van Sosten Road; at the same time Yates was driving his employer's

truck east on Highway 50, intending to cross the intersection and proceed east; Ross was driving on Highway 50 behind appellant's car, intending to cross the intersection and proceed west; as appellant approached the intersection she signaled her intention to turn left. Both Yates and Ross saw the signal. There is a dispute in the testimony as to how fast the cars were going, to what speeds they slowed down and as to their relative distances from the intersection when appellant gave her signal. There was testimony from which the jury could have concluded that when plaintiff gave her signal and drove into the intersection Yates was so far back that she had the right of way and that Yates should have yielded it to her. Her testimony was generally to that effect and she said further that when she had entered the intersection she observed that Yates was still driving toward it without appreciably lessening his speed; that she started her turn and was in position to cross the center line into the south lane when, because Yates was still approaching, she believed he would not stop and she stopped to avoid a collision. She was stationary only a second or so, as she said, when her car was struck by that driven by Ross and shoved into the southbound lane where it was hit by the truck driven by Yates.

Appellant asked of the trial court that it instruct the jury as to the statutory standards governing those involved when a car turns left at an intersection as set forth in Section 551 of the Vehicle Code. That section reads as follows:

"(a) The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard.

"(b) Said driver turning left having so yielded and having given a signal when and as required by this code may make such left turn and the drivers of all other vehicles approaching the intersection from said opposite direction shall yield the right of way to the driver making the left turn."

[1, 2] This instruction was refused and the court gave instead an instruction proposed by respondents and which instruction contained subdivision (a) of said Section 551, but omitted subdivision (b). The refusal to give the instruction requested by appellant was error. Chapter 9 of the Vehicle Code contains the provisions as to the right of way. Section 550 sets up the statutory standard of care imposed upon vehicles approaching or entering an intersection. Section 551 sets up the statutory standards governing vehicles involved when a vehicle turns left at an intersection. The remaining four sections govern vehicles entering a through highway, vehicles entering a highway from a private road, the operation of vehicles and street cars on approach of emergency vehicles and the duties of drivers of vehicles and equestrians at equestrian crossings. Section 550, after requiring a driver of a vehicle approaching an intersection to yield the right of way to a vehicle which has entered the intersection from a different highway, and, after requiring that when two vehicles enter an intersection from different highways at the same time the driver of the vehicle on the left shall yield, specifically provides in subdivision (c) thereof that section 550 shall not apply to vehicles approaching each other from opposite directions when the driver of one of such vehicles is intending to or is making a left turn. It declares that "such movements shall be governed by section 551." Section 551, therefore, clearly is the section which sets up the statutory standards of care which were applicable to appellant, to Yates and to Ross. And under the situation presented by the evidence here the whole of the statutory standard should have been given to the jury. The evidence was somewhat in conflict, as we have said, as to the relative positions of the vehicles of Yates and appellant, but there is no dispute that she signaled her intention to turn and that her signal was observed and understood by Yates and Ross. From the evidence the jury could have concluded that when she, pursuing her intention to turn left, had entered the intersection, Yates was so close in his opposite approach thereto that his vehicle constituted an im-

mediate hazard if she should make the turn and that, therefore, it was her duty to yield to Yates. Also there was ample evidence from which the jury could conclude that at that moment of time Yates was so far back from the intersection that his vehicle did not constitute such an immediate hazard and that, therefore, it was the duty of Yates to yield to appellant. Subdivision (a) of the section was, of course, applicable. But subdivision (a) of Section 551 expressly states the duty of the driver of a vehicle intending to turn and says nothing about the duties of drivers approaching the intersection from the opposite direction. That subject is covered fully by subdivision (b). Subdivision (b) says in effect that if a driver intending to make or making a left turn has yielded the right of way to vehicles, if any there be, which were so close to the intersection as to constitute an immediate hazard to such turning such driver may then proceed to make the turn and cross into the opposite lane without yielding to other vehicles, even though during the interval occupied by the yielding, and which may have approached the intersection so closely that if they continue and the turning maneuver is executed there is danger of a collision. But the subdivision does more than that. It says further, in effect, that a driver, not under necessity of yielding because there is no immediate hazard, may make the left turn, and that the drivers of all other vehicles approaching the intersection from the opposite direction must yield the right of way to the driver making the turn. Instructing on subdivision (b), even in the language of the statute, would have told the jury that if Yates was far enough back when appellant began her turn so that she could have proceeded to make it in safety he was required to yield the right of way to her. Whether or not the position of Yates on the highway was such that if he proceeded lawfully into the intersection the appellant's turning maneuver would have interfered with him was in this case clearly a question of fact for the jury to determine. Under the evidence they could have determined it either way. They were given the statutory standard as to appellant's duty, but they were not given

the statutory standard applicable to Yates and prescribing his duty if Yates was far enough back so that his vehicle did not constitute an immediate hazard to appellant's intended maneuver.

Appellant requested and the court refused to give the following instruction:

"Where a car has actually entered an intersection before the other approaches it, and when the other car does not constitute an immediate hazard, the driver of the first car has the right to assume that he will be given the right of way and be permitted to pass through the intersection without danger of collision. He has the right to assume, until the contrary appears, that the driver of the other car will obey the law, slow down, and yield the right of way, if slowing down be necessary to prevent a collision."

[3] This instruction should have been given. It has frequently received the approval of appellate courts. *Morehead v. Roehm*, 118 Cal.App. 312, 316, 4 P.2d 995; *Cowan v. Market Street Railway*, 8 Cal.App. 2d 642, 647, 47 P.2d 752; *Page v. Mazzei*, 213 Cal. 644, 3 P.2d 11. It would have accomplished two legitimate purposes. It would have supplied the lack created by the court's failing to instruct on subdivision (b) of Section 551 of the Vehicle Code. But it would have done more. Bearing in mind that the jury from the evidence could have determined that appellant had the right of way over Yates, then appellant, rightfully assuming that Yates would yield, would have signaled only her intention to turn and might well have had no opportunity to signal a stop and thus avoid a collision with Ross, since the failure of Yates to yield might well have created a situation compelling her to make an emergency stop without opportunity to signal. Appellant's testimony is generally to the effect that such was the factual situation. These same considerations were material in the trial of the cause as bearing on the proximate cause of the accident, for Ross, facing the situation when appellant signaled a turn, might have been justified in concluding that

Yates would yield, appellant would continue her turning maneuver, and his rate of slow-down need only be such as to permit her, so continuing, to leave the lane on which Ross was traveling and not such as to accommodate a stopping of her vehicle in that lane.

Appellant requested and the court refused the following instruction:

"You are hereby instructed that it is well established law that an original wrongful act may be so continuous that the action of a third person precipitating the disaster will in law be regarded as not independent, but as joining with the original act to produce the accident."

[4, 5] This instruction stated a well-settled rule of negligence law and in this case should have been given, for it was applicable to the issue of proximate cause for the reason we have just hereinabove stated. It would have guided the jury in determining whether or not Yates' conduct was a proximate cause of the accident if from the facts the jury should first have determined that Yates ought to have yielded the right of way to appellant.

[6] Appellant advances other contentions, but we think the refusal of the court to give the foregoing instructions was prejudicial error necessitating a reversal of the judgment in favor of Robertson Truck-A-Ways, Inc., and Yates.

Appellant, taking the position that Yates' actionable negligence was made out as a matter of law, asks us to reverse the judgment given and to direct the entry of judgment for the amount of damages which the jury awarded in its verdict against Ross. We think it apparent from what has been said that this cannot be done. The question of Yates' actionable negligence was for the jury to determine, both on the issue of negligent conduct and on the issue of proximate cause.

The judgment appealed from is reversed.

SCHOTTKY, J., and FINLEY, J. pro tem., concur.

STATE COMPENSATION INSURANCE FUND, Pacific Employers Insurance Company, a corporation, Guarantee Insurance Company, a corporation, California Compensation Insurance Company, a corporation, Allied Compensation Insurance Company, a corporation, California Casualty Indemnity Exchange, a reciprocal or inter-insurance exchange, and Argonaut Insurance Exchange, a reciprocal or interinsurance exchange, Plaintiffs and Appellants,

v.

F. Britton McCONNELL, as Insurance Commissioner of the State of California, substituted in the place of John R. Maloney, as Insurance Commissioner of the State of California, Defendant and Respondent,

Industrial Indemnity Company, Plaintiff in Intervention and Appellant.

Civ. 16496.

District Court of Appeal, First District,
Division 1, California.

June 20, 1955.

As Corrected on Denial of Rehearing

July 20, 1955.

Hearing Granted Aug. 17, 1955.*

Action by the State Compensation Insurance Fund and seven domestic insurance companies against the State Insurance Commissioner for declaratory relief, injunction and mandamus to prevent an order of the Commissioner, changing the State Compensation Insurance Fund premium ratings system from becoming effective. From a judgment of the Superior Court, City and County of San Francisco, William T. Sweigert, J., sustaining the validity of the order, plaintiffs appealed. The District Court of Appeal, Bray, J., held that the Commissioner had power to issue the order, that there was no irregularity or abuse of discretion in procedure of its issuance, and that it did not violate constitutional and statutory policies respecting Workmen's Compensation system and State Compensation Insurance Fund.

Judgment affirmed.

1. Workmen's Compensation §1063

The Insurance Code sections, requiring State Insurance Commissioner to approve or issue, as adequate for all admitted work-

men's compensation insurers, a uniform classification of risk and premium rates, did not restrict Commissioner to mere grouping of hazards in each with corresponding rate for each such classification as rate-making involves consideration of losses and expense, as well as particular hazards of various occupations, especially as rate, under statute, must be adequate. Insurance Code, §§ 11732, 11734.

2. Workmen's Compensation §1063

The statute respecting supervision of State Workmen's Compensation Insurance premium rates does not expressly or impliedly restrict Insurance Commissioner to consideration and reflection of expense factor in such rates by means of flat percentage loading as he has always done in past. Insurance Code, §§ 11730-11742.

3. Workmen's Compensation §1063

The State Insurance Commissioner's modification of his previous flat percentage expense loading system in computing minimum workmen's compensation insurance premium rates, regardless of size of risks, by providing in premium discount plan, promulgated by him, for graduated discounts from premiums produced by manual rates, was not invalid as fixing a premium, rather than premium rate; discount from manual rate being in effect a modifying factor in rate-making process. Insurance Code, §§ 11730-11742.

4. Workmen's Compensation §1063

The statute authorizing Insurance Commissioner to approve or issue a system of workmen's compensation insurance premiums "merit rating," defined as including schedule rating and experience rating, wherein particular insured's experience is used as factor in raising or lowering his rate, does not limit Commissioner to use of insured's past experience and preclude use of current experience during policy year, as provided in Retrospective Rating Plan promulgated by him, so that such plan, applying principle of expense gradation by size of risk as part of merit rating plan, is a form of experience rating within Commissioner's power to issue. Insurance Code, §§ 11730, 11732, 11734.

* Opinion vacated 294 P.2d 440.

5. Workmen's Compensation **⌚1063**

The statute requiring Insurance Commissioner to approve or issue "classification of risks and premium rates" relating to workmen's compensation insurance did not freeze into statute insurers' previous method of classifying such risks and rates through risk groupings by occupations, businesses and industries according to degree of hazard, with corresponding rate for each classification, in view of express statutory provision that Commissioner may change any such classification or system and administrative officer's power to make changes reasonably necessary to effectuate purpose of statute governing him. Insurance Code, §§ 11732, 11734.

6. Statutes **⌚234½**

Generally, a statute expressed in general terms and words of present or future tense will be applied, not only to situations existing and known at time of its enactment, but also prospectively to things and conditions coming into existence thereafter.

7. Statutes **⌚219**

Interpretation of a statute by officer administering it as a specialist is entitled to great weight, though not determinative.

8. Workmen's Compensation **⌚1063**

The Insurance Code sections, authorizing Insurance Commissioner to approve or issue classifications of workmen's compensation insurance risks and premium rates and a system of merit rating, did not limit Commissioner to consideration only of expense reflected in premiums paid in State as expense factor in computing premium discounts, so that his ruling, contemplating ratings based on premiums paid by state employers in other states under Retrospective Rating Plan for other types of liability insurance, as well as workmen's compensation, in other plans for workmen's compensation insurance only, was not invalid for want of power in Commissioner to authorize such "interstate rating". Insurance Code, §§ 11732-11734.

9. Workmen's Compensation **⌚1063**

The State Insurance Commissioner's ruling, modifying existing minimum workmen's compensation insurance premium rates by putting in effect retrospective and

premium discount rating plans, did not violate Insurance Code sections prohibiting rebate of premium payable on insurance contract or not specified in policy, nor section providing that refund because of participating provision in compensation policy may only be made from surplus as such rating plans are parts of each policy and provide for discounts, which are not rebates or refunds but method of computing rates, and word "participating" refers to right to share in earnings, not to price paid for insurance. Insurance Code, §§ 750, 751, 11738.

10. Workmen's Compensation **⌚1063**

The State Insurance Commissioner's consideration of exhibit containing arithmetical calculations increasing excess loss premium factor in retrospective workmen's compensation insurance premium rating plans, promulgated by Commissioner, to reflect information obtained after hearing before him from other files and records in his office, without presence of insurance companies objecting to such plans, did not constitute an irregularity, invalidating Commissioner's ruling putting plans in effect, as denying such companies hearing contemplated by statute nor prejudice them. Insurance Code, §§ 11732, 11734.

11. Workmen's Compensation **⌚1063**

The State Insurance Commissioner's delegation to Inspection Rating Bureau, licensed by State, of functions of revising and constructing tabular workmen's compensation insurance premium rating plans, was proper, in view of such Bureau's functions and relationship to Commissioner, as recognized by Insurance Code, especially as such rating values must be ultimately embodied in a policy or endorsement approved by Commissioner. Insurance Code, §§ 11658, 11750.1-11758.

12. Workmen's Compensation **⌚1063**

The State Insurance Commissioner's authorization of Inspection Rating Bureau, licensed by State, to accept verification of certain data from workmen's compensation premium rating organizations in other states or, in lieu thereof, from individual insurance carriers, in conformity with Commissioner's long and necessary practice in similar and related matters, did not con-

stitute improper delegation of Commissioner's statutory rate-making powers. Insurance Code, §§ 731, 11732, 11734, 12921.5.

because of possibility of differing interpretations thereof. Insurance Code, §§ 11732, 11734.

13. Workmen's Compensation ⇨1063

Workmen's compensation insurance premium discount and retrospective premium rating plans, promulgated by Insurance Commissioner, were regulations fixing and establishing insurance premium rates within statutory exception of regulations establishing or fixing rates, prices or tariffs from statutory requirement that certain administrative regulations be filed with Secretary of State. Government Code, §§ 11371(b), 11380; Insurance Code, §§ 11732, 11734.

14. Workmen's Compensation ⇨1063

The State Insurance Commissioner's fixing of effective date of his ruling, establishing elective workmen's compensation insurance premium discount and retrospective premium rating plans, at approximately eleven days after promulgation of ruling, was not abuse of Commissioner's discretion as violating statute providing that certain administrative regulation shall be filed with Secretary of State and become effective 30 days after such filing, in view of Insurance Code section providing that effective dates of rates issued by Commissioner shall be dates fixed by him. Government Code, §§ 11380, 11422; Insurance Code, §§ 11732, 11734, 11736.

15. Workmen's Compensation ⇨1063

The State Insurance Commissioner's ruling, modifying existing minimum workmen's compensation insurance premium rates by establishing premium discount and retrospective rating plans, was sufficiently clear and intelligible, though subject-matter was technical and complicated; material in question being designed for guidance of insurance specialists, not laymen. Insurance Code, §§ 11732, 11734.

16. Workmen's Compensation ⇨1063

The State Insurance Commissioner's orders establishing workmen's compensation insurance premium rate plans should be upheld by court, if susceptible of reasonable interpretation and use in insurance industry, and should not be invalidated merely because their construction may be difficult or

17. Workmen's Compensation ⇨1063

The State Insurance Commissioner's ruling, establishing premium discount and retrospective workmen's compensation insurance rating plans, was not invalid as incomplete when issued because of Commissioner's directions therein to Inspection Rating Bureau for revision of certain tabular plans and construction of various such plans as related to retrospective rating plan without need of further specific approval by Commissioner, as Bureau's future revision of such plans would not make ruling any less complete as it stood when issued. Insurance Code, §§ 11732, 11734.

18. Workmen's Compensation ⇨1063

The statute authorizing State Insurance Commissioner to prescribe fair and equitable minimum workmen's compensation insurance premium rates, based on cost of furnishing insurance, did not prohibit him from recognizing existing gradations of expense by size of risk, without allowing excessive premiums to enable certain insurers to pay high dividends, by ruling establishing elective premium discount and retrospective rating plans. Insurance Code, §§ 11732, 11734.

19. Workmen's Compensation ⇨1063

The State Insurance Commissioner had power to issue ruling modifying existing minimum workmen's compensation insurance premium rates by establishing elective premium discount and retrospective rating plans. Insurance Code, §§ 11732, 11734.

20. Workmen's Compensation ⇨1063

The State Insurance Commissioner has no power to adopt workmen's compensation premium rating system which would violate constitutional and legislative policy, expressed in statute creating State Compensation Insurance Fund, that such fund be fairly competitive with other insurers and neither more nor less than self-supporting. Insurance Code, §§ 11732, 11734, 11775; West's Ann.Const. art. 20, § 21.

21. Workmen's Compensation ⇨1063

The State Insurance Commissioner's ruling, modifying existing minimum work-

men's compensation insurance premium rates by establishing elective premium discount and retrospective rating plans, is not invalid as violating constitutional and legislative policy, expressed in Insurance Code, that State Compensation Insurance Fund shall be fairly competitive with other insurers and be neither more nor less than self-supporting, or preventing such Fund from adequately performing its functions. Insurance Code, §§ 11732, 11734, 11775; West's Ann.Const. art. 20, § 21.

22. Workmen's Compensation — 1063

The fact that act setting up rating mechanism for liability insurance expressly authorized many features of premium discount and retrospective workmen's compensation insurance rating plans established by ruling of State Insurance Commissioner, but expressly excluded workmen's compensation insurance from provisions of act, did not show legislative intent that such features could not be used by Commissioner in workmen's compensation insurance rating system, but merely meant that Legislature was continuing historic procedure of completely separating control and operation of workmen's compensation insurance from that of all other types of insurance. Insurance Code, §§ 1850 et seq., 11732, 11734.

Donald Gallagher, Loton Wells, San Francisco, Edward R. Young & John F. O'Hara, Los Angeles, McFarland, Laumeister & Ferdon, San Francisco, for appellant State Comp. Ins. Fund.

Edmund G. Brown, Atty. Gen., State of California, Harold B. Haas, Deputy Atty. Gen., for respondent Insurance Commissioner.

1. The Fund joined in the briefs with the other original plaintiffs, and also filed its own briefs. Plaintiff in intervention filed a separate brief. Defendant filed a brief and 47 nonresident insurance companies, as amici curiae, filed a brief in support of defendant. Many questions corollary to the main question were raised. These will be considered without, in most instances, reference to who raised them.

Robert Minge Brown, James B. Donovan, Sidney L. Weinstock, Weinstock, Anderson & Chase, McCutchen, Thomas, Matthew, Griffiths & Greene, San Francisco, for amici curiae in support of respondent Insurance Commissioner.

McFarland, Laumeister & Ferdon, San Francisco, for plaintiff in intervention Industrial Indemnity Co.

BRAY, Justice.

The State Compensation Insurance Fund and the above-named six California insurance companies, plaintiffs, filed a superior court action against the California Insurance Commissioner for declaratory relief, injunction and mandamus, to prevent a certain order changing the present system of rating workmen's compensation insurance premiums from becoming effective. Another California insurance company, Industrial Indemnity Company, intervened as plaintiff. From a judgment sustaining the validity of the order all plaintiffs appeal.

Questions Presented.¹

1. Did the Insurance Commissioner have the power to promulgate and adopt Ruling 67 changing the method of rating premiums for workmen's compensation insurance?

2. Did he violate procedural requirements?

Preliminary Statement.

In 1950 seven of the amici curiae doing about 5 per cent of the compensation insurance business in this state organized into "the California Workmen's Compensation Committee." They filed a proposal with the Commissioner requesting approval of two rating plans, changing the present system for classifying risks and premium rates, and the present system of merit rating.² After

2. The rating system now in use is called the "Flat percentage expense loading system." In general, this system has been in effect from the inception of compulsory workmen's compensation in 1913, to date. Simply stated, the rates are based upon the risk or hazard within particular occupation groups in California, only (i. e., carpenters, mechanics, etc.). The same premium rate is imposed upon all risks within the same occupation groups. The same rates are

public hearings the Commissioner approved these plans and ordered the Administrative Code amended by adoption of Ruling 67.

Ruling 67.

Reduced to its bare rudiments, Ruling 67 provides for two new rating systems: (1) the "Retrospective" plans, and (2) a "Premium Discount Plan." Within the general retrospective scheme there are three separate plans, "D", "A", and "B". Thus, we have four plans to consider.

1. The Retrospective Plans.

All three retrospective plans have this in common: Final determination of premium cost is delayed, being computed retrospectively *after the expiration of the insurance and on the basis of paid and actual loss experience during the insurance period*. Each insured's premium is determined on an individual basis, without reference to other employers or to particular fields or occupations. (However, in each retrospective plan, a sort of "tentative" premium is paid initially, and then adjusted at the end of the insurance period to the actual premium.)

Plan D: Plan D provides for retrospective determination of premium for employers who produce \$5,000 or more in annual premium from operations in *all states*. Determination may be on an annual or three year basis. The unique feature of Plan D is that the employer may combine premiums from other lines of liability insurance with his workmen's compensation premium in order to become eligible for this plan. — This multiline provision is not in either Plan A or B.) In brief, Plan D may be chosen if annual premium is over \$5,000,

charged to the large insured as to the small insured. For example, even though X Corporation has 1,000 carpenters and small contractor Doaks has only three, their respective cost per carpenter would remain substantially the same. In many cases large surpluses result, due to the smaller expense of processing the premium of the large insured. Thus, today nearly 90 per cent of workmen's compensation business in California is written by "participating" companies; that is, carriers who, at their own discretion, make periodic refunds to their insured.

based on premiums from all states, including other types of liability insurance. (Test: \$5,000 total, multistate, multiline.)

Plan A: Plan A provides for retrospective determination of premium for employers who produce \$1,000 or more in workmen's compensation premium *in all states*. (Workmen's compensation only; not a multiline plan.) The standard (or tentative) premium in Plan A is always the maximum premium, and the minimum premium is higher than in Plan B. (Test: \$1,000 total, multistate, workmen's compensation only.)

Plan B: Plan B provides for retrospective determination of premium for employers who produce \$1,000 or more in workmen's compensation premium *in all states*. (Workmen's compensation only; not a multiline plan.) In this plan, the standard (tentative) premium is lower than the maximum, and the minimum premium is lower, correspondingly, than the minimum premium in Plan A. These maximum-minimum levels are the chief differences between Plans A and B. (Test: \$1,000 total, multistate, workmen's compensation only.)

How retrospective plans work: Retrospective rating is defined in Appendix B to Ruling 67 as "a plan or method which permits adjustment of the final premium for a Risk on the basis of its own loss experience subject to Maximum and Minimum limits." In tabular plans A and B, the maximum and minimum premiums are fixed in relation to the standard (tentative) premium, which in Plan A is the maximum and in Plan B is much lower. In Plan D, the selection of maximum and minimum limits is left (within limits) to agreement

All plaintiffs are participating companies (except the Fund, which is nonprofit, and is legally required to make refunds). The original plaintiffs transact about 50 per cent of the business in this state, while the plaintiff in intervention is the largest single compensation carrier in the state, accounting for an additional 18 per cent of the business.

The amici curiae are 47 out-of-state carriers, licensed to do business in California. Apparently, 42 are nonparticipating companies and five are participating carriers.

between the buyer and seller. Within the limits of the maximum and minimum, Ruling 67 provides formulae reflecting loss experience and costs used in determining the final cost of the insurance. The appropriate formula is applied at the end of the insurance period, and the result is an adjustment of the standard premium to reflect the actual loss and cost experience during the insurance period. This adjustment results in the retrospective rate.

2. Premium Discount Plan: This plan provides for graduated expense loading determined through a *scale of discounts graduated according to the annual amount of the employer's premium*. To qualify for this plan, the employer must have premiums from workmen's compensation in excess of \$1,000. This total may include premiums paid in all states to one insurer, but may not include other lines of liability insurance. (Multistate, but not multiline.) Then, the discount is applied to the California portion of the premium. This discount is received no matter how small the California portion may be; that is, the California portion need not be over \$1,000. Furthermore, the discount is granted irrespective of loss experience.

"The California portion of the total workmen's compensation standard premium of the policy or group of policies combined in accordance with this Rule

3. Important here are the following:

§ 11730: "The term 'merit rating,' as used in this article, includes 'schedule rating,' in which the rate is varied according to physical conditions, and also includes 'experience rating,' in which the experience of the particular insured is used as a factor in raising or lowering his rate."

§ 11732: "The commissioner shall approve or issue, as adequate for all admitted workmen's compensation insurers, a classification of risks and premium rates relating to workmen's compensation insurance. He may also approve or issue a system of merit rating. Such classification and system shall be uniform as to all insurers affected."

§ 11734: "The commissioner may change any such classification or system previously approved or issued if he first

shall be subject to the following discounts:

Total Workmen's Compensation Standard Premium	Discounts Applicable To California Portion
First \$1,000	None
Next 4,000	7.1%
Next 95,000	12.2%
Over 100,000	13.7%

The foregoing premium discounts shall not be applicable to any standard premium subject to retrospective rating."

In Stats.1913, chap. 176, a compulsory workmen's compensation system and the State Compensation Insurance Fund were established by the Legislature, without any express constitutional authority therefor. To give legality to an already accomplished fact, article XX, section 21, California Constitution, authorizing the Legislature to "create, and enforce a complete system of workmen's compensation," was adopted in 1918. Pursuant thereto, we now have Insurance Code sections 11730 to 11742 covering "State Rate Supervision." ³

1. Power.

The trial judge, Hon. William T. Sweigert, wrote an excellent opinion considering in detail most of the points raised on appeal. We adopt it in part.

"By Ruling 67, the Commissioner seeks to modify existing minimum workmen's com-

holds a hearing to determine the effect of the proposed change upon the adequacy or inadequacy of rates. Such changes shall also be uniform as to all insurers affected."

§ 11737: "If the commissioner approves or issues such a system of merit rating, insurers may apply it to any risks subject thereto, but shall show basis rates no less than the rates under the classification approved or issued by the commissioner. Any reductions from the basis rates on account of the application of such system of merit rating shall be clearly set forth in the insurance contracts or policies or indorsements attached thereto."

Section 11738 gives statutory backing to the participating companies, permitting refunds "from surplus accumulated from premiums * * *."

pensation premium rates by putting into effect two new rating plans, one of them called the 'Premium Discount Plan' and the other, the 'Retrospective Rating Plan.'

"The purpose of both rating plans, as stated by the Commissioner in Ruling 67, is to introduce into the California workmen's compensation insurance minimum rate structure the principle of 'expense graduation by size of risk' as a means of reflecting in premium rates his finding that an insurance company's expense involved in handling individual risks represents a smaller percentage of the premium in the case of larger risks than in the case of smaller risks.

"Pointing out that the present system, under which minimum premium rates are loaded by the Commissioner for expense on a flat percentage basis without reference to possible variation of expense by size of risk, involves a redundancy of the expense item in the case of the larger risks, the Commissioner has concluded that the proposed modifications of the rating structure will maintain adequate minimum rates and at the same time reduce existing expense redundancy, and, further, that their effect will be to promote competition between all types of workmen's compensation insurance carriers and to reduce rates charged to the public.

"The two plans, although similar in purpose, seek to accomplish the purpose in different ways and may be considered separately.

"In the case of the Premium Discount Plan, the Commissioner seeks to accomplish the purpose by providing that all workmen's compensation policies involving premiums in excess of \$1,000, computed at the regular manual rates, shall be subject to a graduated discount in favor of the insured upon the California portion of the premium.

"Plaintiffs contend that this Premium Discount Plan exceeds the powers granted to the Commissioner by the California Workmen's Compensation Insurance Minimum Rating Law.

[1] "Insurance Code Sections 11732 and 11734 provide that the Commissioner shall approve or issue as adequate for all admitted insurers a classification of risks and

premium rates, uniform as to all insurers affected. In the opinion of the Court, the Commissioner is not restricted by these sections (as contended by plaintiffs), to a mere grouping of hazard in each with a corresponding rate for each such classification. Rate-making involves a consideration, not only of the particular hazards of various occupations, but also of losses (pure premium) and of expense (expense loading). This is especially true where, as under our statute, the rate must be adequate. Expense is, therefore, not only a relevant, but an essential factor to be considered.

[2] "It is true that the Commissioner in the past has always reflected this expense factor in the rate by means of a flat percentage loading. But, there is nothing in the statute which, expressly or impliedly, restricts him to that mode of considering and reflecting the expense factor.

[3] "If, as the Commissioner concluded in making up the Premium Discount Plan, a flat percentage expense loading produces redundancy in rates beyond the requirements of adequacy, he may make such modification of the flat percentage loading as to him seems necessary to correct the redundancy.

"In the Premium Discount Plan, the Commissioner has seen fit to do this by the device of providing for a graduated discount from the premium produced by the manual rate. Plaintiffs' argument to the effect that in so doing the Commissioner fixes a premium, rather than a premium rate, is based upon form rather than substance.

"The discount from the Manual rate becomes in effect a modifying factor in the rate-making process. * * *

[4] "Turning now to the Retrospective Rating Plan, we see that this plan involves different features. Although it applies the principle of expense graduation by size of risk, it does so as part of a plan of merit rating issued under the merit rating provisions of the Insurance Code.

"Sections 11732 and 11734 provide that the Commissioner may approve or issue a system of merit rating. Insurance Code Section 11730 defines merit rating as including schedule rating 'in which the rate is

varied according to physical conditions,' and experience rating 'in which the experience of the particular insured is used as a factor in raising or lowering his rate.'

"The Retrospective Rating Plan has been issued as a form of experience rating. Plaintiffs contend, however, that it is not experience rating within the meaning of Insurance Code Sec. 11730, because under that section, the experience of the particular insured which may be used as a factor in raising or lowering the rate means, according to plaintiffs' interpretation, the *past* experience of the insured, and does not permit use of *current* experience during the policy year as provided in the Retrospective Rating Plan.

"On this point, however, the Court has concluded that the statute, which expressly defines the term 'experience rating' without any such restriction, should not be so narrowly construed and that the Retrospective Rating Plan is, therefore, a form of experience rating within the power of the Commissioner to issue. In this connection it is significant that in 1938, a former Commissioner issued a Retrospective Rating Plan based upon the same principle and still in effect except as modified by the present plan which embodies additional features."

[5] There was testimony to the effect that the uniform interpretation prior to and since 1914 of "classification of risks and premium rates" by persons in the business has been risk groupings by occupation, businesses and industries by degree of hazard with a corresponding rate for each classification. It is then claimed that what the Legislature intended by the use of those words was to freeze that method into the act. We fail to find any such intention in the act. It is obvious that the Legislature had no intention to freeze any particular method of classification because in section 11734 it expressly provided he "may change any such classification or system * * *." See *First Industrial Loan Co. of California v. Daugherty*, 26 Cal.2d 545, 550, 159 P.2d 921, as to powers of an administrative officer to make changes reasonably necessary to effectuate the purpose of the statute governing him.

[6] " * * * it is a general rule of statutory construction that a statute, expressed in general terms and words of present or future tense, will be applied, not only to situations existing and known at the time of the enactment, but also prospectively to things and conditions that come into existence thereafter. Legislation must be given elastic operation if it is to cope with changing economic and social conditions." (2 Sutherland, *Statutory Construction*, 3rd ed., § 5102, pp. 509-510.)

[7] Moreover, the evidence showed that over the years of the existence of the Fund, with the knowledge of the insurance trade, the hazard of the particular employment has not been the sole basis of classifying risks and rates, that size limits as to eligibility based on the cost of administering plans, and size of the organization have also been considered. For example, minimum payrolls of packing houses and department stores and others have been considered. In 1946 the Insurance Commissioner approved the principle of graduation of expense by size of risk as applied to premium discount and retrospective rating plans. In 1951 he applied an additional charge on risks earning a premium under a certain amount. This is called "expense constant." While not determinative, the interpretation of a statute by an officer administering it as a specialist is entitled to "great weight." See *Whitcomb Hotel, Inc., v. California Emp. Comm.*, 24 Cal.2d 753, 756, 151 P.2d 233, 155 A.L.R. 405.

Combination of Premiums.

[8] As pointed out before, the plans set up by Ruling 67 contemplate rating of premiums for workmen's compensation based upon premiums paid by the California employers in other states, under Plan D for other types of liability insurance as well as workmen's compensation, in the other plans for the latter type insurance only. It is contended that the commissioner had no power to authorize this "interstate rating." We adopt Judge Sweigert's opinion concerning this subject:

"Under Insurance Code Sections 11732-4, the Commissioner is not limited in his

process of reflecting the expense factor to the consideration of only expense as reflected in California premiums. Even under the flat percentage loading system, the Commissioner has always based his findings as to the proper expense loading of a premium upon all available statistical evidence, statewide, nationwide, or both. There is nothing in our statute to prevent similar consideration in working out a premium discount which is merely a modification of the flat percentage loading."

Rebates.

[9] It is contended that Ruling 67 violates Insurance Code sections 750, 11738 and related statutes which prohibit rebates. Sections 750 and 751 prohibit rebate of the premium "payable on an insurance contract" or "not * * * specified * * * in the policy * * *." Here the rating plans, if used, would be specified in each policy and provide for discounts, not rebates. A discount is not a rebate or refund but a method of computing rate. See Associated Indemnity Corp. v. Oil Well Drilling Co., Tex.Civ.App., 258 S.W.2d 523, 532; Id., Tex., 264 S.W.2d 697. Section 11738 provides that "A refund by reason of a participating provision in a compensation policy" may only be made from surplus. "Participating" refers to the right to share in earnings and does not refer to the price paid for insurance. Refunds to participants should only come from surplus, although there are other types of refunds which obviously do not have to come from surplus, thus, refund of unearned premium on cancellation. Premium discount and retrospective rating do not refund anything. They are merely formulae for determining amount of price of insurance ultimately to be paid. The various opinions of the Attorney General and counsel for the Commissioner dealt with attempts, by guaranteeing dividends, to contract for rates lower than the minimum prescribed by the Commissioner. Here the rating plans as applied (including the discounts) constitute the minimum rates.

2. Procedural Questions.

(a) Outside Evidence.

[10] It is contended that exhibit 42 relating to retrospective rating only, and

containing arithmetical calculations increasing the excess loss premium factor in the rating plans to reflect certain information obtained after the hearing from other files and records in the commissioner's office, was considered by the Commissioner without the presence of plaintiffs, and that thereby the hearing contemplated by section 11734 was denied.

Concerning this contention we adopt the following portion of Judge Sweigert's opinion:

"The plans included in Ruling 67 are the result of studies that have been made since 1946, at which time a former California Commissioner had rejected similar proposals, not upon the ground of any lack of legal power, but solely for the stated reason that there was insufficient statistical data at the time. (See Ex. EE, p. 56.)

"Since then, studies were made under the sponsorship of the National Association of Insurance Commissioners to accumulate further statistical data relative to the principle of graduation of expense by size of risk. The results of these studies were the subject of the hearings held by the defendant, California Insurance Commissioner, prior to the issuance of the present Ruling 67.

"Among other things there was evidence before the Commissioner to the effect that similar plans were in operation and working satisfactorily in other states. He points out that 35 states have a premium discount plan and 45 states have a retrospective rating plan similar to Plan D herein involved.

"Plaintiffs further contend that Exhibit 42, which consists of some arithmetical calculations made by the Commissioner concerning excess loss premium for purposes of the Retrospective Rating Plan, was not properly a part of the record. However, the nature and purpose of these calculations were such that their consideration by the Commissioner did not constitute an irregularity. Nor could their consideration possibly have prejudiced plaintiffs."

Particularly is this so, because all interested parties were given every opportunity to introduce material for the consideration of the Commissioner and the effect of the material in exhibit 42 was to *increase* the

permissible minimum rates. Plaintiffs being in no way prejudiced by the Commissioner's action, may not complain. See *Eastern-Columbia, Inc., v. County of Los Angeles*, 61 Cal.App.2d 734, 143 P.2d 992.

(b) Delegation of Authority.

(c) Promulgation of Ruling 67.

(d) Effective date.

(e) Ruling Sufficient, Clear and Complete.

[11] We adopt Judge Sweigert's opinion on these subjects:

"* * * the functions of revising and constructing tabular plans which the Commissioner delegated to the Inspection Rating Bureau (a rating organization licensed by the state) were proper in view of the Bureau's functions and relationship to the Commissioner as recognized by Insurance Code Sections 11750.1-11758, especially where such rating values would have to be ultimately embodied in a policy or endorsement approved by the Commissioner. (Ins. Code Sec. 11658.)

[12] "It is further contended that the Commissioner improperly delegated authority to the Inspection Rating Bureau by authorizing it to accept verification of certain data from rating organizations in other states or, in lieu thereof, from individual insurance carriers. (See Ruling 67, Appendix B. Plan D. Rule D-2.)

"This is in conformance with long and necessary practice in similar and related matters. See also: Ins.Code Sec. 731; Ins. Code Sec. 12921.5) and does not constitute an improper delegation of the Commissioner's statutory powers.

[13] "It is contended that Ruling 67 was never validly promulgated by the Commissioner. Government Code Sec. 11371(b) and 11380, requiring certain administrative regulations to be filed with the Secretary of State, expressly except regulations establishing or fixing rates, prices or tariffs. Both the Premium Discount Plan and the Retrospective Rating Plan are regulations fixing and establishing insurance premium rates within the meaning of this exception. They were promulgated reasonably and in conformity with long established practice in the insurance industry."

[14] It is contended that the Commissioner abused his discretion in making the effective date of Ruling 67 approximately eleven days after promulgation, in view of the fact that the ruling had to be filed with the Secretary of State, Gov.Code § 11380, and section 11422, Government Code, provides that a regulation required to be filed with the Secretary of State becomes effective 30 days after such filing. Section 11736, Insurance Code, states that the effective date of rates issued by the Commissioner shall be the date fixed by him. It is not too important which of these sections control here for the reason that the plans established by Ruling 67 are not compulsory. They are elective and become applicable if the insured and insurer so agree by appropriate provision in the policy contract. No insurer was required to adopt any of these plans on or after either effective date. If an insurer makes no election under Ruling 67, its rates continue on under the existing system.

Continuing with Judge Sweigert's opinion:

[15,16] "Plaintiffs make the further claim that Ruling 67, particularly Appendix B, is not sufficiently clear and intelligible. The Court has concluded that, although the subject matter is admittedly technical and complicated, it is legally sufficient. It must be borne in mind that the material in question is designed, not for laymen, but for the guidance of insurance specialists. Such orders should be upheld if they are susceptible of reasonable interpretation and use in the industry and should not be invalidated by a court merely because their construction may be difficult or because of the possibility of differing interpretations.

[17] "It is further argued that Ruling 67 was incomplete when issued because in it the Commissioner gave certain directions to the California Inspection Rating Bureau for the revision of Tabular Plans A and B and for the construction of various tabular plans, all as related to the Retrospective Rating Plan, without need of further specific approval by him. (See Rule 67, Findings and Conclusions, pp. 8, 9.) However, such future revision of the Commissioner's

Tabular Plans A and B would not make Appendix B any less complete as it stood at the time of issuance."

[18] There is substantial evidence to the effect that the use of the flat percentage expense loading has produced rates that are excessive in the larger premium brackets, a portion of which has been returned by way of dividends. The statute requires adequate minimum rates. There is nothing in the statute requiring the freezing into the rate structure particular factors merely because they have been used in the past. The rating law which authorizes the Commissioner within the limits herein discussed in prescribing fair and equitable minimum rates based on the cost to insurers of furnishing the insurance in no wise prohibits him from recognizing the existing gradation of expense by size of risk without allowing excessive premiums to enable certain insurers to pay high dividends.

[19] The Commissioner generally had the power to issue Ruling 67, and we find no irregularity or abuse of discretion in the procedure of its issuance.

This brings us to the questions of whether Ruling 67 violates the constitutional and statutory policies pertaining to the workmen's compensation system and particularly, the State Compensation Insurance Fund.

In 1911 the Legislature enacted the Roseberry Act which was an elective rather than a compulsory compensation act. Stats.1911, chap. 399. Section 21, article XX, California Constitution, adopted the same year, expressing a basic policy concerning work-

men's compensation, did not expressly provide for state compensation insurance.⁴

[20] Following receipt of the message and the report mentioned in the footnote, the Legislature passed the Boynton Act, Stats.1913, chap. 176, making workmen's compensation compulsory and creating the State Compensation Insurance Fund. In 1918 the present section 21 of article XX was adopted expressly providing authority for the creation of such fund, which had already been operating since 1913. Section 11775, Insurance Code, provides: "The fund shall, after a reasonable time during which it may establish a business, be fairly competitive with other insurers, and it is the intent of the Legislature that the fund shall ultimately become neither more nor less than self-supporting. For that purpose loss experience and expense shall be ascertained and dividends or credits may be made as provided in this article." In view of this constitutional and legislative policy, the Commissioner would have no power to adopt a rating system which would violate this policy or prevent the fund from adequately performing its functions. Whether Ruling 67 does so, is our next problem.

[21] It is true that the fund may not be able to participate in the interstate and multiline features of the plan because it has no authority to write insurance outside of the state or in other lines. Theoretically, it can join with multiline and multistate companies. However, as a practical matter it will not be able to do so. It must be remembered that during its entire existence

4. In Governor Hiram W. Johnson's First Biennial Message to the Legislature, January 6, 1913, he called attention to "the rapacity of insurance companies" concerning insurance for industrial accidents, and recommended that a state insurance fund be provided. In the First Report of the Industrial Accident Board (created by the Roseberry Act) to Governor Johnson, in recommending that a state compensation fund be provided, it was pointed out that employers were not "electing" the compensation provisions of that act, mainly because of the "adverse rates made against compensation by the liability insurance companies." To make compensation compulsory on all employers and leave them "at the mercy of a

combination of insurance companies" whose rates for California were made in New York City, would be an injustice to the employers. Nor, it was felt, would a state monopoly of insurance meet the situation. What was needed was for the state to "invade the sphere of private enterprise only to the extent that is needful in order to obtain justice for its people." It then stated that to be self-supporting a state fund would have to do about 12 per cent of the business, "after which the opportunity of private enterprise to do a prosperous business in that field will be dependent upon its ability to do business more efficiently than the State can do it."

it has not been able to write insurance on an interstate basis, as do many carriers, yet it has never been claimed that the rate structures existing heretofore applying to both the Fund and to intrastate and interstate carriers, were invalid, and during all this period the Legislature has not concerned itself with this difference between the power of the Fund and of interstate companies. The competitive advantage of multistate companies, if any such advantage exists, has not injured the Fund to date. While there has been no experience with the competition of multiline companies, the evidence as to whether such competition would seriously affect the Fund is conflicting. The trial court resolved that conflict.

It is contended that Ruling 67 will result in the Fund getting only the business of policyholders having less than \$1,000 of annual premium, the expense ratio of which business is higher than where the premiums are large, and that this small business, combined with the state agency business,⁵ would not be sufficient to permit it to compete with the other carriers. Sixty-eight per cent of all workmen's compensation business in California has been written by the California companies (including the Fund, which writes 24.78 per cent of the business) in competition with companies doing an interstate business. It would appear that the Fund has held its own with both local and multistate companies.

The general expense level recognized by the Commissioner in Ruling 67 was in excess of 40 per cent (36.55 per cent expense loading plus \$10 expense constant for small risks). The expense level of the Fund is less than 14 per cent. This leaves the Fund an average margin of 24 per cent with which to meet the competitive effect of a discount plan which permits discounts ranging from 7.1 per cent to 13.7 per cent as to a portion only of business. State Fund dividends have averaged around 25 per cent of premium in recent years and in the case of some risks dividends up to 70 per cent have been paid. At least four states⁶ having

State Funds have approved these rating plans.

The Commissioner determined that the effect of the use of the plans provided by Ruling 67 on "participating" insurance carriers, including the fund, will be, not any injurious interference with their ability to compete for workmen's compensation insurance business, but merely the correction of an accidental competitive advantage enjoyed by them up to this time as a result of the continued use in California of the flat percentage loading formula with its inherent rate redundancy. The trial court, in effect, came to the same conclusion. Whether, as claimed by plaintiffs, the plans will result in loss by the Fund of most of its business where the annual premiums exceed \$1,000 and practically all of its business where the annual premiums exceed \$5,000, or will not, as claimed by defendant, and in effect as found by the court, is a matter that can be determined definitely only by application of the plans.

[22] The fact that the McBride-Grunsky Act, Stats.1947, chap. 805 Insurance Code, § 1850 et seq., in setting up a rating mechanism for liability insurance expressly authorized many of the features of the plans included in Ruling 67, but expressly excluded workmen's compensation insurance from the provisions of the act, can in no way be construed to mean that the Legislature intended that those features could not be used by the Commissioner in a system of workmen's compensation insurance rating. It merely meant that the Legislature was continuing the historic procedure of completely separating the control and operation of workmen's compensation insurance from that of all other types of insurance.

It apparently is contended that in order to be "fairly competitive with other insurers" the Fund must be in all respects in the same situation as its competitors and that because the Fund, by law, is restricted to California workmen's compensation insur-

5. About 10 per cent of the Fund's business is from state, municipal and district agencies which are required by law to insure with the Fund.

6. Michigan, New York, Maryland and Pennsylvania.

ance only, it cannot be in the same situation as multistate and multiline insurers. We have pointed out that historically the Fund has more than held its own with the competition of the multistate insurers, and that that competition from the beginning has been considered not to interfere with the Fund being fairly competitive. For the same reason competition with multiline insurers does not in itself interfere therewith either.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



134 Cal.App.2d 93

Charles S. COBB, Plaintiff and Appellant,

v.

PASADENA CITY BOARD OF EDUCATION, Defendant and Respondent.

Civ. 20915.

District Court of Appeal, Second District,
Division 2, California.

June 24, 1955.

Rehearing Denied July 11, 1955.

Hearing Denied Aug. 17, 1955.

Proceeding to enjoin school board from disbursing public funds for architect fees. The school board demurred. The Superior Court, Los Angeles County, Kurtz Kauffman, J., sustained the demurrer and entered judgment dismissing the action, and petitioner appealed. The District Court of Appeal, Moore, P. J., held that architect may properly be employed by school board without competitive bidding.

Affirmed.

1. Schools and School Districts $\S$ 80(2)

The employment of person who is highly and technically skilled in his science or profession may properly be made by board

of education without competitive bidding. West's Ann.Gov.Code, $\S$ 53060.

2. Schools and School Districts $\S$ 80(2)

Where competitive proposals do not induce an advantage for school district, statute requiring board of education to let its contracts on basis of competitive bidding does not apply. West's Ann.Education Code, $\S\S$ 18051, 18052.

3. Schools and School Districts $\S$ 80(1)

School board's employment of architect who did not reside or do business in school district was not improper. West's Ann.Gov.Code, $\S$ 53060.

4. Schools and School Districts $\S$ 80(2)

Employment of architect, who was not resident of school district, without competitive bidding by school board was within its discretion, and courts will not interfere in the absence of fraud or abuse of discretion in exercise of board's legislative powers. West's Ann.Gov.Code, $\S$ 53060.

Appellant in pro. per.

Harold W. Kennedy, County Counsel,
Wm. E. Lamoreaux, Deputy County Counsel,
Los Angeles, for respondent.

MOORE, Presiding Judge.

The question here presented is whether a board of education is required to advertise for competitive bids before it may contract with an architect for his professional services to prepare plans for the city's school extension program.

By his complaint, appellant sought an injunction to prevent respondent from disbursing public funds as architect's fees for services rendered and to be performed in connection with the proposed Pasadena school extension program. A general demurrer was sustained. After appellant's failure to file a valid pleading following successive attempts, the court entered judgment dismissing the action.

Appellant urges upon this court that his cause is governed by sections 18051 and 18052* of the Education Code which re-

strict shall let any contracts involving an expenditure of more than five hundred

* Section 18051, Education Code.

"The governing board of any school dis-

quire (1) respondent to advertise for bids from architects and (2) to award any contract to the lowest bidder. Because such procedure was not followed, appellant contends that the judgment should be reversed and that respondent should be enjoined from expending any public funds on a void contract.

[1, 2] The contention here made has long since been denied judicially and legislatively. It has been held that because an architect is an artist, that his work requires taste, skill and technical learning and ability of a rare kind, it would be bad judgment to advertise and get many bids when the lowest bidder might be also the least capable and most inexperienced and his bid absolutely unacceptable and therefore "the employment of a person who is highly and technically skilled in his science or profession is one which may properly be made without competitive bidding." *City & County of San Francisco* 1044; *Miller v. Boyle*, 43 Cal.App. 39, 44, 184 P. 421. Because all contracts for the construction of improvements must be subject to competitive bidding, and because such contracts must conform with the procedure prescribed in sections 18051 and 18052, *supra*, it does not follow that in the employment of an architect to prepare plans for a public building a board must comply with those sections. *Kennedy v. Ross*, 28 Cal.2d 569, 581, 170 P.2d 904. Where competitive proposals do not produce an advantage, a statute requiring competitive bidding does not apply. *Ibid*.

But after the above-cited decisions, the Legislature in 1951 added section 53060 to the Government Code as follows:

dollars (\$500) for work to be done or for materials or supplies to be furnished, sold, or leased to the district, to the lowest responsible bidder who shall give such security as the board requires, or else reject all bids. This section applies to all materials and supplies whether patented or otherwise."

Section 18052, Education Code.

"For the purpose of securing bids the

"The legislative body of any public or municipal corporation or district may contract with and employ any persons for the furnishing to the corporation or district special services and advice in financial, economic, accounting, engineering, legal, or administrative matters if such persons are specially trained and experienced and competent to perform the special services required.

"The legislative body of the corporation or district may pay from any available funds such compensation to such persons as it deems proper for the services rendered."

That statute removes all question of the necessity of advertising for bids for "special services" by a person specially trained and experienced and competent to perform the special services required. Now, a board may pay from any available funds a fair compensation to capable and worthy persons for special services.

[3, 4] The contention that respondent improperly employed architects who neither reside in Pasadena nor do business there is based on no authority. Neither section 53060 nor any other statute restricts employment by a school district of architects to those who reside in any particular city or district. Such employment, therefore, lies within the discretion of the board, with which courts will not interfere in the absence of fraud or abuse of discretion in the exercise of its legislative powers. *Ransom v. Los Angeles City High School District*, 129 Cal.App.2d 500, 277 P.2d 455; *Nickerson v. San Bernardino County*, 179 Cal. 518, 523, 177 P. 465.

Affirmed.

McCOMB and FOX, JJ., concur.

board shall publish at least once a week for two weeks in some newspaper of general circulation published in the district, or if there is no such paper, then in some newspaper of general circulation, circulated in the county, a notice calling for bids, stating the work to be done or materials or supplies to be furnished and the time when and the place where bids will be opened."

Michael DE LUCA, Petitioner and Appellant,
v.
BOARD OF SUPERVISORS OF LOS ANGELES COUNTY and Valley Land Development Company, a Co-Partnership, Defendants and Respondents.

BARTHOLOMAE CORPORATION, a California Corporation, Petitioner and Appellant,
v.

BOARD OF SUPERVISORS OF LOS ANGELES COUNTY and Valley Land Development Company, a Co-Partnership, Defendants and Respondents.

Civ. 20867, 20868.

District Court of Appeal, Second District,
Division 3, California.

June 28, 1955.

Rehearing Granted July 25, 1955.*

Two petitions for a writ of review to review action of Board of Supervisors of Los Angeles County, in granting a zone exception to permit a public dump upon land in immediate vicinity of that of petitioners. The Superior Court of Los Angeles County, Arnold Praeger, J., entered judgment denying certiorari in each case, and the petitioners appealed. The District Court of Appeal, Ashburn, J. pro tem., held that the petitions were insufficient.

Order affirmed in each case.

Opinion vacated 286 P.2d 395.

1. Certiorari ⇨70(5)

On appeal from order denying petition for writ of review, where respondent board of supervisors stood upon a memorandum of law filed in opposition to the application, the ruling was required to be tested by allegations of the petition.

2. Administrative Law and Procedure ⇨454 Process ⇨152

Generally, one who has been notified to attend a certain proceeding, and does so, cannot be heard to complain of alleged insufficiency of the notice, and such rule applies to one who appears in administrative proceeding without the notice to which he is entitled by law.

*Opinion vacated 286 P.2d 395.

3. Municipal Corporations ⇨621.40

The rule that one who has been notified to attend a certain proceeding and does so, cannot be heard to complain of alleged insufficiency of the notice, applies to a hearing upon a zoning application.

4. Certiorari ⇨42(3)

It is incumbent on petitioner seeking a writ of review to review action of county board of supervisors to aver facts which show an absence or excess of jurisdiction.

5. Certiorari ⇨42(4)

Evidence ⇨83(4)

There is a presumption of regularity and legality of official action of county board of supervisors, and, hence, allegations of a petition for writ of review to review supervisors' action must be sufficient to overthrow the presumption. West's Ann.Code Civ.Proc. § 1963, subd. 15.

6. Administrative Law and Procedure ⇨391 Municipal Corporations ⇨122(2)

Statutes ⇨61

Where regulation is within scope of authority legally delegated, the presumption of existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies.

7. Counties ⇨21½

Where petition seeking writ of review to review action of county board of supervisors in granting zoning exception to permit a public dump upon land in immediate vicinity of that of petitioner alleged an excess of jurisdiction on board's part in that the required notice of hearing on the application was misleading and was in fact no notice at all, but did not allege the petitioner had been misled in any substantial way by the notice or that he had not been present at the hearing, petition was properly denied as insufficient.

Mize, Kroese, Larsh & Mize and Royal E. Hubbard, Santa Ana, for appellants.

Harold W. Kennedy, County Counsel, Edward H. Gaylord, Deputy County Counsel, Los Angeles, for respondent Board of Sup'rs of Los Angeles County.

Burke, Williams & Sorensen, Los Angeles, for respondent Valley Land Development Co.

ASHBURN, Justice pro tem.

[1] These cases involve the same facts and identical law points, with one exception which needs no comment. Each is an appeal from an order denying petition for writ of review. Counsel for the respondent Board of Supervisors stood upon a memorandum of law filed in opposition to the application and the ruling must be tested by the allegations of the petition. That of DeLuca will be reviewed; the Bartholomae Corporation petition contains the same allegations.

Petitioner says he is the owner of certain real property upon which he has a residence; it is located within zones A-1 and M-3 under the county zoning ordinance, No. 1494, and the maintenance of a public dump in those zones is prohibited; respondent Valley Land Development Company filed an application with the Regional Planning Commission of the County requesting that a zone exception be granted "to permit a public dump" upon its land which is in the immediate vicinity of that of petitioner; petitioner's property is within 500 feet of the exterior boundaries of that of Valley Land Development Company; the zoning ordinance requires ten days notice of hearing of such an application, i. e., by publication in a newspaper, and by post card mailed to all persons whose names and addresses appear on the assessment roll as owning property within a distance of 500 feet from the exterior boundaries of the area to be occupied by the use for which the variance is sought; notice was published and mailed; each gave notice of a hearing of a request for an exception to the A-1 zone "in order to establish, operate and maintain, a land reclamation project" on the subject property. Each petition also says that there are only two land owners in the vicinity of applicant's property which are within 500 feet of its exterior boundaries, and that one of those owners is said Valley Land Development Company. The petition says the notice was published as required and was mailed to

the persons required by the ordinance, but does not show whether petitioner received the same or whether he ever saw or knew its contents. It is alleged that a public hearing was held by the Zoning Board, which made findings favorable to the application and recommended that the exception applied for be granted; that thereafter the Regional Planning Commission approved and adopted said finding and recommendation. Also that, within the time prescribed by the ordinance, an appeal was taken by Bartholomae Corporation to the Board of Supervisors and the decision of the Regional Planning Commission was affirmed. It was alleged further that the establishment of a dump as contemplated would constitute a nuisance and depreciate the value of petitioner's property.

The petition and the briefs on appeal assert an excess of jurisdiction in that the published and mailed notices "contain no adequate intimation of the true subject matter of the application, namely, permission to establish a public dump on the property described"; that they "are not real notice, or in truth and in fact any notice at all." The gist of the argument is that a public dump is not "a land reclamation project" and that the notice is essentially misleading; that the object of a notice is an opportunity to interested persons to be heard and hence it must adequately inform as to the true nature and subject matter of the hearing. Also, that "when the method for the exercise of the power is prescribed by the statute such method is the measure of the power to act. * * * When the statute requires notice and hearing as to the possible effect of a zoning law upon property rights the action of the legislative body becomes *quasi* judicial in character, and the statutory notice and hearing then becomes necessary in order to satisfy the requirements of due process and may not be dispensed with." *Hurst v. City of Burlingame*, 207 Cal. 134, 141, 277 P. 308, 311. Appellant relies upon *Kane v. Board of Appeals of City of Medford*, 273 Mass. 97, 173 N.E. 1, which holds in effect that such a notice must be a real and not a misleading one.

Counsel for respondent Board of Supervisors argue "As a practical matter there is no distinction between a land reclamation project and a dump, when the reclamation is carried on by means of a sanitary fill operation. * * * In view of the modern practices of land reclamation the terms 'land reclamation project' and 'public dump' are sufficiently synonymous so that notice of one constitutes notice of the other," and they say that the zoning ordinance provides: "'Section 224. Land Reclamation Projects Defined. The disposal of rubbish and unwanted material in such a manner so as to fill up holes and other depressions or in other ways make the property more usable shall be known as a land reclamation project.'"

We find it unnecessary to resolve these questions propounded by counsel for the petitioner to aver any facts showing injury to petitioner as a result of the alleged inadequacy of the notice. The point is raised by respondent and is meritorious.

Not only does the petitioner fail to disclose whether the notice mailed to him was received, or whether he was misled thereby into staying away from the hearing, but he does not tell the court whether he did attend and participate in the meeting, with or without protest as to the form of the notice.

[2, 3] The general rule is that one who has been notified to attend a certain proceeding and does so, cannot be heard to complain of alleged insufficiency of the notice; it has in such instance served its purpose. This rule applies to one who appears in a lawsuit after defective service of process upon him, 21 Cal.Jur. § 4, p. 477, to one who responds to a notice of motion without adequate notice. 18 Cal. Jur. § 7, p. 652. Also to one who appears in an administrative proceeding without the notice to which he is entitled by law. 2 Cal.Jur.2d § 108, p. 202; *Howe v. State Bar*, 212 Cal. 222, 231, 298 P. 25; *Light v. State Bar*, 14 Cal.2d 328, 331-332, 94 P.2d 35; *Farmers' & Merchants Bank v. Board*, 97 Cal. 318, 325, 32 P. 312. The rule also applies to a hearing upon a zoning application. See *Hopkins v. MacCulloch*, 35 Cal.

App.2d 442, 451, 95 P.2d 950; *Livingstone Rock & Gravel Co. v. County of L. A.*, 43 Cal.2d 121, 129, 272 P.2d 4; *Keeling v. Board of Zoning Appeals*, 117 Ind.App. 314, 69 N.E.2d 613, 616; *Wilson v. Township Committee of Union Tp.*, 123 N.J.L. 474, 9 A.2d 771, 772; *Hancock & Others v. City of Boston*, 1 Metc. 122, 42 Mass. 122, 123.

[4-6] It is incumbent upon the petitioner to aver facts which show an absence or excess of jurisdiction. 10 Cal.Jur.2d § 212, p. 348; § 68, p. 141; § 86, p. 166; *Chambers v. Board of Supervisors*, 57 Cal. App. 401, 407, 207 P. 288; *Landtbohm v. Board of Fire Com'rs*, 98 Cal.App. 629, 632, 277 P. 369; *Traders Credit Corp. v. Superior Court*, 111 Cal.App. 663, 666, 296 P. 99; 2 Cal.Jur.2d § 212, p. 348. And, as there is a presumption of regularity and legality of official action, Code Civ.Proc. § 1963, subd. 15, the allegations must be sufficient to overthrow the same. In *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 56 S.Ct. 159, 80 L.Ed. 138, the court affirmed an order dismissing a suit to enjoin enforcement of an order of the Oregon Department of Agriculture prescribing use of a certain type of container for berries. Concerning the sufficiency of the allegations, the court said in 296 U.S. at page 185, 56 S.Ct. at page 163:

"It is urged that this rebuttable presumption of the existence of a state of facts sufficient to justify the exertion of the police power attaches only to acts of legislature; and that where the regulation is the act of an administrative body, no such presumption exists, so that the burden of proving the justifying facts is upon him who seeks to sustain the validity of the regulation. The contention is without support in authority or reason, and rests upon misconception. * * *

"But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies. Compare *Aetna Ins.*

Co. v. Hyde, 275 U.S. 440, 447, 48 S.Ct. 174, 72 L.Ed. 357, 364."

Beverly Oil Co. v. City of Los Angeles, 40 Cal.2d 552, 254 P.2d 865, was an attack upon the application of a zoning ordinance to plaintiff's nonconforming use. At page 559 of 40 Cal.2d, at page 869 of 254 P.2d the court said: "The burden rests upon the plaintiff to establish the invalidity of the ordinance in its application to the property involved. The plaintiff's failure to sustain this burden raises a presumption of the existence of such facts as are sufficient to sustain the ordinance. *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 56 S.Ct. 159, 80 L.Ed. 138 [101 A.L.R. 853]."

[7] If petitioner was misled in any substantial way by the notice in question or if he was not present at the hearing, it was necessary for him to show the fact in his petition; as he has not done this the presumption of lawful action is not overthrown and his petition was properly denied.

The order denying certiorari is affirmed in each case.

SHINN, P. J., and VALLÉE, J., concur.



134 Cal.App.2d 100

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

John LEIVA, Defendant and Appellant.
Cr. 5217.

District Court of Appeal, Second District,
Division 2, California.

June 24, 1955.

Rehearing Denied July 7, 1955.

Hearing Denied July 20, 1955.

Prosecution for sale of a preparation of heroin in violation of the Health and Safety Code. From an order of the Superior Court, Los Angeles County, Charles W. Fricke, J., the defendant appealed.

The District Court of Appeal, Moore, P. J., held where defendant was indicted for having sold heroin in violation of Health and Safety Code, and prosecution proved the sale by defendant and also the name of the purchaser, such proof would enable defendant to establish former jeopardy in the event of subsequent accusations, even though indictment failed to name purchaser.

Judgment and the order denying the motion for new trial affirmed.

1. **Polsons** Ⓒ9

Indictment for selling narcotics is not defective because it fails to name the vendee. Health and Safety Code, § 11500.

2. **Indictment and Information** Ⓒ148

An attack on indictment for selling narcotics because of failure to name vendee, could be made only by special demurrer. Health and Safety Code, § 11500.

3. **Criminal Law** Ⓒ1167(1)

A defective information or indictment will not result in a reversal unless a substantial right of the accused on the merits is adversely affected.

4. **Criminal Law** Ⓒ295

Where defendant was indicted, for having sold a preparation of heroin in violation of the Health and Safety Code and prosecution proved the sale by defendant and also the name of his purchaser, such proof would enable defendant to establish former jeopardy in the event of subsequent accusations, even though indictment failed to name purchaser. Health and Safety Code, § 11500; Pen.Code, § 951.

5. **Criminal Law** Ⓒ1208(9)

It is not essential to a judgment that it specify the exact term a convict must serve.

6. **Criminal Law** Ⓒ1208(5)

The Superior Court, by a judgment sentencing a person to the maximum period prescribed, is not divested of its power.

7. **Constitutional Law** Ⓒ270

Criminal Law Ⓒ1206(1)

Indeterminate sentence law does not deny due process. Pen.Code, §§ 951, 1168,

3020, 3022; U.S.C.A.Const. Amend. 14; West's Ann.Const. art. 6, § 1.

8. Criminal Law ⇨995(4)

Judgment which decreed that defendant be imprisoned for the term prescribed by law, did not lack certainty. Pen.Code, §§ 951, 1168, 3020, 3022.

9. Criminal Law ⇨1208(9)

A judgment pursuant to Indeterminate Sentence Law, is in legal effect, a sentence for the maximum term and therefore is definite and certain. Pen.Code, §§ 951, 1168, 3020, 3022.

10. Criminal Law ⇨977(1)

In prosecution for violation of the Health and Safety Code, the Superior Court had the function of determining the guilt of the defendant and of imposing the sentence provided by law for the offense involved. Health and Safety Code, § 11500.

11. Pardon ⇨4

Where defendant was convicted of having sold heroin in violation of the Health and Safety Code and judgment decreed that he be imprisoned for term prescribed by law, the execution of such judgment and the application of merciful measures were administrative and were properly vested in the executive branch of the government. Health and Safety Code, § 11500.

12. Pardon ⇨4

Under Indeterminate Sentence Law, the length of terms of imprisonment and rights of parole are subject to redetermination from time to time within prescribed limits. Pen.Code, §§ 951, 1168, 3020, 3041.

13. Criminal Law ⇨575

Where indictment was filed February 10, 1954, and trial was commenced April 7, defendant was tried within 60 days as required by the Penal Code. Pen.Code, § 1382.

14. Witnesses ⇨337(5)

Whether neither indictment nor any other document referring to former penal judgments against defendant were read to jury, but reference to a prior conviction was made for purpose of impeachment,

defendant's prior convictions were not brought to the attention of the jury in violation of the Penal Code.

15. Criminal Law ⇨1169(1)

Where tape recording of interrogation of defendant by officers at narcotics division headquarters after defendant's arrest, used to present evidence to the jury corresponded to a stenographic record, such use was not prejudicial to defendant.

John F. Leiva in pro. per.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Indicted for having sold a preparation of heroin in violation of the Health and Safety Code, section 11500, appellant was convicted by a jury of such crime, and also the court found that he had suffered two prior felony convictions. The judgment decreed that he be imprisoned for the term prescribed by law. He demands a reversal on the sole ground that the indictment failed to state facts sufficient to constitute a cause of action.

He specifies that the pleading does not allege the name of the vendee who purchased the narcotic and that such omission is a fatal defect. "A sale" he asserts "must be a transaction between two or more parties." He argues that (1) the true test of the sufficiency of an indictment is whether the record shows with accuracy to what extent he may plead a former adjudication of the facts alleged in the indictment; (2) because the indictment is thus fatally defective, the judgment is void and in violation of both the applicable statutory provisions and of the Fourteenth Amendment; (3) the Indeterminate Sentence Law, Penal Code, secs. 1168, 3020, 3041, provides that the final determination of appellant's sentence shall be determined by the Board of Prison Terms and Paroles, i. e., the Adult Authority; (4) because the cited code sections divest the superior courts of their power and confer it upon the Adult Authority in violation of Article

VI, section 1, of the state's constitution which confers the judicial power upon designated courts, they deprive a convict of his right of due process of law.

He supports his theses with quotations from numerous decisions and text writers and concludes that the judgment of his conviction is void. Notwithstanding the skill and learning displayed in the brief, filed in *propria persona*, appellant thereafter requested this court to appoint counsel to prosecute his appeal. An attorney¹ was appointed. He made an investigation of the proceedings prior to the trial, the evidence admitted, the verdict and judgment, and advised the court that the appeal is without merit. That such advice must be approved will presently appear. The facts are simple; the judgment is valid.

For a year prior to appellant's arrest, the police department of Los Angeles had assigned officer Manuel Gutierrez to the narcotics division. He operated as an undercover agent, wore old clothes, long hair and a mustache. Accompanied by a friend on January 26, 1954, he drove on West Temple Street and parked his car. He was promptly approached by appellant who was familiarly hailed by Gutierrez' companion. Thereupon appellant inquired: "Are you guys trying to pick up?" Gutierrez replied: "Yes, we want three for ten dollars if it is good stuff." Appellant assured the officer that he would not "burn you guys; it is good." He then entered the automobile and directed the disguised officer to drive to First Street and he would get what they desired. They readily appeared at an apartment house on West First Street. Appellant alone entered the place and promptly returned. He entered the car and directed Gutierrez to drive around the corner and park. At that point appellant asked who had the money. He gave the officer three capsules of powder wrapped in paper and received in return two five-dollar bills. He was then returned to the street where he was first encountered.

At the trial, Gutierrez proved the meaning of all the phrases used by appellant

when he inquired as to the purpose of the officer, which established the occupation of appellant. By other men of the police department, it was established that the three capsules contained heroin; that appellant claimed the capsules belonged to another person, a woman, but refused to divulge the name of the owner; that he had just got out of jail ten days prior to his arrest. A tape recording of the six minutes Leiva was questioned by Officers Logue and Gutierrez after his arrest was played for the court and jury.

Appellant denied the facts proved by the prosecution; testified that he had never sold narcotics in his life; that on the day of the alleged sale he was at home with his wife and children, had been in jail for a year and a half; that the recording played did not have his voice. His wife testified that at the hour of the alleged sale by appellant, he was at home with her.

Despite the denials and proof by appellant, the jury convicted him and the court adjudged him guilty and he was sentenced to the State Prison for the term prescribed by law.

Indictment Valid.

[1-4] An indictment for selling narcotics is not defective because it fails to name the vendee. While an attack on the pleading could have been made only by special demurrer, even that attack is impotent. *People v. Gelardi*, 77 Cal.App.2d 467, 472, 175 P.2d 855; *People v. Faust*, 113 Cal. 172, 175, 45 P. 261; *People v. Malone*, 68 Cal.App. 615, 618, 229 P. 1000. It is the law that even a defective information or indictment will not result in a reversal unless a substantial right of the accused on the merits is adversely affected. *People v. Howes*, 99 Cal.App.2d 808, 816, 222 P.2d 969. In the case at bar, the prosecution proved the sale by appellant and also the name of his purchaser. Such proof will enable appellant to establish former jeopardy in the event of subsequent accusations. Furthermore, the indictment of appellant followed the form prescribed by section 951 of the Penal Code.

1. Arthur C. Baker, Esquire, of the Los Angeles Bar.

The Statutes Involved

[5-12] It is not essential to a judgment that it specify the exact term a convict must serve. The superior court, by a judgment sentencing a person to the maximum period prescribed, is not divested of its power. The statutes dealing with the Indeterminate Sentence Law, Penal Code, secs. 1168, 3020, 3022, do not infringe the right of due process of law. A judgment pursuant to those statutes is in legal effect a sentence for the maximum term and therefore it is definite and certain. In re Lee, 177 Cal. 690, 693, 171 P. 958. So construed, such judgment does not lack certainty. The superior court has the function of determining the guilt of the defendant and of imposing the sentence *provided by law* for the offense involved. The execution of its judgment and the application of merciful measures are administrative and were properly vested in the executive branch of the government. "It is a part of the philosophy of the indeterminate sentence law and our whole penological system that, within prescribed limits, the length of terms of imprisonment and rights of parole shall be subject to redetermination from time to time." In re McVickers, 29 Cal.2d 264, 271, 176 P.2d 40, 45. Such measures were wisely designed for the welfare of society as well as for the prisoner.

[13] In a belated supplemental brief, appellant asserts that he was not tried within 60 days as required by the Penal Code, section 1382. The record shows that the indictment was filed February 10, 1954, and that trial was commenced April 7, or within 60 days.

[14] His statement that his two prior convictions were brought to the attention of the jury by the assistant district attorney in violation of the Penal Code is without support. The transcript of the proceedings discloses neither the reading of the indictment nor any other document referring to the former penal judgments against appellant. The reference to a prior conviction was made for the purpose of impeachment.

[15] His statement that the assistant district attorney "used a tape recorder to

present evidence to the jury" could refer only to the record made after his arrest when the officers were interrogating him at narcotics division headquarters. This corresponds to a stenographic record which is the usual proceeding when officers are questioning a suspect.

The reporter's transcript does not disclose any act of the trial judge indicating a prejudice against appellant.

The judgment and the order denying the motion for a new trial are affirmed.

McCOMB and FOX, JJ., concur.



133 Cal.App.2d 640

Theodore GOLDEN, Plaintiff-Respondent,

v.

STATE of California, etc., Defendant-Respondent.

McKESSON & ROBBINS, Inc., a corporation, Max Sobel Wholesale Liquors, a corporation, Rathjen Bros., Inc., a corporation, Pacific Brewing & Malting Co., a corporation, and Lewis-Westco & Co., a corporation, Defendants-Appellants,

v.

UNITED STATES of America, Plaintiff In Intervention-Respondent.

No. 16334.

District Court of Appeal, First District,
Division 1, California.

June 15, 1955.

Interpleader action wherein United States sought to impose tax lien for internal revenue taxes assessed against seller of liquor license on funds in escrow deposited in connection with purchase of liquor license and held for benefit of general creditors who filed claims with escrow holder. The Superior Court, County of Alameda, Chris B. Fox, J., entered judgment for United States and general creditors appealed. The District Court of Appeal, Fred B.

Wood, J., held that on-sale general liquor license is property within meaning of statute providing that United States shall have lien on any property of taxpayer who is liable to pay any tax and who neglects or refuses to pay after demand, and proceeds from sale became subject to government lien for taxes.

Affirmed.

1. Internal Revenue ⇨1717

Under statute, providing that United States shall have lien on any property of a taxpayer who is liable to pay any tax and who neglects or refuses to pay after demand, "property" is used in a broad sense, designed to include all concepts of such term. 26 U.S.C.A. §§ 3670-3672.

See publication Words and Phrases, for other judicial constructions and definitions of "Property".

2. Intoxicating Liquors ⇨99

General on-sale liquor license is "property" within statutes defining property and things subject to ownership. West's Ann. Civ.Code, §§ 654, 655; West's Ann.Bus. & Prof.Code, §§ 23106-23815, 23823, 24040-24043, 24045, 24047-24049, 24070-24072.

3. Intoxicating Liquors ⇨102

A renewal of liquor license is deemed a continuation of original license. West's Ann.Bus. & Prof.Code, §§ 24045, 24048, 24049.

4. Intoxicating Liquors ⇨103

A contract to transfer a liquor license, subject to approval by state licensing agency and other conditions and restrictions imposed by law is valid, and a refusal to perform such contract is remediable, e. g., specific performance. West's Ann.Bus. & Prof.Code, §§ 24070-24076.

5. Constitutional Law ⇨145

Contract to transfer liquor license enjoys constitutional immunity from legislative impairment. West's Ann.Bus. & Prof.Code, §§ 24070, 24076.

6. Intoxicating Liquors ⇨111

Statute, which prohibits pledging the transfer of liquor license as security for loan or for fulfillment of an agreement, does

not operate retroactively. West's Ann.Bus. & Prof.Code, § 24076.

7. Intoxicating Liquors ⇨110

Statute, which prohibits pledging the transfer of liquor license as security for loan or for fulfillment of an agreement, merely narrows the scope of the uses and purposes of agreement for transfer, but constitutes an express recognition of right to contract for transfer of license. West's Ann.Bus. & Prof.Code, § 24076.

8. Internal Revenue ⇨1717

Under statute providing that United States shall have lien on any property of taxpayer who is liable to pay any tax and who neglects or refuses to pay after demand, an on-sale general liquor license is "property" within such statute and becomes subject to government's lien for taxes. 26 U.S.C.A. §§ 3670-3672; West's Ann.Bus. & Prof.Code, §§ 23815-23823.

9. Internal Revenue ⇨1717

Statutes, which provide for lien on property of taxpayer who is liable to pay any tax and who neglects or refuses to pay after demand, provide for continuing lien on all property of taxpayer, thus including property presently owned and that which is later acquired. 26 U.S.C.A. §§ 3670, 3671, 3678.

10. Internal Revenue ⇨1719

Where seller of on-sale liquor license was indebted to government of United States for internal revenue taxes which Commissioner of Internal Revenue had assessed against seller, and where seller acquired a chose in action for stipulated purchase price on contract for sale of liquor license, government's pre-existing lien immediately attached to purchase price money paid into escrow over which general creditors could not acquire a preference. West's Ann.Bus. & Prof.Code, §§ 24073-24075; 26 U.S.C.A. §§ 3670-3672, 3678.

11. Internal Revenue ⇨7

Federal government has plenary power over property of taxpayers to collect taxes and is in no wise subject to state laws.

12. Internal Revenue ⇨7

State exemption laws do not prevent federal tax lien from attaching.

13. Internal Revenue Ⓒ1721

Where pre-existence of tax lien of federal government for internal revenue taxes assessed against seller of liquor license arose against property of taxpayer when assessment list was received by collector, federal government was not required to file claim with escrow holder of funds obtained from subsequent purchase and sale of liquor license. 26 U.S.C.A. § 3672; West's Ann.Bus. & Prof.Code, §§ 24073-24075.

14. Appeal and Error Ⓒ187(4)

Where United States was allowed by trial court to intervene in an interpleader action, and where parties joined issue and tried case on its merits, capacity of intervenor to appear and participate in action could not be questioned on appeal. West's Ann.Code Civ.Proc. §§ 430-434.

Shapro & Rothschild, Raymond T. Anixter, San Francisco, for appellants.

Lloyd H. Burke, U. S. Atty., Charles Elmer Collett, Asst. U. S. Atty., San Francisco, Melvin L. Sears, Regional Counsel, Leon Yudkin, Robert G. Thurtle, Attorneys, Office of Regional Counsel, Internal Revenue Service, San Francisco, of counsel, for the United States.

Golden, Stefan & Fratis, Oakland, for respondent Golden.

Leon E. Gold, Atty., Division of Labor Law Enforcement, Department of Industrial Relations of State of California, San Francisco, for respondent State of California.

FRED B. WOOD, Justice.

On March 14, 1949, Henry Fleck agreed to sell his restaurant and bar business including his on-sale liquor license. In accordance with the provisions of section 7.2 of the Alcoholic Beverage Control Act, Deering's Gen.Laws, Act No. 3796, now sections 24073-24075 of the Business and Professions Code, notice of the intended sale was recorded in the official records of the county; an escrow holder was designated; the purchase price, \$7,700, was deposited with him; and the appellants herein, general creditors of the seller, filed their

claims with the escrow holder within the prescribed period of seven days after the recording of the notice.

It happened that the seller was also indebted to the government of the United States for internal revenue taxes which the Commissioner of Internal Revenue had assessed against the seller in varying amounts, from time to time, between May 7, 1948, and March 3, 1949. The collector of Internal Revenue received the assessment lists at various times between May 18, 1948, and March 3, 1949. Notices of lien were filed in the office of the Recorder of the county on various dates between June 7, 1948, and March 3, 1949, except that as to an assessment in the amount of \$143.51 made March 3, 1949, and list received by the collector the same day, the notice of lien was filed with the County Recorder on June 22, 1949.

The government filed no claim with the escrow holder during the seven-day period, March 18-25, 1949. It did, on the first of April following, serve on him a notice of levy in the amount of \$14,274.87.

The trial court found that the government acquired tax liens on all of the "property and rights to property of the seller * * *, including the proceeds from the sale of on-sale general liquor license * * * on the dates that the Commissioner's respective assessment lists were received by the Collector of Internal Revenue * * *; such liens were then valid as to all persons except purchasers, mortgagees, pledgees and judgment creditors; as to such persons said liens became valid on the dates when notices of said tax liens were recorded in the office of the County Recorder * * *"; and that the claims of the appellants are "subordinate and inferior to the claims and liens" of the government.

The trial court concluded therefrom and decreed that the government be paid the sum of \$7,035.75, the unexpended balance of the \$7,700 purchase price remaining after payment to the escrow holder for his services and expenses.

Appellants contend that the government acquired no interest in or lien upon the liquor license or the proceeds of its sale, and no right to payment from the proceeds

until after payment in full of the claims of the appellants.

(1) *The United States acquired a lien upon the license if the license was "property" or a "right to property" within the meaning of those terms as used in section 3670 of title 26 of the U. S. Code.* Section 3670 declares that "if any person liable to pay any tax neglects or refuses to pay * * * after demand, the amount * * * [including interest, penalty, additional amount, addition to the tax, and costs] * * * shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."¹

[1] "Property" was there used by Congress in a broad, not narrow, sense; designed to include all concepts of the term. See *Citizens State Bank of Barstow, Tex., v. Vidal*, 10 Cir., 114 F.2d 380, 383; *Metropolitan Life Ins. Co. v. United States*, 6 Cir., 107 F.2d 311, 313; and cases collected in 174 A.L.R. 1373, § 6, 1378-1384. "Although 'in the interpretation and application of federal statutes, federal not local law applies' [citations], it is necessary to examine the rights which flow under state law from ownership of an on-sale liquor license in determining whether it possesses the characteristics of 'property' within the Bankruptcy Act. [Citations.]" In re *Quaker Room*, D.C.S.D., Cal. 1950, 90 F.Supp. 758, 760-761.

"Property" has been defined as "the thing of which there may be ownership". Cal. Civil Code, § 654. "There may be ownership of all inanimate things which are capable of appropriation or of manual delivery; of all domestic animals; of all obligations; of such products of labor or skill as the composition of an author, the good will

of a business, trademarks and signs, and of rights created or granted by statute." Civil Code, § 655.

[2, 3] The general on-sale liquor license in California would seem to meet these tests. It is issued to a specific person. Although issued upon an annual basis, it is renewable under the conditions expressed in the statute. Act 3796, § 8.² A renewal is deemed a continuation of the original license. *Saso v. Furtado*, 104 Cal.App.2d 759, 762, 232 P.2d 583. It is transferable from one person to another upon approval by the state agency which administers the Alcoholic Beverage Control Act and upon payment of a transfer fee. *Deering Act*, No. 3796, § 7, Stats. 1947, ch. 1566, pp. 3219, 3221.³

The limitation of the number of on-sale general licenses, Act No. 3796, § 38f, Stats. 1945, ch. 1401, p. 2615 at p. 2642,⁴ coupled with the factor of transferability, tends to create for each license a substantial value; evidenced in the instant case by the sum of \$7,700 which the purchaser paid into escrow, the license being the principal item of value in the transfer.

[4] A contract to transfer a license, subject of course to approval by the state licensing agency and the other conditions and restrictions imposed by law, is valid. A refusal to perform such a contract is remediable; e. g., specific performance, *Campbell v. Bauer*, 104 Cal.App.2d 740, 232 P.2d 590; *Saso v. Furtado*, supra, 104 Cal. App.2d 759, 232 P.2d 583; *Etchart v. Pyles*, 106 Cal.App.2d 549, 235 P.2d 427; *Leboire v. Black*, 84 Cal.App.2d 260, 190 P.2d 634; rescission and damages, *Fong v. Rossi*, 87 Cal.App.2d 20, 195 P.2d 854.

[5-7] Like any other contract, it enjoys constitutional immunity from legislative

1. The "lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time." 26 U.S.C. § 3671. The lien is not valid "as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector. * * * [i]n the office in which the filing of such notice is authorized by the law of the State * * *

in which the property subject to the lien is situated, whenever the State * * * has by law authorized the filing of such notice in an office within the State * * *." 26 U.S.C. § 3672.

2. Now Bus. & Prof. Code, §§ 24045, 24048, 24049.

3. Now Bus. & Prof. Code 23106, 24040-24043, 24047, 24070-24072.

4. Now Bus. & Prof. Code, 23815-23823.

impairment. The prohibition against pledging the transfer of a license as security for a loan or for the fulfillment of an agreement, expressed in section 7.3 added to the Act in 1949, Stats.1949, ch. 1348, pp. 2349, 2360,⁵ could not and did not operate retroactively. *Pehau v. Stewart*, 112 Cal.App.2d 90, 96, 245 P.2d 692, and cases cited. We observe, also, that section 7.3 merely narrows the scope of the uses and purposes of an agreement for transfer. It constitutes express recognition of the right to contract for transfer of a license.

We have found no California Supreme or Appellate Court decision directly in point on the question whether the license here involved is "property" within the meaning of 26 U.S.C. § 3670. It was held non-taxable in *Roehm v. County of Orange*, 32 Cal.2d 280, 196 P.2d 550, because under our statutes a tax simply is not imposed upon this kind of property, not because a liquor license is not property, a question not decided. *Hevren v. Reed*, 126 Cal. 219, 58 P. 536, and *State Board of Equalization v. Superior Court*, 5 Cal.App.2d 374, 42 P.2d 1076, dealt merely with such questions as the revocability of a liquor license and the notice and hearing requirements, if any, applicable thereto.

The federal district court, southern district of California, has held, in a well considered opinion, that the California liquor license is "property" as that term is used in the Bankruptcy Act. In *re Quaker Room*, supra, 90 F.Supp. 758. The court of appeal for the District of Columbia has held that a transferable liquor license is a "property right" which is subject to execution to satisfy a judgment, declaring that the "rule of the common law which forbids a levy upon licenses, was confined, and should be confined to non-transferable licenses" and that "the reason for the rule fails in the case of a license which, by express statutory provision, is made subject to transfer * * *" even though subject to limitations and restrictions. *Rowe v. Colpoys*, 78 U.S.App.D.C. 75, 137 F.2d 249, 251, 148 A.L.R. 488, certiorari denied 320 U.S. 783, 64 S.Ct. 190, 88 L.Ed. 470.

Similarly, in Montana a liquor license which is transferable with the consent of a state agency is property which is subject to attachment. *Stallinger v. Goss*, 121 Mont. 437, 193 P.2d 810. In Washington it is property which passes to a receiver when appointed to conserve the assets of a business. *Deggender v. Seattle Brewing & Malting Co.*, 41 Wash. 385, 83 P. 898, 4 L.R.A.,N.S., 626. By way of comment upon decisions of this character, including some that we have cited, our Supreme Court recently said: "These decisions recognize the principle that since such a license has a transferable value to the debtor it is property that in fairness ought to be within the reach of his creditors. Since by statute a liquor license in this state has in effect been given a transferable value, it has assumed the characteristics of property." *Roehm v. County of Orange*, supra, 32 Cal.2d 280, 283, 196 P.2d 550, 552.

[8] We conclude that the liquor license in question was "property" within the meaning of section 3670 and became subject to the government's lien for taxes.

(2) *Did the United States acquire a lien against the proceeds, the money in escrow?*

Appellants seem to concede that if the tax lien attached to the license it attached immediately to the proceeds of the sale of the license. While no case precisely so holding has been brought to our attention it seems sound upon principle. Although not strictly analogous, it is in harmony with the holding that a federal tax lien on real estate which is subject to a prior mortgage attaches to the proceeds of sale upon foreclosure of the mortgage, subject to satisfaction of the mortgage and other prior liens, if any. *United States v. City of New Britain*, 347 U.S. 81, 74 S.Ct. 367, 98 L.Ed. 520. Similarly, upon distraint and sale of a taxpayer's personal property for payment of rent accruing, the government by reason of its tax lien under section 3670 had a prior right to the proceeds of sale in *Jones v. Mustard*, Del.Super.1954, 109 A.2d 789.

[9] Even if the government had acquired no lien on the liquor license, there is considerable authority tending to support

the view that the tax lien nevertheless attached to the proceeds of the sale when those proceeds came into existence. Sections 3670, 3671 and 3678 of title 26 of the U.S. Code provide for a continuing lien on all property of the taxpayer, thus including property presently owned and that which is later acquired. *Glass City Bank v. United States*, 326 U.S. 265, 66 S.Ct. 108, 90 L.Ed. 56; *In re Salsbury Motors*, D.C. S.D.Cal.1951, 104 F.Supp. 482, affirmed in 9 Cir., 210 F.2d 171, certiorari denied in 347 U.S. 953, 75 S.Ct. 679, 98 L.Ed. 1099. Thus, it has been held that grapes grown on the taxpayer's land after the government's notice of lien has been filed are subject to that lien, *Nelson v. United States*, 9 Cir., 1944, 139 F.2d 162, certiorari denied 322 U.S. 764, 64 S.Ct. 1287, 88 L.Ed. 1591.

[10] At the very moment the taxpayer and his purchaser entered into the contract for the sale of the liquor license the taxpayer acquired a chose in action for the stipulated purchase price, to which "property" or "right to property" the government's pre-existing tax lien immediately attached. Then when the purchase price money was paid into escrow the tax lien at once attached and later followed the fund when paid into court in this interpleader action.

[11,12] In this process there was no opportunity for the claims of the appellants (general creditors, not lienholders) to acquire precedence over the government tax lien. The federal statute certainly gave those claims no priority. We do not believe the state statute, § 7.2, Act 3796, was intended to give them precedence over the prior government tax lien, nor do we believe it competent for the state in any such manner to impinge upon and thwart the operation of the Congressional Statute. "The government has plenary power over the property of taxpayers to collect taxes and is in no wise subject to state laws." *Metropolitan Life Ins. Co. v. United States*, supra, 107 F.2d 311, 313. See also *United States v. City of New Britain*, supra, 347 U.S. 81, 84, 74 S.Ct. 367, 98 L.Ed. 520; *United States v. Division of Labor Law Enforcement*, 9 Cir., 201 F.2d 857, 36 A.L.R. 2d 1197; *United States v. E. Regensburg*

& Sons, D.C., 124 F.Supp. 687, 690; *Jones v. Mustard*, supra, Del.Super., 109 A.2d 789, 791-792; *United States v. Standard Brass & Manufacturing Co.*, Tex.Civ.App., 266 S.W.2d 407, 409. State exemption laws do not prevent the federal tax lien from attaching. 174 A.L.R. 1373, § 7, 1384.

Consonant with these views is the very recent case of *United States v. Blackett*, 9 Cir., 220 F.2d 21. After liens under 26 U.S.C. §§ 3670-3673 had been perfected, creditors of the taxpayer obtained the sale of his on-sale liquor license in proceedings to enforce their judgment against him. The proceeds were paid to the marshal of the municipal court, as receiver, for proper distribution. The government sued in the district court, which ordered the proceeds paid to the judgment creditor, saying: " * * * ; the said on-sale liquor license not being subject to any lien whatever, either in favor of the United States of America or any other person, firm or entity, and the said proceeds from the sale thereof being the result only of an in personam proceeding supplementary to judgment against John R. Blackett in accordance with the laws of the State of California relative thereto." At page 22. In reversing that judgment the court of appeals said: "The United States at no time attempted to impose its lien against the liquor license, but upon the sale taking place and money having been received therefor, it claims that it has the right to enforce its lien against the money as 'property and right to property' of the delinquent taxpayer. It is true that the sale was precipitated by the judgment creditor, but whatever was received through the sale became the property of the vendor-owner, subject, as any other property belonging to him, to valid liens thereon in the order of their priority, in this case, first the tax lien, second the judgment creditor's lien. [Citations.]" At page 23.

Appellants argue that in view of the provisions of section 7.2 of the state statute the taxpayer had a right to that portion only of the escrowed purchase price money as might be left after payment of creditors' claims that were filed within the prescribed seven day period and that the government's tax lien could apply only to that portion.

That is specious reasoning. It would permit a person to sell a valuable property and apportion the proceeds among his creditors in utter disregard of the prior tax lien which the federal statute unequivocally declares. Appellants' cases do not support their contention. Thus, *Steineck v. Haas-Baruch Co.*, 106 Cal.App. 228, 288 P. 1104, appropriately held that a certain creditor sued and attached too late. He did so *after* the debtor-vendor had assigned his interest in the purchase price money by instructing the escrow holder to pay certain other creditors of his. *New York Casualty Co. v. Zwerner*, D.C., 58 F.Supp. 473, was a case in which the government claimed a lien upon the moneys accruing to a contractor under a construction contract. But the contractor's surety had become entitled to that balance. The surety had paid claims for labor and material under the obligation of its performance and payment bonds; hence, it had an equitable lien on any and all funds remaining unpaid to the contractor (the taxpayer), a lien that related back to the time of execution of the suretyship contract, which in turn antedated the tax lien.

(3) *Did the United States take the necessary procedural steps to perfect its lien and collect the tax? Yes.*

[13] Appellants suggest that the government should have filed notice of its claim with the escrow holder within the seven day period prescribed by section 7.2 of the state statute, Act 3796. We find no such requirement in the federal statute, which as we have noted is not dependent upon state law for its implementation. The only "filing" pursuant to state law which the federal statute, 26 U.S.C. § 3672, prescribes is filing in an "office" (not with a mere escrow holder) when authorized by the law of the state in which the property is situated, the county recorder, Cal.Gov.Code, § 27330,

and then only to give the lien validity as against a "mortgagee, pledgee, purchaser, or judgment creditor", none of whom is present in this case.

Accordingly, in the instant case the tax lien arose against the property of the taxpayer when the assessment list was received by the collector and attached to the taxpayer's after-acquired property as soon as the latter came into existence. 26 U.S.C. § 3671.

Appellants in their closing brief further suggest that the United States could enforce the lien only by bringing an independent action therefor under section 3678 of 26 U.S.Code. They cite only *Maryland Casualty Co. v. Charleston Lead Works*, D.C., 24 F.2d 836. The court in that case did refer to the procedure under former Rev.St. § 3207 (now 26 U.S.C. §§ 3678, 3679) as exclusive but it was dealing with the right of a private owner of a real estate lien to file a petition in the federal district court for a determination of all claims to or liens upon the real estate.

That the filing of an action in the federal district court is not the exclusive mode for collection of the tax by the government is demonstrated by the very existence of the separate and independent remedy of distraint. §§ 3690-3717 of title 26, U.S.C.

[14] Where, as here, the United States, at the request of the Commissioner of Internal Revenue and by the direction of the attorney general, has with approval of the court intervened in this interpleader action, and the parties have joined issue and have tried the case upon the merits, it is too late now to question the capacity of the intervenor to appear and participate in the action. Code Civ.Proc., §§ 430-434.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

133 Cal.App.2d 649

Helen Jagoe MATTOS, Administratrix of the Estate of Mollie Fabiano Russell, also known as Mary Ellen Fabiano, Deceased, Plaintiff and Respondent,

v.

Mima KIRBY, et al., Defendants,

Mima Kirby and Alex de Mello, Defendants and Appellants.

No. 16337.

District Court of Appeal, First District,
Division 1, California.

June 15, 1955.

Action to set aside a deed and a deed of trust and to recover rental values of premises conveyed. The Superior Court, Alameda County, A. T. Shine, J., set aside instruments. Grantee under deed and beneficiary under her trust deed appealed. The District Court of Appeal, Bray, J., held that evidence was sufficient to support finding of mental incompetency on part of grantor at the time she made deed.

Judgment affirmed.

1. Cancellation of Instruments ⇨50

In action to set aside deed, on ground of mental incompetency of grantor, resolving of conflicts in evidence was matter for trial court.

2. Deeds ⇨211(1)

In action to set aside deed, there was substantial evidence to support finding that grantor was mentally incompetent at time she made deed.

3. Cancellation of Instruments ⇨50

In action to set aside deed on ground of mental incompetency of grantor, trial court had right to believe grantee's statement that grantor's condition was same on day she made deed as it was on day doctor visited her, but had right to disbelieve her statement as to what her condition was on those dates.

4. Deeds ⇨211(1)

Fact that grantor was in a semi-comatose slumber at time she signed deed and character of her signature were circumstances to be weighed by trial court along

with other circumstances in case in determining mental condition of grantor at time she made deed.

5. Deeds ⇨196(1)

In action to set aside deed on ground that grantor was mentally incompetent at time she made deed, grantee had benefit of presumption of sanity, but such presumption was rebuttable, and was overcome when trial court believed plaintiff's witnesses.

6. Mortgages ⇨11

Grantee of deed which was void for mental incapacity of grantor had no title to convey to person who loaned \$2,000 to grantee and who was named beneficiary of trust deed executed by grantee, notwithstanding that such beneficiary had no knowledge of circumstances of making of deed to grantee. West's Ann.Civ.Code, § 38.

7. Deeds ⇨211(4)

In action to set aside deed on ground of mental incompetency, and undue influence in confidential relationship, evidence was insufficient to support finding of confidential relationship between grantee and grantor and undue influence on the part of the grantee.

8. Deeds ⇨76

Where a deed has been made by a person without understanding, a finding of lack of consideration from the grantee is not required to set aside the deed.

9. Cancellation of Instruments ⇨53

Finding of mental incompetency was sufficient to support judgment setting aside deed, even though finding of confidential relationship between grantor and grantee and of undue influence of the latter was unsupported.

10. Judgment ⇨5

One clear, sustained and sufficient finding which supports a judgment is all that is required, even though there be other unsupported, inconclusive findings.

11. Cancellation of Instruments ⇨53

In action to set aside deed on ground of mental incompetency of grantor, and abuse of confidential relationship by grantee, there was no inconsistency between

finding of mental incompetency and one of confidential relationship and undue influence, as latter finding did not imply mental alertness in the person influenced, notwithstanding that latter finding was not supported by evidence.

Duggan, Smith & Lawlor, Oakland, for appellants.

Raymond A. Ferrario, Young & Whitton, Oakland, for respondents.

BRAY, Justice.

In an action to set aside a deed, a deed of trust, and to recover rental value of premises described therein, plaintiff recovered judgment setting aside said instruments and awarding her \$2,030. Defendants Kirby and de Mello appeal.

Questions Presented.

1. Insufficiency of the evidence to support the findings (a) that the deed's grantor was mentally incapable of understanding the transaction; (b) that a confidential relationship existed between the grantor and the grantee,* and (c) that there was no consideration for the deed.

2. That the court's findings are inconsistent.

Evidence.

At the time of the execution of the deed, Mrs. Fabiano, a woman 83 years of age, had lived alone for many years in her Emeryville home. Other than a small pension, her sole income was \$35 per month rental from a downstairs apartment. From June or July, 1951, to about October 1st, Mrs. Ustice, a practical nurse, cared for her. Late in September, defendant Kirby, who had known Mrs. Fabiano since about 1935, commenced visiting the latter. About October 1st, defendant moved into the house, discharged Mrs. Ustice, and assumed care of Mrs. Fabiano, which she continued

until Mrs. Fabiano's death October 15th. October 2nd the deed was executed.

Concerning deceased's mental condition and the execution of the deed the testimony was as follows: Mrs. Ustice testified that when she first came to the home deceased was in bed and hardly able to move. She did not leave the bed to attend to her wants. A Mrs. Earl came to see deceased each morning. Deceased made salary arrangements with the witness, although Mrs. Earl also offered to pay her. Deceased's mental condition got worse. She could not carry on a rational conversation. Although her brother had been dead a year or two, deceased would tell the witness that he had been in to see her that day. Deceased was not of sound mind. She did not know where anything was. Defendant discharged the witness. Deceased said nothing.

Mrs. Trestler, deceased's great niece, visited her periodically, the last time being approximately six weeks or a month prior to her death. Deceased would only recognize her when the witness told deceased who she was. Deceased would not remember that the witness had been there before. On one occasion the witness left deceased for about 15 minutes. On returning deceased did not know the witness had been there. The witness showed deceased pictures of the witness' grandfather, grandmother, uncle and several friends of deceased. Deceased said she never knew them. Deceased imagined there were two people in the house who were going to take her property away. About a year before she died, deceased offered to give the witness her property if the witness would live with her. Her mental condition got worse. Deceased was not of sound mind. Deceased was very feeble and never sat up. In the witness's opinion deceased could not write her name. Deceased made the wit-

* The action arises out of the execution of a deed from plaintiff's intestate, Mrs. Fabiano, to defendant Mima Kirby. Defendants Oakland Title Insurance & Guaranty Co., a corporation, and Alex de Mello, are joined because of the later execution of a deed of trust by defendant Kirby in which the title company is trus-

tee and de Mello is beneficiary, to secure a loan from de Mello to Kirby. Defendant de Mello was found to have no knowledge of the Fabiano-Kirby transaction, but because the deed, Fabiano to Kirby, was void, Kirby had no title to convey by the deed of trust.

ness promise she would never let anyone take her house away from her.

Defendant Kirby testified that she was an old and trusted friend of deceased. The latter was of sound mind at the time of making the deed and at all times. On October 12th, when Dr. Hart came, deceased's mental and physical condition were the same as when she signed the deed. Deceased recognized him when he came in. Defendant went to the court house and got a description of deceased's property, took it to a realtor with whom she had done business before and had him draw the deed. She brought the deed to the house. Deceased signed it. Later the realtor put revenue stamps on the deed. The witness did not discharge Mrs. Ustice. Deceased did. Deceased told defendant that whoever stayed with her when she had her last days in the home was the one who would get her property. She had burial money in the safe deposit box to which Mrs. Earl had the key.

Dr. Hart treated deceased off and on from 1946 until he last saw her October 12, 1951. She was suffering from lung tuberculosis, and was then in a terminal condition. He saw that she was going to die. She was very weak and fragile. She was semi-comatose to the point he did not arouse her. She was mentally involved. He tried to carry on a conversation with her but he could not because she was semi-comatose. She made no reply to anything he stated to her. Her condition had been developing over a period of some time. She was not of sound mind on the 12th and most likely was in the same mental condition ten days before. She was mentally involved, disturbed and semi-conscious. While he could not state whether deceased on October 2nd was sane or insane (he had never determined any trace of insanity) he would say that in all probability she was mentally involved. On October 12th she was not mentally competent.

Mrs. Di Rienzo, called by defendants, testified that she was employed by the realtor who drew the deed. Defendant drove her to deceased's home. Defendant told deceased that this was the "little girl" who was to notarize the deed. The witness

asked deceased if she knew what the paper was. Deceased said, "Yes, I am going to give Fifty my house." (Fifty was defendant's nickname.) Deceased was conscious, mentally alert, talked coherently and answered all questions. The witness showed deceased where to sign the deed and she signed it. Afterward they talked for about half an hour. Deceased spoke with a strong voice. Deceased's hand was not held during the signing.

Mrs. Brady, the tenant in the downstairs apartment, visited with deceased in late September and early October. Deceased was conscious, mentally sane and alert. The witness saw her on three or four days before her death and she seemed to be all right then. On that last visit, deceased spoke about the witness's children and their visits in earlier days.

1. Sufficiency of Evidence.

(a) Mental Incapacity.

[1-3] While there is a conflict in the evidence upon this subject, the resolving of that conflict is a matter for the trial court. There is substantial evidence to support the court's finding. Mrs. Ustice and Mrs. Trestler testified positively that in their opinion deceased was of unsound mind. Additionally, Mrs. Ustice testified that deceased could not carry on a rational conversation, spoke of a brother who was dead visiting her. Mrs. Trestler testified that deceased was unable to recognize her or pictures of the immediate family; that deceased imagined someone was in the house trying to take her property from her. Dr. Hart, who had treated deceased for some time, stated that on October 12th (ten days after the execution of the deed) she was not of sound mind and most likely was in that condition on October 2nd. Defendant testified that at the time of the execution of the deed deceased was in the same mental and physical condition as when Dr. Hart saw her October 12th. If so, then if Dr. Hart is to be believed (and the trial court believed him) deceased could not have been of sound mind when she signed the deed. True, defendant meant by her testimony that deceased was of sound mind on both dates, but the court did not have to believe all of her testimony. It had the

right to believe her statement that deceased's condition was the same on both dates, but disbelieve her statement as to what that condition was. Defendant testified that on October 12th deceased recognized Dr. Hart and carried on a conversation with him. Dr. Hart's testimony was to the contrary.

[4] It does not necessarily follow, as contended by defendants, that a signature cannot be obtained from a person in a semicomatose slumber. The character of the signature here was a circumstance to be weighed by the trial court along with the other circumstances in the case.

[5] Defendants, in addition to the testimony of their witnesses, have the benefit of the presumption of sanity. See *Estate of Perkins*, 195 Cal. 699, 235 P. 45. However, the presumption is a rebuttable one, and like the testimony of defendants' witnesses, was overcome when the trial court believed plaintiff's witnesses.

This case differs from *Estate of Dunne*, 130 Cal.App.2d 216, 278 P.2d 733, where it was held that the evidence of incompetency was insufficient primarily in that there all that was proved was that the testator had delusions which did not bear upon his testamentary capacity. In our case the tests of mental incompetency stated in the *Dunne* case, 130 Cal.App.2d at page 220, 278 P.2d 733, at page 734, were met. Here there was evidence that because of her mental condition deceased did not have mental capacity "(1) to understand the nature of his act; (2) to understand and recollect the nature and situation of his property * * *." Coupling Dr. Hart's testimony with defendant Kirby's, it would appear that Mrs. Fabiano was in a condition in which she could not understand what she was signing or the nature and situation of her property. "(3) to remember and understand his relations to the persons having claims upon his bounty, and whose interests would be affected * * *." Mrs. Fabiano could not remember who her relatives were.

[6] As to the defendant de Mello,—while he had no knowledge of the circum-

stances of the making of the deed and parted with \$2,000 for his deed of trust, defendant Kirby had no title to convey to him, as the deed to her, being made by a person entirely without understanding, was void. See Civil Code, § 38; *Maionchi v. Nicholini*, 1 Cal.App. 690, 82 P. 1052; *Trout v. Taylor*, 220 Cal. 652, 32 P.2d 968; *Jacks v. Estee*, 139 Cal. 507, 73 P. 247.

(b) Confidential Relationship.

[7] Plaintiff practically concedes that the finding of a confidential relationship between the deceased and defendant and of undue influence of the latter is unsupported.

(c) Consideration.

[8] The court found that defendant Kirby gave no consideration for the deed. She testified that it was given in exchange for her promise to take care of the grantor for the balance of her life. She did take care of Mrs. Fabiano for the thirteen days elapsing between the making of the deed and her death. A finding of lack of consideration is not necessary where a deed is made by a person without understanding.

[9, 10] As the supported finding of mental incompetency is sufficient to support the judgment, we deem it unnecessary to discuss the findings further. One clear, sustained and sufficient finding which supports a judgment is all that is needed, even though there be other unsupported, inconclusive findings. *Kreisa v. Stoddard*, 127 Cal.App.2d 627, 633, 274 P.2d 164.

2. Inconsistency.

[11] We can see no inconsistency between a finding of mental incompetency and one of confidential relationship and undue influence. The latter finding does not imply mental alertness in the person influenced. Actually it is easier to influence a mentally incompetent person than a competent one. While the court erred in making the latter finding, there is no inconsistency involved.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

134 Cal.App.2d 158

**Emmajene PORTER, Plaintiff and
Appellant,**

v.

**CALIFORNIA JOCKEY CLUB, Inc., a
corporation, et al., Defendants
and Respondents.**

Civ. 16323.

District Court of Appeal, First District,
Division 2, California.

June 27, 1955.

Rehearing Denied July 27, 1955.

Hearing Denied Aug. 17, 1955.

Action by race track spectator against operator of track for injuries sustained when another spectator ran into plaintiff so violently as to knock her down. The Superior Court, County of San Mateo, Murray Draper, J., entered judgment of nonsuit, and plaintiff appealed. The District Court of Appeal, Dooling, J., held that in absence of evidence of any facts which would reasonably put defendant on notice that one spectator would run violently into another so as to put the duty upon defendant to take steps to guard against such contingency, evidence did not present a question as to operator's negligence.

Judgment affirmed.

1. Negligence ◊48

Liability of landowner to provide against injury to an invitee from act of another is based upon fact that landowner has notice of prior conduct from which he could reasonably anticipate that such injury might occur.

2. Negligence ◊68

In absence of conduct to put person on notice to the contrary, a person is entitled to assume that others will not act negligently or unlawfully.

3. Theaters and Shows ◊6(33)

In action by race track spectator against operator of track for injuries sustained when another spectator ran into her so violently as to knock her down, in absence of evidence of any facts which would reasonably put operator on notice that one spectator would run violently into another so as to put duty upon operator to

take steps to guard against such contingency, evidence did not present a question as to operator's negligence.

Arthur D. Klang, San Francisco, for appellant.

Alexander, Bacon & Mundhenk, San Francisco, Guernsey Carson, San Francisco, for respondent California Jockey Club, Inc.

DOOLING, Justice.

Plaintiff appeals from a judgment of nonsuit. She was injured while a spectator at the race track operated by defendant when another spectator ran into her so violently as to knock her down.

Appellant testified that she attended the track on Monday, October 13, 1952, a day celebrated as a holiday since Columbus Day fell on a Sunday that year. Between the second and third races she left the place where she was sitting so that she might place a bet. Returning she proceeded down a stairway in order to get back to her seat. At this point she stated that she saw a man running up the same stairway and that he "touched" her on the side and she "went to the bottom of the steps."

Appellant further testified that she observed a crowd of people sitting down and standing up on the stairway; that there was a banister or handrail on the stairway but that it was so crowded that it was impossible for her to get next to the banister in order to hold on to it; that she saw no policeman or usher on the stairway; and that she was about to take the third step down the stairway when she noticed the man running up the stairs who caused her fall.

The operations manager of the track testified that on the day of the accident 9,436 people were present at the track as opposed to an ordinary day when anywhere from seven to eight thousand usually attended; that on a normal day 15 ushers were employed and that on the day in question this number was not increased because no additional reserved sections were added; that the number of police at the track on this day was 17 as against 13 on the preceding week.

day. There was further testimony that spectators were in the habit of crowding onto the stairways just before the start of each race, and that spectators were in the habit of running to the betting windows just before each race started.

[1] In passing upon the motion for non-suit the trial judge asked: "should the track assume not only that a man is going to run but that he is going to run right into a person standing in the space that he must occupy, and guard against that?" This question pointed up the weakness of plaintiff's case. It was established that spectators were in the habit of congregating on the stairways at the start of each race and that bettors were in the habit of running to place bets at the last moment; but there was no evidence of any prior negligent conduct on the part of even one spectator. The liability of the landowner to provide against injury to an invitee from the act of another is based upon the fact that the landowner has notice of prior conduct from which he could reasonably anticipate that such injury might occur. *Edwards v. Hollywood Canteen*, 27 Cal.2d 802, 810, 167 P.2d 729; *Terrill v. Key System*, 69 Cal.App.2d 682, 159 P.2d 704; *Stockwell v. Board of Trustees*, 64 Cal.App.2d 197, 148 P.2d 405; *Rest. Torts*, sec. 348.

[2, 3] An injury of the sort which occurred to appellant could only happen if the conduct of the spectator who ran into her so violently as to knock her down was either negligent or wilful. It is axiomatic that in the absence of conduct to put him on notice to the contrary a person is entitled to assume that others will not act negligently or unlawfully. *Leo v. Dunham*, 41 Cal.2d 712, 715, 264 P.2d 1. We are satisfied that there was no evidence of any facts in this case which would reasonably put respondent on notice that one spectator would run violently into another so as to put the duty upon it to take steps to guard against such contingency. Such cases as have considered a like question in other jurisdictions support this conclusion. *Futterer v. Saratoga Ass'n, etc.*, 262 App.Div. 675, 31 N.Y.S. 2d 108; *Carr v. Mile High Kennel Club*, 125 Colo. 251, 242 P.2d 238; *Dahna v. Clay*

County Fair Ass'n, 232 Iowa 984, 6 N.W.2d 843.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J.,
concur.



133 Cal.App.2d 382

**BROADWAY FEDERAL SAVINGS and
LOAN ASSOCIATION OF LOS AN-
GELES**, a Federal Savings and Loan As-
sociation, Plaintiff and Respondent,

v.

H. A. HOWARD et al., Defendants,

H. A. Howard, Appellant.

Civ. 20428.

District Court of Appeal, Second District,
Division 2, California.

June 3, 1955.

As Modified on Denial of Rehearing
June 15, 1955.

Hearing Denied July 27, 1955.

Action by savings and loan association to recover secret profits made by its president and general manager by use of the association's assets. From a judgment of Superior Court, Los Angeles County, Clarence M. Hanson, J., in favor of the association, and from order denying motion for new trial, the former officer appealed. The District Court of Appeal, Fox, J., held that the officer had owed a fiduciary duty to the association and was liable to it for secret profits which he had concealed and which he had made in various transactions by use of the association, its facilities and assets.

Judgment affirmed and appeal from order denying motion for new trial dismissed.

I. Evidence 47

Rules and regulations for federal savings and loan system, issued pursuant to Home Owners' Loan Act, have force and

effect of law and are judicially noticed. West's Ann.Code Civ.Proc. § 1875, subds. 2, 3; Home Owners' Loan Act of 1933, § 5(a, b), 12 U.S.C.A. § 1464(a, b); Federal Register Act, §§ 1-14, 44 U.S.C.A. §§ 301-314.

2. Appeal and Error ⇨931(1)

Evidence must be viewed on appeal in light most favorable to party successful in trial court.

3. Corporations ⇨307

One who is director or officer of corporation acts in fiduciary capacity and law does not allow him to secure any personal advantage against corporation.

4. Building and Loan Associations ⇨23(1)

Where defendant was director, general manager and president of savings and loan association, he owed fiduciary duty to it and was liable to it for secret profits which he concealed and which he had made in various transactions by use of the association, its facilities and assets.

5. Appeal and Error ⇨994(3), 1010(1)

In action by savings and loan association to recover secret profits made by its president and general manager by use of association's assets, it was exclusive province of trial judge to determine credibility of witnesses and weight to be given to their testimony.

6. Evidence ⇨317(2)

Where question, posed by judge, sought only witness' personal knowledge whether other members of board were aware of president's interest in certain transactions involving assets of association, witness' statement relevant to lack of knowledge on part of other directors as to president's interest in transactions was not hearsay.

7. Limitation of Actions ⇨197(2)

In action by savings and loan association to recover secret profits made by its president and general manager by use of association's assets, evidence supported finding that president and general manager was estopped to assert time limitation by his concealment of secret profits and of his interest in transactions whereby such profits were made.

8. Building and Loan Associations ⇨23(8)

In action by savings and loan association to recover secret profits made by its president and general manager by use of association's assets, evidence sustained judgment against him in amount in which it was rendered.

9. Building and Loan Associations ⇨23(8)

In action by savings and loan association to recover secret profits made by its president and general manager by use of association's assets, evidence sustained trial court's implied finding that such president and general manager received proceeds of check which was endorsed in name of payee by some one other than the payee and was then cashed by the association.

10. Building and Loan Associations ⇨23(8)

In action by savings and loan association to recover secret profits made by its president and general manager by use of association's assets, findings were not inconsistent in that one found certain amount due as secret profits received by defendant and the other found identical sum due on theory of money had and received for use and benefit of the association, where certain counts of complaint were in alternative.

11. Appeal and Error ⇨1071(6)

Though findings are required upon all material issues, judgment will not be set aside on appeal because of failure to make an express finding upon issue if finding thereon, consistent with judgment, results by necessary implication from express findings which are made.

12. Trial ⇨404(3)

Finding of ultimate fact includes finding of all probative facts necessary to sustain such ultimate finding, and it is unnecessary to state probative or evidentiary facts in findings.

13. Building and Loan Associations ⇨23(8)

In action by savings and loan association to recover secret profits made by its president and general manager by use of association's assets, wherein complaint alleged certain counts in alternative, and court rendered finding of certain sum due as secret profits received by defendant and

another finding of identical sum due as money had and received for use and benefit of the association, latter finding was adequate finding in which court impliedly found in accordance with evidence presented by prevailing party, and amply supported judgment in amount specified.

14. Jury ⇨28(17)

Where trial by jury has been regularly and voluntarily waived, such waiver cannot later be withdrawn except in discretion of court.

15. Jury ⇨28(17)

Where relinquishment of jury trial is made before amendment to complaint, with full knowledge of facts and as matter of trial tactics, waiver is as binding as if made after amendment.

16. Jury ⇨28(17)

In action by savings and loan association to recover secret profits made by its president and general manager by use of association's assets, wherein defendant's waiver of jury trial was repeated after filing of second amended complaint and after five days of trial had oriented defendant as to nature of transactions relied upon by association, trial court's ordering non-jury trial after declaration of mistrial and after filing of third amended complaint which effected no material change in pleading and prayed for no different relief, was not abuse of discretion.

17. Appeal and Error ⇨151(2)

Where husband and wife cross-complained that plaintiff had slandered the title to wife's realty by allegedly wrongful mortgage foreclosure, husband was not aggrieved by order sustaining demurrers to cross-complaint without leave to amend and could not as sole appellant urge judicial error with respect thereto.

18. Libel and Slander ⇨130

Gravamen of an action for wrongful disparagement of title to real property is invasion of the interest in its marketability.

19. Libel and Slander ⇨139

Conventional elements of damage, in an action for wrongful disparagement of title to real property, are pecuniary loss

caused by impairment of vendibility of interest in the property and the cost of clearing title from the disparaging claim.

20. Appeal and Error ⇨948

Burden of showing that trial court abused its discretion in not permitting an amendment to a pleading after sustaining of demurrer rests upon the pleader.

21. Appeal and Error ⇨681

Where record on appeal failed to show that cross-complaint, as to appellant, could be amended so as to state cause of action in appellant, he failed to sustain burden of showing that trial court abused its discretion in not permitting amendment after sustaining of demurrer.

22. Appeal and Error ⇨917(1)

In determining whether trial court had abused discretion in sustaining demurrer to cross-complaint without leave to amend, reviewing court would presume that appellant had pleaded all facts favorable to his case as strongly as it was possible for him to do.

23. Appeal and Error ⇨1170(1)

Where nothing appeared in record of action by savings and loan association to recover secret profits made by the president and general manager by use of association's assets indicated a miscarriage of justice, judgment could not be reversed. West's Ann.Const. art. 6, § 4½.

Eric A. Rose, Long Beach, for appellant.

Sylvester Hoffmann, Los Angeles, for respondent.

FOX, Justice.

Plaintiff recovered judgment for (1) \$17,667.46 against H. A. Howard,¹ alone; (2) \$1,090.41 against Howard and Avalon Enterprises, Inc., jointly and severally, and (3) \$5,581.18 against Avalon Enterprises, Inc., alone. No recovery was awarded against Dorothy B. Howard, wife of Howard. By the judgment the cross-complaint of the Howards was dismissed, plaintiff's demurrer thereto having been sustained without leave to amend. Mrs. Howard has

1. H. A. Howard is also known as Herbert A. Howard, and sometimes referred to herein as Howard.

not appealed. The appeal of Avalon Enterprises (hereinafter referred to as Avalon) has been dismissed. This leaves Howard as the only appellant.

By its third amended complaint² plaintiff sought to recover asserted secret profits which Howard made in a variety of transactions³ in which he made use of plaintiff and its assets, fraudulently, however, concealing his identity in these transactions from plaintiff and its board of directors.

In a memorandum ruling the trial judge summarized Howard's relation to plaintiff and his general modus operandi as follows:

"The defendant Howard for more than 25 years has been a real estate broker. His clientele for the most part has been the members of the colored race. Sometime prior to November, 1946, he concluded that a federal savings and loan association would not only be a valuable adjunct to his business, but would serve the needs of his community. With that in mind he applied to the Home Loan Bank Board at Washington for a charter under the name of Broadway Savings and Loan Association. This was granted in November, 1946.

The association opened for business in January, 1947, with a board of five directors. The defendant was not only a director but the president and general manager of the association. It is undisputed that he was the dominant figure in the association until he was ousted in September, 1949, at the instance apparently of the national Home Loan Bank Board.

"The defendant Avalon Enterprises, Incorporated, is wholly owned by the defendant Howard and his wife. It was employed by the plaintiff prior to September, 1949, to supervise and disburse some of the loans made by plaintiff to individual borrowers who were constructing their own homes.

[1] "The ability of the defendant Howard to make use of the lending powers of the plaintiff was severely restricted by the charter and the federal laws and regulations pertaining to federal savings and loan associations. He was prohibited, among other things, from borrowing money from the association except for a single loan on a home or combined home and business establishment occupied by him,⁴ or from selling loans to the association.⁵

2. This pleading is more than 100 pages in length.

3. Thirty-four counts are pleaded. However, counts 8, 10, 23 to 30, each inclusive, 33 and 34 were abandoned and dismissed. The findings and judgment, apparently by inadvertence, fail to enumerate count 32 as one of the counts that was abandoned and dismissed. The Reporter's Transcript, however, is clear that this count was in fact abandoned. The proceeds from the transactions alleged in counts 12 and 13 were traced to Avalon but not to appellant.

4. *Rules and Regulations* for the Federal Savings and Loan System, Chapter I(C), Title 24, Code of Federal Regulations (1949 Ed.), of the Home Loan Bank, issued and promulgated pursuant to Sec. 5, subds. (a) and (d), Home Owners' Loan Act of 1933, 12 U.S.C.A. § 1464(a, b), as amended provide:

"Sec. 143.10, sub. (i) *Loans to directors, officers, or employees.* A federal association may not make a real estate loan to a director, officer or employee of the association * * *: *Provided*, That nothing herein shall prohibit a Fed-

eral association from making loans on the security of a first lien on the home or combination of home and business property owned and occupied by a director, officer or employee of an association * * *.

"Sec. 143.10 sub. (k) *Initial loan charges.* No director, officer, or employee of a Federal association * * * may receive from the association or from any other source any fee or other compensation of any kind in connection with the procuring of any particular loan from or by such association * * *."

These rules and regulations have the force and effect of law and are judicially noticed. Code Civ.Proc. sec. 1875, subds. 2 and 3; 44 U.S.C.A. §§ 301-314; Home Owners' Loan Corp. v. Gordon, 1937, 36 Cal.App.2d 189, 97 P.2d 845; Livermore v. Beal, 1937, 18 Cal.App.2d 535, 541, 542, 64 P.2d 987; Woodward III v. Broadway Federal Savings & Loan Ass'n, 111 Cal.App.2d 218, 223, 244 P. 2d 467.

5. Paragraph 145.6-5. *Purchase of Loans.* This paragraph of the Rules and Regulations provides: "Any Federal association may purchase loans of any type that it

"As the defendant was engaged as a real estate broker in buying and selling on his own account notes secured by either first or second trust deeds or mortgages, in providing real estate loans for persons who wished to buy property listed for sale or exchange with or owned by the defendant Howard, he found himself considerably handicapped in dealing with the association. He surmounted that difficulty in large part by operating in the names of third persons, at times with their consent, and sometime without such consent or knowledge. Without disclosing the manner in which he was operating to the board of directors he approved as president and general manager loans or purchases of existing trust deeds or mortgages and as a director voted approval of such purchases or loans in which he had a beneficial interest. These activities on the part of the defendant Howard were directly contrary to the Rules and Regulations issued by the Home Loan Bank Board.

"The plaintiff having ascertained on or sometime subsequent to September 1949 the factual situation it filed its action. The third amended complaint * * * sets forth various transactions in which the purchasing or lending powers of the association were employed by the defendant Howard in achieving secret profits of various kinds for which recovery is sought. * * *"

These views of the trial judge were carried into the findings in substantially the foregoing language.

The court further found that in numerous transactions the lending powers of the association and its powers to purchase loans were employed by Howard in making secret profits; that in certain of these transactions defendant caused to be acquired at a substantial discount promissory notes secured by trust deeds with the intent on his part to have such instruments paid for by the association at their face value and to personally receive the profit without the knowledge of the association, and that he was successful in so doing;

that Howard concealed his identity and personal interest in these transactions from the plaintiff. In some of these transactions this concealment was effected through the use and identification of F. Marie Shaw, Lillian Marie Russell, and Olivia Mae Daniels. None of these individuals had any personal interest in any of the transactions and acted therein "as the dummy, agent, nominee or alter ego of Howard." In handling these purchases, Howard caused the records of plaintiff to show that plaintiff made each such purchase directly from the holder, who endorsed the note and assigned the trust deed securing payment thereof directly to plaintiff. Howard did not appear of record to have any interest therein. In order to further conceal from plaintiff his interest, Howard sometimes caused his profit in such transactions to be paid by plaintiff to Avalon. In other cases he concealed the profit by a check made payable to one of his "dummies" or caused the check for his profits to be made payable to the seller or to some third person who had no connection with or interest in the transaction without, however, the payee's knowledge or consent. Howard then "caused such payee's name to be forged, as an endorser and received the proceeds" from such checks.

Findings IX and X read as follows: IX. "In none of the transactions could Howard have taken a profit but for his having caused the plaintiff to act within the scope of its corporate powers at some point in the transaction, and in none of those instances could he have so caused it to act but for his position as director, president and general manager." X. "Howard at no time used any of his own funds or credit in the purchase of the aforesaid notes, or in any of the transactions wherein he took a secret profit, and the profit he received was wholly through the use of the funds, facilities and corporate entity of plaintiff. In each instance Howard caused the plaintiff to act within the scope of its corporate powers and as a result enabled Howard to profit."

may make; * * * Provided, That no loan may be purchased * * * from a di-

rector, officer or employee of such association, * * *"

The court also found that Howard purchased and sold certain real property in the financing of which transactions he made use of the plaintiff and its assets, in that the full purchase price was paid out of the proceeds or loans which he caused the plaintiff to make, each such loan being in an amount in excess of the cost of the property to Howard. He concealed from plaintiff his interest in these transactions by using the names of the persons hereinabove identified and of his real estate company, Avalon, and by means of multiple escrows. Howard never occupied, or intended to occupy, as a home or combination home and business, any of the property, the purchase of which he caused to be financed by plaintiff.

The court further specifically found that "Howard at no time used any of his own funds or credit in the purchase of such property." He retained the profit that was made on these transactions.

The court found that Howard, by the same devices as hereinbefore mentioned, procured loans from plaintiff for borrowers and received a fee or commission therefor, but concealed this fact from the association. The court also found that plaintiff did not discover any of the facts relating to its right of recovery from Howard or Avalon, or either of them, until the month of September, 1949, when a summary report of an audit made by the Home Loan Bank Board was presented at a meeting of plaintiff's directors. By reason of concealment, the court found that Howard and Avalon were estopped from urging or asserting the lapse of time as a defense to this action.

Similarly, the court found that Howard and Avalon were indebted to plaintiff for money had and received for its use and benefit in the amounts heretofore stated.

[2] Howard contends, among other things, that there is no evidence of fraud, bad faith, unfair dealings or other acts on his part which support the findings and judgment. It is therefore necessary to

briefly summarize the evidence⁶ relative to the various transactions:

Count 1: In this transaction one Evans sold a note to plaintiff on which there was an unpaid balance of \$1,462.70. He received from plaintiff \$1,000, the amount of his demand. After paying the Recorder's fee and escrow expense totaling \$62.70 a check for the balance of \$400 was made out, on Howard's instructions, to C. R. Ransom, who was a real estate broker. There is no evidence that Mr. Ransom had ever met Evans or that he was entitled to a commission from plaintiff. Although the check bore the endorsement "C. R. Ransom" it was not, in fact, his signature and he received no funds therefrom. This check was cashed by plaintiff and the proceeds were given to Howard in cash.

Count 2: Amy Gaither listed her property for sale at Howard's real estate office. Howard, acting through Marie Shaw (described in his brief as the "undisclosed agent of defendant"), opened Escrow No. 1265 in plaintiff's escrow department for the purchase of Mrs. Gaither's property by Marie Shaw for \$4,750. Simultaneously, Miss Shaw made application to plaintiff for a loan on the Gaither property of \$5,250. Loan File 168 was opened in plaintiff's loan department. Miss Shaw's application falsely represented that she then owned the property and that she had paid \$7,950 for it. The \$5,250 loan was granted and the proceeds were transferred from Loan File 168 to the Gaither-Shaw escrow, No. 1265, and Gaither received her sales price out of the funds Shaw had borrowed from plaintiff. Miss Shaw received plaintiff's check for the remaining unexpended loan funds from the escrow in the amount of \$430.03. She endorsed the check and deposited it in Howard's bank account at his request.

In a couple of weeks, Mrs. Searles visited Howard's real estate office in search of property to purchase. At Howard's direction, Escrow 1371 was opened in plaintiff's escrow department for the sale of the former Gaither property by Miss Shaw to

6. The evidence is viewed, as it must be on appeal, in the light most favorable to the successful party in the trial court.

Searles et ux. for \$8,500 on the following terms: \$1,500 cash, assumption of the loan to Miss Shaw, and a second trust deed for the balance. At the close of the escrow a note secured by a second trust deed of \$1,802.63 payable to Miss Shaw, was delivered to her as the balance of the purchase price, together with plaintiff's check in her favor for the remaining portion of the cash payment made by Searles of \$1,475. This check was endorsed by Miss Shaw and deposited in Howard's bank account. She also sold this note to plaintiff about a year later, and the proceeds therefrom were received by Howard. Howard made approximately \$3,700 out of the various phases of this transaction.

Count 3: A secured note in favor of Green et ux., on which there was an unpaid balance of \$4,198.23, was endorsed and delivered by them to plaintiff. Howard personally approved the transaction as a member of plaintiff's loan committee. The Greens received \$3,100, the amount of their demand; \$495 was used to pay plaintiff's loan fee and expenses. The remainder was paid by a check for \$598, as a "commission" to Emma Morris, a real estate broker. Mrs. Morris, however, never knew anything about the transaction and did not represent any party to it. The check was endorsed "Emma Morris" but she testified it was not her signature. It was then cashed by plaintiff.

Count 4: Howard purchased from a church a secured promissory note, having an unpaid balance of \$4,800, for \$2,400. He sold the note to plaintiff at face value. Four hundred dollars was paid plaintiff "as an office charge." In his brief Howard admits that "\$2,000.00 was paid to and received by him" in this transaction. It was handled in the name of Olivia Daniels, who was employed in his real estate office.

Count 5: Howard purchased a note secured by a trust deed from one Whisenant for \$3,000 and then sold it to plaintiff "at face value." He admitted a profit of \$1,200 on the transaction. The checks, however, in payment of this profit were made in the name of one Knighten, a real estate broker, who had no personal connection

with the deal and who did not in fact endorse the checks.

Counts 7 & 16: (Same transaction but different theories.) In this transaction Mrs. Blodgett purchased a \$10,000 property which she occupied as a tenant. She arranged through Howard to have the full purchase price financed by plaintiff. As it was necessary for her to leave Los Angeles on business, she authorized a Mrs. Cleveland, since deceased, to handle the transaction for her. Through a series of three escrows and a loan of \$11,750 by plaintiff the purchase was consummated. Twelve hundred dollars (\$1,200) of this amount was represented by a check to Mrs. Cleveland. Mrs. Blodgett did not authorize plaintiff to make such payment to her. The endorsement on the check was not that of Mrs. Cleveland. Howard was the last endorser and received the proceeds of the check.

Count 9: Howard purchased a promissory note secured by second trust deed on which there was an unpaid balance of \$4,081.41 from one Mosby for \$3,000. Plaintiff then purchased the note from Howard at face value. Howard admittedly received \$834.41 out of the deal. This amount was represented by two checks: one for \$700 and one for \$134.40, both payable to Mosby, who, at Howard's request, endorsed them and handed them back to Howard.

Count 11: Through his agent, Marie Shaw, Howard purchased property owned by one Murray for \$4,836.66. Then, also through Miss Shaw, he applied for and received a loan from plaintiff of \$7,500 on the property based upon an appraisal of \$11,500 which the loan committee of plaintiff approved. The application for the loan was in Howard's handwriting and misrepresented the purchase price. A check out of these funds for \$2,604.84 in favor of Marie Shaw was signed by Howard who admits he received the proceeds thereof.

Counts 14 & 15: In this transaction Howard bought property from one Williams through and in the name of his agent, Lillian Russell, for \$5,500. Plaintiff made a loan on this property of \$10,000 which in-

cluded improvements in the sum of \$2,500. Miss Russell authorized payment out of the escrow of \$275 as a "commission" to Marie Shaw, another of his agents. Although Miss Shaw worked in Howard's real estate office, her residence address was given. A check for \$540.50 was issued to Miss Russell out of this escrow. At Howard's request she endorsed the check, had it cashed, and gave the proceeds to his bookkeeper, Marie Shaw. Howard admits receiving the proceeds of these checks. A third check for \$660 was drawn against the funds in this escrow in favor of Paul Hairston. He never saw the check; the endorsement was not made by him; and plaintiff was not indebted to him in any amount.

Count 17: In this rather complicated transaction it appears that Bertha Lee Jenkins and her husband were interested in buying a piece of property that was in an estate for \$8,750. They had \$2,500 and went to Howard to borrow the difference. He agreed to arrange the loan to them from plaintiff. The loan of \$7,500 was made to Lillian Russell, Howard's agent, who did not own the property, and assigned by her to plaintiff. Funds were then transferred from this loan to a Russell-Jenkins escrow and from this escrow to a Jenkins Estate escrow, and the sale to the Jenkinses was consummated and confirmed by the probate court. Marie Shaw received a check for \$439 as a "commission" out of this transaction, and Lillian Russell a check for \$772.75. The endorsement, however, was not Miss Russell's. Howard admits receiving the proceeds of both of these checks.

Count 18: Howard bought certain real property from one Jackson, taking title in the name of his agent Marie Shaw, who resold the property to Mae Lacy. A loan of \$9,000 was made on the property by plaintiff. A check signed by Howard in favor of Marie Shaw for \$1,089.95 was drawn against the funds in the escrow. She endorsed and cashed the check, and at his request deposited \$1,000 of the proceeds in his bank account and put the balance in his cash drawer.

Count 19: Leola Wilson owned a note secured by a second trust deed having an

unpaid balance of \$5,223.93. Howard agreed to purchase the note from her for \$3,900. An escrow was opened for the purchase of the note by the plaintiff. She executed an assignment of the note and trust deed directly to plaintiff, at Howard's request. She also authorized payment out of the escrow of \$1,082.18 to F. E. Johnson, whom she did not know. A check in that amount was signed by Howard in favor of Mr. Johnson. Howard, however, admits that the proceeds of this check were received by him.

Count 20: The Glicksteins owned a vacant lot and entered into an escrow at plaintiff's office with Lillian Russell, Howard's agent, to sell it to her for \$2,800. While this escrow was pending, Howard had Miss Russell enter into another escrow with Mrs. Levy and Mrs. Coleman for the sale of this lot to them for \$3,300. A third escrow was then opened for a construction loan on this property by plaintiff to Levy and Coleman. Funds were transferred from this loan to the other escrows. All three escrows were closed on the same day. The net profit on this transaction was \$432.55, represented by plaintiff's check to Miss Russell, whose endorsement was made by Miss Shaw. Howard admits getting the proceeds of this check.

Counts 21 & 22: (Same transaction but different theories.) Howard, through his agent Marie Shaw, bought a parcel of realty from Foster and Dunn for approximately \$4,330. To facilitate the purchase she entered into Escrow No. 1756. She then secured a loan from plaintiff for \$5,750, for which purpose a second escrow, No. 1766, was opened between Miss Shaw and plaintiff. Miss Shaw's loan instructions were to pay the entire net proceeds of the loan escrow to the purchase escrow. Instead, only the net amount required to complete the purchase was transferred to Escrow No. 1756, and all the excess loan funds—\$1,090.41—were paid to Avalon by plaintiff's check (signed on its face by Howard) and deposited in its account. At Howard's request and without explanation, Miss Shaw drew Avalon's check in favor of Howard, in the same amount, and deposited it in Howard's bank account.

Counts 6 and 31: Counts 6 and 31 are common counts for money had and received in the amount of \$70,000. In these counts Howard's fiduciary relation to plaintiff is alleged. Count 31 incorporates by reference all of the other counts except Counts 6 and 10. It also alleges Howard's failure to disclose the facts of these transactions to plaintiff and that he "intentionally concealed" them from plaintiff.

[3,4] The law is settled that one who is a director or officer of a corporation acts in a fiduciary capacity and the law does not allow him to secure any personal advantage against the corporation. *Bainbridge v. Stoner*, 16 Cal.2d 423, 427, 106 P.2d 423. It is admitted that during the time the transactions here in question took place Howard was a director, general manager, and president of plaintiff. Thus his fiduciary duty to plaintiff was established. A reading of the foregoing summary of the transactions amply supports the trial court's determination that Howard personally profited from them at the expense of plaintiff through the use of the association, its facilities and assets and that in so doing he violated his fiduciary duty to plaintiff. From the character of the transactions, the manner in which they were handled, together with the reasonable inferences to be drawn therefrom, and the testimony of Director Hudson, there is also ample support for the trial court's finding that Howard concealed his interest in these transactions from plaintiff and its board of directors and that the personal profits he thus made were unknown to plaintiff and its board and were secret in character. Under these facts, Howard's liability to plaintiff is unmistakably established. *Farmers' & Merchants' Bank of Los Angeles v. Downey*, 53 Cal. 466; *Fleishhacker v. Blum*, 9 Cir., 109 F.2d 543, certiorari denied 311 U.S. 665, 61 S.Ct. 23, 85 L.Ed. 427; *Western States Life Ins. Co. v. Lockwood*, 166 Cal. 185, 135 P. 496; *Angelus Securities Corp. v. Ball*, 20 Cal. App.2d 436, 67 P.2d 158; *Pasadena Mercantile Finance Corp. v. De Besa*, 122 Cal. App. 575, 10 P.2d 492; *Industrial Indemnity Co. v. Golden State Co.*, 117 Cal.App. 2d 519, 256 P.2d 677; *Blackburn's Adm'x*

v. Union Bank & Trust Co., 269 Ky. 699, 108 S.W.2d 806. Furthermore, many of these transactions were in direct violation of the Rules and Regulations for the Federal Savings and Loan System for they represent loans on property which Howard was purchasing but in which he did not reside. See Footnote 4, *infra*.

[5,6] Appellant attacks the testimony of Director Hudson to the effect that he did not know of Howard's personal interest in and profit from any of these transactions and that so far as he knew other members of the board did not have any knowledge of these matters, on two grounds: (1) that he was antagonistic to Howard because he had been a defendant in a number of suits brought by Howard and had taken the latter's place as manager and chairman of the board of plaintiff association; and (2) that his statement relative to the lack of knowledge on the part of other directors that Howard was interested in these transactions was hearsay. The answer to the first charge is that it was the exclusive province of the trial judge to determine the credibility of the witnesses and the weight to be given to their testimony. The charge of hearsay is not well founded for the question, posed by the judge, only sought Hudson's personal knowledge as to whether the other members of the board were aware of Howard's interest in these deals. From Hudson's testimony it is apparent that Howard did not acquaint the board with his interest in any of these transactions when Hudson was present.

[7] Appellant then argues that apart from Hudson's hearsay testimony there is no evidence of concealment and that all of the competent evidence is to the contrary, consequently there is no support for the finding that Howard is estopped to assert the limitations of time. There are two difficulties with Howard's position. The first is that the trial judge could reasonably infer concealment on the part of Howard from: (1) the evidence that these transactions were carried in the names of his agents and upon occasion in the names of persons who were totally unaware of them; (2) the manner in which the checks representing the profits in these deals were han-

dled; (3) the fact that Howard's name did not appear as a principal in any of these matters; and (4) the other facts and circumstances in the record indicating that his relation to and interest in these various transactions was not disclosed but, in fact, purposely and painstakingly covered up. From this the trial judge could reasonably draw the further inference that he concealed all this information from the board. Director Hudson's testimony that he had no knowledge of such matters, and, in effect, that Howard made no such disclosures to the board when he was present, lends support to this inference of concealment on the part of Howard. These facts and circumstances amply support the finding of estoppel.

The second difficulty lies in the trial judge's evaluation of Howard's testimony to the effect that he fully revealed to the board his interest in and relation to these various deals. The inescapable conclusion is that the judge did not believe him. In his memorandum ruling the judge said that material testimony given by appellant "was directly contrary to that given by him in a criminal trial in the federal court which likewise involved the activities of the defendant [appellant] in connection with the plaintiff corporation. Accordingly, defendant's [appellant's] credibility was seriously impaired."

[8] Appellant also argues that the evidence is insufficient to sustain the amount of the judgment against him. The total of the amounts proved under the counts herein summarized aggregates \$18,927.43 which is \$169.56 more than the total judgment⁷ against him. Thus Howard is not aggrieved.

[9] Count 3 is the only transaction about which there can be any serious question relative to Howard's getting the profit therefrom. He personally approved the purchase of the loan from the Greens. They received \$3,100. Plaintiff's loan fees and expenses were \$495. Upon someone's instructions, the balance of \$598 was paid

by check as a "commission" to Emma Morris, a real estate broker. Mrs. Morris, however, knew nothing about the transaction and represented no party to it. The check was endorsed "Emma Morris" but not by her. It was then cashed, on someone's authority, by plaintiff. The court could reasonably draw the inference from Howard's relation to the transaction, the fact that Mrs. Morris was not connected with it, the manner in which it was handled, and from all the testimony in the case, that Howard received the proceeds from this check although he denied it.

[10] Appellant vainly argues the findings are contradictory. Findings XVII and XVIII each find the precise amount for which judgment is entered in favor of plaintiff. One finding is on the theory of "secret profits received by" Howard and the other is upon the theory of "money had and received" by Howard "for the use and benefit of plaintiff." The identical amounts are found to be due plaintiff in each finding. There is no contradiction. Appellant's difficulty arises from his failure to recognize that certain counts are in the alternative, viz., Counts 7 and 16, Counts 21 and 22; and Counts 6 and 31. Also, Count 32 while not formally dismissed was abandoned.

[11, 12] Appellant also argues that the court failed to find on material issues. The rule is that "while findings are required upon all material issues a judgment will not be set aside on appeal because of a failure to make an express finding upon an issue if a finding thereon, consistent with the judgment, results by necessary implication from the express findings which are made." *Richter v. Walker*, 36 Cal.2d 634, 640, 226 P.2d 593, 596. There can be no question but that the court found adverse to Howard on each issue essential to his liability. His complaint is that the court did not in detail make an express finding as to the amount of his secret profits on each transaction, or, in other words, the amount of money he had received for the use and benefit of plaintiff in each of the counts that were not

7. The judgment against Howard alone is for \$17,667.46, and against him and Avalon, jointly and severally, for \$1,090.-

41. Thus the aggregate judgment against Howard is \$18,757.87.

dismissed or abandoned. The finding, however, of the ultimate fact, viz., the amount due plaintiff, "includes the finding of all probative facts necessary to sustain" such ultimate finding. *Fischer v. Ostby*, 127 Cal. App.2d 528, 531, 274 P.2d 221; *Haigler v. Donnelly*, 18 Cal.2d 674, 677-678, 117 P.2d 331, and "it is unnecessary to state the probative or evidentiary facts * * *." *Gschwend v. Stoll*, 104 Cal.App.2d 806, 808, 232 P.2d 494, 495.

[13] Furthermore, finding XVIII, which is based on Count 31 which is a common count for money had and received for the use and benefit of plaintiff, is an adequate finding in which "the court impliedly found in accordance with the evidence presented by the prevailing party", *Cherry v. Hayden*, 100 Cal.App.2d 416, 420-421, 223 P.2d 878, 881, and amply supports the judgment. This justifies an affirmation insofar as the sufficiency of the findings is concerned. *Eistrat v. Brush Industrial Lumber Co.*, 124 Cal.App.2d 42, 45, 268 P.2d 181.

Waiver of Jury

[14-16] Appellant also contends that the court erred in denying him the right to trial by jury. An examination of the record discloses, however, that appellant, both before and after the mistrial, filed written waivers of a jury trial. Plaintiff's original complaint was couched in the simple form of a common count for money had and received and sought a maximum recovery of \$70,000. After first requesting a trial by jury, the defendants, on September 14, 1951, one day before the trial commenced signed a waiver of jury. During the course of the trial before Judge Mosk, plaintiff asked leave to file an amendment to its complaint. This was granted and such amendment was filed on September 19, 1951. The amended pleading set out in some detail about eight transactions and alleged that because of the clandestine nature of the dealings, defendants "are estopped from pleading, alleging or urging the lapse of time of any statute of limitations as a defense to this action." Defendants thereupon moved for a mistrial upon the grounds of surprise and unpreparedness to defend. Judge Mosk granted the mistrial and ordered plaintiff "to file a

further amendment to the complaint naming every transaction upon which he (sic) relies." (Emphasis added.) A second amendment was filed on Oct. 1, 1951. On that date, with knowledge that a retrial would be held on amended pleadings setting forth the various transactions constituting plaintiff's claim, and after about five days of trial prior to the mistrial, during which the nature of plaintiff's case had been developed, defendants filed a second written waiver of jury trial, dated Sept. 28, 1951. Thereafter, plaintiff filed its third amended complaint on December 13, 1951, further amplifying and defining the transactions comprising its claim to recovery of the \$70,000 originally sought. Defendant answered, interposing no affirmative defense. In March, 1952, and in January, 1953, defendants filed demands for a trial by jury. On June 30, 1953, the time set for trial of the action, plaintiff moved that the cause be transferred from the jury to the nonjury calendar. The Presiding Judge granted this motion, and the trial subsequently proceeded to the court sitting without a jury.

As the point of departure for our discussion of appellant's contention that he was entitled as of right to a jury upon retrial, we assume, arguendo, but without deciding, that notwithstanding defendants' waiver of trial by jury when this case was first at issue, their right to a trial by jury was restored, after the declaration of mistrial, with respect to subsequent proceedings. But this proposition is of no assistance to them since, following the mistrial, defendants again, in writing, unequivocally waived trial by jury. This was done (1) after five days of trial oriented them as to the nature of the transactions upon which plaintiff relied, (2) after plaintiff had already filed one amendment setting forth some eight specific transactions and introducing allegations charging appellant with concealment to estop defendants from relying on any statute of repose, and (3) with full knowledge that the court, on granting a mistrial, had ordered plaintiff to further amend, so that every transaction on which its action was predicated would be enumerated therein. In this posture of the case, defendants cannot escape the force of

their solemn waiver of a jury trial after the mistrial by asserting that plaintiff added new issues to its original complaint by its third amendment. That amendment neither changed the cause of action nor altered the issues, nor effected any material change in the pleadings, nor prayed for any different relief; it merely particularized the transactions making up defendants' scheme of operations, much like a bill of particulars amplifies the obligation tersely stated in a common count. But what is here significant is that defendants, having advance notice that plaintiff's complaint was to be further amended to set forth every transaction, consciously chose to re-waive a jury upon the next trial without regard to the nature of the transactions set out. Defendants' relinquishment of a jury with full knowledge of the facts being a matter of trial tactics, the waiver is as binding upon them as if made after the amendment. See *Cloud v. Market Street Ry. Co.*, 74 Cal.App.2d 92, 104, 168 P.2d 191. Where a trial by jury has been regularly and voluntarily waived, such waiver cannot later be withdrawn except in the discretion of the court. *People v. Colton*, 92 Cal.App.2d 704, 707, 207 P.2d 890. Under the circumstances previously related, which suggests no more than that defendants changed their minds after two waivers, the court did not abuse its discretion in having the case tried without a jury. *Harmon v. Hopkins*, 116 Cal.App. 184, 188, 2 P.2d 540.

Cross-Complaint

Appellant also urges that "the trial court erred in sustaining plaintiff's demurrer to the cross-complaint without leave to amend and granting plaintiffs' motion for dismissal of cross-complaint." A prefatory epitomization of the pleading in question is required in answer to this contention.

The cross-complaint was filed by appellant and Dorothy Howard and comprises six causes of action, all sounding in tort. The first two counts purport to state causes of action for slander of title to certain

real property (for convenient reference, designated Lots 14 and 15) under substantially the following circumstances: it is alleged that *Dorothy was and is the owner of the above-mentioned lots and through her sister, Colleen Williams*, obtained from plaintiff loan No. 32 on Lot 14 and loan No. 281 on Lot 15, upon the execution of notes secured by trust deeds on the respective lots; that plaintiff wrongfully caused false notices of default and of trustee's sale to be published, thus clouding, slandering and rendering unmarketable the title to said property; that to eliminate the cloud, action No. 477518⁸ was instituted for an injunction to restrain the sale of said property and for an accounting of the amounts due under the respective notes; that a final judgment was entered enjoining and restraining plaintiff from selling lots 14 and 15 under the notices of default and granting other relief; that the sum of \$5,000 was expended by cross-complainants for attorney's fees in prosecuting the above action; that the recordation of the notice of default and publication of the notice of trustee's sale "decreased the value of the property owned by Dorothy B. Howard and rendered it untenable, all to the damage of said real estate and to cross-complainants in the sum of \$30,000." Exemplary damages to cross-complainants are also alleged.

The third and fourth counts make essentially the same allegations, except that they charge a conspiracy among plaintiff and others to cloud and slander Dorothy's title, causing great damage to the cross-complainants. The fifth and sixth counts reallege Dorothy's ownership of lots 14 and 15 and charge that plaintiff engaged in the acts previously described solely to embarrass "cross-complainant [presumably Dorothy] in the free enjoyment, use and disposition of said lots" and that cross-complainants' interests have been greatly depreciated and damaged because of such acts by plaintiff, which caused them vexation and harassment, and "rendered the value of cross-complainants' property un-

8. As appears in Count 5, this case was entitled "*Colleen B. Williams and Dorothy B. Howard, Plaintiffs, v. Broadway Federal Savings & Loan Association of Los*

Angeles, a corporation, et al." Appellant was not a party to that action, nor is Colleen B. Williams a party to the cross-complaint herein.

marketable," all to the damage of cross-complainants.

[17] Plaintiff's separate, general and special demurrers were sustained without leave to amend. From the judgment effectuating these orders, appellant alone has appealed. Under such circumstances, whatever error, if any, inheres in the court's ruling as against his non-appealing co-party's (Dorothy's) rights cannot be asserted by Herbert as a ground for reversal. *Fisher v. Nash Bldg. Co.*, 113 Cal.App.2d 397, 404, 248 P.2d 466; *Landfield v. Gardner*, 88 Cal.App.2d 320, 323, 198 P.2d 717. That being so, no merit attaches to appellant's claim of judicial error on this phase of the case. He, as the sole appealing party, has not been aggrieved by the court's rulings on the cross-complaint.

For it is amply clear from an analysis of that pleading that all the direct and consequential damages allegedly sustained under each count stem from the disparagement of *Dorothy's* title by plaintiff. Counts one and two are bottomed on an alleged slander of Dorothy's title to the lots in question. Counts three and four, charging a conspiracy to slander said title, are substantially similar to the previous counts. "Where two or more persons are sued for a civil wrong effected by conspiracy, it is the civil wrong resulting in damage, and not the conspiracy, which constitutes the cause of action." *Biggs v. Tourtas*, 92 Cal.App.2d 316, 206 P.2d 871. Counts five and six, based on the same recordation and publication of the notices of default and trustee's sale, add no new or distinct cause of action to the cross-complaint. They merely emphasize plaintiff's alleged notice as a foundation for exemplary damages by alleging the above publications were part of a course of harassment and vexation designed to interfere with the free use, disposition, enjoyment and vendibility of the two lots. At most, they reflect an alternate theory of the basis of recovery or measure of damages rather than a separable cause of action. *Wells v. Lloyd IV*, 6 Cal.2d 70, 88, 56 P.2d 517. The quintessence of the pleading is the injury to Dorothy's title and the damage flowing therefrom.

[18-22] The gravamen of an action for wrongful disparagement of title to real property is the invasion of the interest in its marketability. *Phillips v. Glazer*, 94 Cal. App.2d 673, 677, 211 P.2d 37. The conventional elements of damage are the pecuniary loss caused by the impairment of vendibility of the interest in the property and the cost of clearing title from the disparaging claim. *Phillips v. Glazer*, *supra*; *Rest., Torts*, sec. 663(b). Assuming for the sake of argument that the cross-complaint states a valid cause of action in favor of Dorothy, the non-appealing party, that pleading not only fails to allege the invasion of any legally protected interest in appellant, but inferentially even negatives such an implication. The cross-complaint discloses that the loans on the lots were obtained by Colleen B. Williams for Dorothy and the allegation is constantly iterated that Dorothy was the owner of the lots. No assertion is made that appellant had any interest therein. It is highly significant that action No. 577518, to enjoin the trustee's sale, was brought by Dorothy and Colleen Williams; appellant's brief refers to that action as one brought by Colleen and Dorothy "as plaintiffs and owners" of the two lots. Appellant was not a party to that action; and any right to recover attorney's fees expended in that action, if recoverable at all, accrued to Dorothy, and not to a stranger to the action who might have advanced such funds. It is thus plain that as to appellant the demurrer was properly sustained. The burden of showing that the trial court abused its discretion in not permitting an amendment rests upon appellant. *Vilardo v. County of Sacramento*, 54 Cal. App.2d 413, 417, 129 P.2d 165. That burden is not met where, as here, the record before us is devoid of any indication that the cross-complaint could be so amended as to state a cause of action in appellant. *Paraco, Inc., v. Department of Agriculture*, 118 Cal.App.2d 348, 358, 257 P.2d 981. Under such circumstances, it will be presumed that appellant pleaded all the facts favorable to his case as strongly as it was possible for him to do. *Faulkner v. California Toll Bridge Authority*, 40 Cal.2d 317, 328, 253 P.2d 659; *Augustine v. Trucco*, 124 Cal.

App.2d 229, 244, 268 P.2d 780. For the foregoing reasons, there is no basis for disturbing the court's judgment on the cross-complaint.

[23] We find nothing in the record indicating a miscarriage of justice. Under such circumstances the judgment may not be reversed. Art. VI, sec. 4½, Calif.Const.

The appeal from the order denying motion for new trial is dismissed. The judgment is affirmed.

McCOMB, Acting P. J., concurs.



134 Cal.App.2d 140

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

George L. JOHNSON, Defendant and
Appellant,

Cr. 2600.

District Court of Appeal, Third District,
California.

June 24, 1955.

Hearing Denied July 20, 1955.

Defendant was convicted of violation of Vehicle Code. The Superior Court, Mercer County, R. R. Sischo, J., denied defendant's application, made after expiration of probation period, to have information and finding of guilt set aside, and defendant appealed. The District Court of Appeal, Finley, J. pro tem., held that where it appeared that defendant had satisfactorily completed his probationary period, he was entitled to have information and finding of guilt set aside, notwithstanding that he had, after expiration of probation period, committed again offense of which he had been originally convicted.

Order reversed.

1. Criminal Law ⇨1023(10), 1134(10)

Where probation is revoked so that judgment and sentence may be pronounced,

an appeal lies from judgment whereupon validity of all orders made prior to judgment become reviewable. Pen.Code, § 1237, subd. 3.

2. Criminal Law ⇨1023(12)

Where probationary period expired without revocation, order granting probation was a "final judgment" insofar as subsequent orders were concerned, and order subsequently denying application to have information and finding of guilt set aside was appealable as an order made after judgment, affecting substantial rights of defendant. Pen.Code, §§ 1203.4, 1237, subd. 3; Vehicle Code, § 501.

See publication Words and Phrases, for other judicial constructions and definitions of "Final Judgment".

3. Criminal Law ⇨982

Granting of probation, aside from being an act of clemency extended to one who has committed a crime, is also in substance and effect a bargain made by people, through legislature and courts, with malefactor. Pen.Code, § 1203.

4. Criminal Law ⇨982

It is not necessary, in order to have information and finding of guilt set aside upon completion of probationary period, that defendant prove total and permanent reformation or rehabilitation. Pen.Code, § 1203.

5. Criminal Law ⇨982

Withholding of privilege, after completion of probation, to have information and finding of guilt set aside, not amounting to a constitutionally guaranteed right, does not constitute punishment in sense that it is a penalty exacted by society for commission of a crime. Pen.Code, § 1203.

6. Statutes ⇨227

Word "shall" in a statute is not necessarily mandatory, and may be construed as directory or permissive, depending upon intent of legislature.

See publication Words and Phrases, for other judicial constructions and definitions of "Shall".

7. Statutes ⇨241(1)

When language which is readily susceptible of two constructions is used in a

penal law, ordinarily that construction which is more favorable to offender will be adopted.

8. Criminal Law ⇐982

Word "shall" within statute relating to the setting aside of information and finding of guilt upon completion of probation period was intended to be mandatory, and, where a court finds that defendant has fulfilled conditions of probation for entire period, he is entitled as a matter of right to the benefits prescribed in the statute. Pen.Code, §§ 1203.4, 1237, subd. 3.

9. Criminal Law ⇐982

Where it appeared that defendant had satisfactorily completed his probationary period, he was entitled to have information and finding of guilt set aside, notwithstanding that he had, after expiration of probation period, committed again the offense of which he had been originally convicted. Pen.Code, §§ 1203 et seq., 1203.4, 1237, subd. 3; Vehicle Code, § 501.

Treadwell & Kane, Merced, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier and F. G. Girard, Deputy Attys. Gen., for respondent.

FINLEY, Justice pro tem.

Defendant has appealed from an order of the trial court denying an application he made therein under the provisions of section 1203.4 of the Penal Code.

On September 6, 1950, an information was filed in the Superior Court for Merced County charging defendant with a violation of section 501 of the California Vehicle Code, a felony. Defendant pleaded not guilty, and after trial before the court sitting without a jury, he was found guilty as charged. Application for probation was made and granted. After his probationary period had expired, defendant, on October 7, 1954, petitioned the court for an order under the provisions of section 1203.4 of the Penal Code. In the petition he alleged that he had successfully completed his probationary period on January 2, 1954,

and prayed that the information and finding of guilt by the trial court be set aside. A hearing on the petition was held, at which time the trial court, over defendant's objection, admitted and considered evidence concerning a subsequent violation by defendant of the provisions of section 501 of the Vehicle Code occurring on August 12, 1954. Defendant offered no opposing evidence but did offer evidence, which was not refuted, that he had successfully completed his term of probation on January 2, 1954, some seven months prior to the August 12, 1954, violation.

Two questions are presented for determination herein. The first: Under the provisions of section 1237 of the Penal Code and the circumstances of this case, is the order granting probation to be deemed a final judgment so that, under subdivision 3 of the section, an appeal would lie from the order denying defendant's petition to have the information and finding of guilt set aside as being an "order made after judgment, affecting the substantial rights" of appellant? The second question: At the hearing on defendant's petition, did the trial court, in passing upon the petition, properly admit and consider evidence of a law violation occurring subsequent to the successful termination of the probationary period which, had it occurred within that period, would have constituted a violation?

[1, 2] With reference to the first question, respondent argues that since an order revoking probation has been held not to be an appealable order prior to the pronouncement of judgment, *People v. Robinson*, 43 Cal.2d 143, 271 P.2d 872, so should an order denying a defendant's application under the provisions of Penal Code section 1203.4, following an order granting probation, be nonappealable. The circumstances and reasoning are, however, quite different. The purpose of revoking probation is so that judgment and sentence may be pronounced. An appeal then lies from the judgment whereupon the validity of all orders made prior to judgment becomes reviewable by the appellate court. *People v. Boyce*, 99 Cal.App.2d 439, 221 P.2d 1011. But if the probationary period expires with-

out revocation, there can then be no formal judgment, and the order granting probation under the provisions of Penal Code, section 1237, must be considered as the final judgment in so far as any order made thereafter "affecting the substantial rights of the party" are concerned. *People v. McCree*, 128 Cal.App.2d 196, 275 P.2d 95; *People v. Camargo*, 130 Cal.App.2d 543, 279 P.2d 194. In the present case it appears from the record that after granting probation the trial court thereupon immediately went further and pronounced formal judgment of conviction. That point is not raised by either party on this appeal, however, so we shall consider it no further.

[3-5] As to the second point raised by appellant, we are satisfied that it is well taken, and that for the purpose of passing upon appellant's petition the trial court improperly admitted and considered evidence of a criminal episode involving defendant, which took place some seven months after his probationary period had expired. The granting of probation, aside from being an act of clemency extended to one who has committed a crime, is also in substance and effect a bargain made by the People, through their legislature and courts, with the malefactor. The Penal Code, section 1203 et seq., dealing with the subject of probation, provide in effect that in granting probation the People of the State, speaking through their courts, may say to one who has committed a crime, "If you will comply with these requirements you shall be entitled to this reward." The purpose and hope are, of course, that through this act of clemency, the probationer may become reinstated as a law abiding member of society. Removal of the blemish of a criminal record is the reward held out through the provisions of Penal Code, section 1203.4, as an additional inducement. The obvious purpose is to secure law compliance through an attempt at helpful cooperation rather than by coercion or punishment. The law does not require positive proof of total and permanent reformation or rehabilitation as a condition to surrender of the right to impose judgment and sentence, for there could be no such proof. Neither *People v.*

Majado, 22 Cal.App.2d 323, 70 P.2d 1015, nor *In re Phillips*, 17 Cal.2d 55, 109 P.2d 344, 132 A.L.R. 644, cases cited by respondent, lays down any such requirement. The theory seems to be that if one with a reasonably satisfactory background commits a crime, the experience of apprehension and processing through court, together with the restrictions imposed through probation upon unlawful or intemperate conduct, may effect a greater degree of reformation than jail or prison confinement, and a showing that the terms of probation have been complied with would support a hope, at least, that reformation had been accomplished. At any rate the statute requires no further proof thereof. No provision of the law has been brought to our attention, other than that contained in Penal Code, section 1203.4, which authorizes retroactive punishment for wrongdoing subsequent to the expiration of the probationary period. The withholding of a privilege not amounting to a constitutionally guaranteed right does not constitute punishment in the sense that it is a penalty exacted by society for the commission of a crime. *In re Phillips*, supra.

[6-9] It is true that the word "shall" when appearing in a statute is not necessarily mandatory, and may be construed as directory or permissive, depending upon the intent of the legislature. *Cake v. City of Los Angeles*, 164 Cal. 705, 130 P. 723; *In re Estate of Mitchell*, 20 Cal.2d 48, 123 P.2d 503; *Carter v. Seaboard Finance Co.*, 33 Cal.2d 564, 203 P.2d 758. But it is also true that "When language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted." *People v. Valentine*, 28 Cal.2d 121, 143, 169 P.2d 1, 14; *Downing v. Municipal Court*, 88 Cal.App.2d 345, 349, 198 P.2d 923. It is our interpretation of Penal Code section 1203.4 that the word "shall" as used therein was intended by the legislature to be mandatory, and if, upon the evidence and the record, a court finds that the defendant (to use the exact language of the section) "has fulfilled the conditions of his probation for the entire period thereof, or who shall have

been discharged from probation prior to the termination of the period thereof", said defendant is entitled as a matter of right to the benefits prescribed in said section. It was apparently intended that where a defendant has performed the requirements laid down in terms of probation the court should have no discretion but to carry out its part of the bargain with said defendant, even though it might appear at the time of application for said benefits that complete and permanent reformation or rehabilitation has not been accomplished.

Inasmuch as here defendant's probationary period had expired prior to the filing of his petition for the benefits made available under Penal Code, section 1203.4, and in view of the lack of any evidence that he had not fulfilled the requirements demanded thereunder, the defendant is entitled to have his petition granted.

The order appealed from is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



134 Cal.App.2d 199

Odus HERRON, Plaintiff and Appellant,

v.

PACIFIC ELECTRIC RAILWAY COMPANY, a corporation, Defendant and Respondent.

Civ. 20863.

District Court of Appeal, Second District,
Division 2, California.

June 28, 1955

Action under Federal Employers' Liability Act to recover for injuries sustained by plaintiff while engaged in his employment as carman by defendant railroad. The Superior Court, Los Angeles County, Walter C. Allen, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeal, Fox, J., held that plaintiff failed to meet burden of proving

defendant's negligence by credible evidence.

Judgment affirmed.

1. Master and Servant ☞265(2, 3)

To recover under Federal Employers' Liability Act, it is incumbent upon plaintiff to establish that railway company was negligent and that such negligence was proximate cause of his injury. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

2. Negligence ☞136(14)

Negligence is ordinarily question of fact.

3. Master and Servant ☞284(1)

In action under Federal Employers' Liability Act to recover for injuries sustained by plaintiff while engaged in his employment as carman by defendant railroad, trial judge had responsibility of evaluating testimony of plaintiff and of determining weight to be given to it as well as credibility of plaintiff. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

4. Master and Servant ☞284(1)

In action under Federal Employer's Liability Act to recover for injuries sustained by plaintiff while engaged in his employment as carman by defendant railroad, trial judge could consider plaintiff's interest in result of case, manner in which he testified, character of his testimony, and other relevant circumstances. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

5. Master and Servant ☞278(1)

In action under Federal Employers' Liability Act to recover for injuries sustained by plaintiff while engaged in his employment as carman by defendant railroad, plaintiff failed to meet burden of proving defendant's negligence by credible evidence. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

6. Appeal and Error ☞989, 994(3), 996

Reviewing court may not reweigh evidence, reevaluate credibility of parties, or

draw inferences contrary to those drawn by trial court.

Hardwick & English, and Edward S. Hardwick, Los Angeles, for appellant.

C. W. Cornell, San Pedro, O. O. Collins, John R. Allport, Los Angeles, for respondent.

FOX, Justice.

This action was brought under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. Plaintiff appeals from a judgment based on findings that defendant was free from negligence.

Plaintiff had been employed as a car man by defendant for a number of years prior to June, 1951. His duties were to clean motor blocks by dipping the block into a large vat containing a very hot oakite solution. The motor blocks weigh some 500 pounds each. An overhead crane was used in raising and lowering the blocks. It was made of iron, set in concrete and operated by air. There were two hooks which attached to each end of the block by exhaust studs and a big ring that hooked in the pulley and raised the blocks. Plaintiff used his hands to steady the blocks as they were being raised from the vat.

On June 6, 1951, when plaintiff was raising a motor block out of the vat, it swayed to one side and one of the studs caught on the steam pipes in the vat causing one end to become detached from the crane. Plaintiff claims to have reached out over the vat, caught the end of the motor block and pulled it over the edge, thus preventing the block from falling back into the solution. It was then that his feet slipped and he injured his back. Plaintiff was working alone at the time.

Plaintiff testified that the crane had a tendency to run backwards when pulled around to the south and had had this tendency ever since he had been there. Plaintiff said he had spoken to the foreman about it. This was his only complaint about the equipment or its operation.

Plaintiff had regularly and steadily operated this particular crane since some

time in 1948 or 1949. He was thoroughly familiar with his job and the operation of the equipment. He was doing the job "in the usual and customary manner. There wasn't anything different from what it had been all the time." The crane had been completely dismantled and overhauled on at least two occasions—the last one in 1950. It was greased weekly.

[1-5] "To recover under the act it is incumbent upon plaintiff to establish that the railway company was negligent and that such negligence was a proximate cause of his injury." *Crowder v. Atchison, T. & S. F. Ry. Co.*, 117 Cal.App.2d 568, 571, 256 P.2d 85, 87; *Spencer v. Atchison, T. & S. F. Ry. Co.*, 92 Cal.App.2d 490, 494, 207 P.2d 126; *Eckenrode v. Pennsylvania R. Co.*, 335 U.S. 329, 69 S.Ct. 91, 93 L.Ed. 41. In the instant case the court found that defendant was not guilty of any negligence which was a proximate cause of injury to plaintiff. He argues, however, that this finding is not supported by the evidence. Negligence is, of course, ordinarily a question of fact. There is nothing in the evidence herein to justify not applying the general rule. It was, therefore, incumbent upon plaintiff to establish defendant's negligence as a fact by a preponderance of the evidence. To do this plaintiff points to his own testimony. The trial judge, however, had the responsibility of evaluating such testimony and of determining the weight to be given to it and the credibility of plaintiff. In passing on these matters, the judge could consider plaintiff's "interest in the result of the case, the manner in which he testified", *Devens v. Goldberg*, 33 Cal.2d 173, 180, 199 P.2d 943, 948, the character of his testimony, and other relevant circumstances. Implicit in the finding in favor of defendant on the question of negligence is the court's failure to give full credence to plaintiff's story. Since plaintiff failed to meet the burden of proving defendant's negligence by credible evidence, the finding on that crucial issue was necessarily against him. Hence he has failed to establish any right of recovery.

[6] The difficulty of plaintiff's position is that he would have this court reweigh

the evidence, reevaluate plaintiff's credibility and draw inferences contrary to those drawn by the trial court. Under settled principles, a reviewing court may not do this.

The judgement is affirmed.

MOORE, P. J., and McCOMB, J., concur.



134 Cal.App.2d 145

Henry K. HENDERSON, Plaintiff and
Appellant,

v.

Lily Zellerbach DRAKE, Defendant and
Respondent.
Civ. 16228.

District Court of Appeal, First District,
Division 2, California.

June 27, 1955.

Appeal by plaintiff from order of the Superior Court, City and County of San Francisco, H. A. van der Zee, J., granting defendant's motion to dissolve an attachment. The District Court of Appeal, Nourse, P. J., held that where plaintiff had lost right to appeal from judgment in favor of defendant, attachment was properly dissolved even though plaintiff had been granted a new trial.

Order affirmed.

1. Attachment ⇨270

Where plaintiff had lost right to appeal from judgment in favor of defendant, attachment was properly dissolved, even though plaintiff had been granted a new trial. West's Ann.Code Civ.Proc. §§ 553, 946; West's Ann.Rules on Appeal, rule 3(a).

2. Appeal and Error ⇨460(2)

Where plaintiff failed and refused to furnish undertaking although written notice

of order dissolving attachment had been given to plaintiff and time for appeal from judgment in favor of defendant had expired, attachment was not kept in effect by appeal from order dissolving attachment. West's Ann.Code Civ.Proc. §§ 553, 946, 949.

H. W. Glensor, San Francisco, for appellant.

Erskine, Erskine & Tulley, J. Oscar Goldstein, San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an appeal by plaintiff from an order granting defendant's second motion to dissolve an attachment, after the first such motion had been denied.

[1] Plaintiff sued on an accepted sight draft given in Mexico City and, in a second cause of action, on a judgment given in Mexico City upon the draft. Contemporaneously he secured an attachment which was levied on certain shares of stock owned by defendant. Pursuant to a trial judgment was entered for defendant on November 26, 1951. No formal written notice of entry of judgment was given to plaintiff. On December 4, 1951, plaintiff served and filed notice of intention to move for a new trial. On January 3, 1952, defendant served and filed notice of motion to dissolve the attachment. On January 28, 1952, plaintiff's motion for a new trial was granted. On February 6, 1952, defendant's motion to dissolve the attachment was denied. Thereafter defendant timely appealed from the granting of plaintiff's motion for a new trial and from the denial of her motion to dissolve the attachment. The order granting the new trial was affirmed by the other division of this court on June 30, 1953 in Henderson v. Drake, 118 Cal.App.2d 777, 258 P.2d 879, which judgment has become final. The order denying defendant's motion to dissolve the attachment was affirmed by the Supreme Court on December 31, 1953, Henderson v. Drake, 42 Cal.2d 1, 264 P.2d 921. On January 12, 1954, defendant noticed her second motion to dissolve the attachment, which was granted by minute order on February 4, 1954 after the remittitur of the Supreme Court decision had

come down. On February 11, 1954 the Superior Court entered a written order in which it found that plaintiff had failed to appeal from the judgment for defendant and that the time for such appeal had expired, wherefore the attachment was ordered dissolved and the Sheriff directed to release any attachment levied and to notify all garnishees of the release. The appeal before us is from the two orders of February 4 and February 11, 1954.

In its decision, 42 Cal.2d 1, 264 P.2d 921, 922, the Supreme Court gave a construction of Sections 553 and 946 of the Code of Civil Procedure decisive of this appeal. Section 553 provides in part, "If the defendant recovers judgment against the plaintiff, and no appeal is perfected and undertaking executed and filed as provided in section 946 of this code * * * all the property attached * * * must be delivered to the defendant or his agent, the order of attachment be discharged, and the property released therefrom" and Section 946, "An appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant * * * and unless, within five days after written notice of the entry of the order appealed from, such appeal be perfected." The Supreme Court held that the effect of these sections was "that the attachment remains effective as long as an appeal may be taken unless written notice of entry of judgment is given, in which event the attachment perdures for only five days after such notice unless an appeal is perfected within that time." It was further held that when on February 6, 1952 the trial court decided the first motion to dissolve the attachment, defendant could still appeal the order granting a new trial, and if defendant would do so, plaintiff under rule 3(a) of the Rules on Appeal would have 20 days after mailing of notification by the clerk of such appeal to appeal from the judgment. "Therefore, on February 6, 1952, there was still an opportunity for plaintiff to perfect an appeal, file an undertaking, and in that manner keep alive the attachment, and the trial court correctly refused to order that the attachment be dissolved."

It is undisputed that when defendant did appeal from the order granting a new trial plaintiff did not avail himself of his right of cross-appeal of the judgment under rule 3(a), and that when the second motion to dissolve the attachment was decided, plaintiff had lost all opportunity to perfect an appeal from the judgment for defendant. That is what distinguishes the situation at the time of the second motion to dissolve from the one at the time of the earlier motion and what justifies the opposite result.

Appellant contends that the Supreme Court cannot have intended to hold that plaintiff, to keep his attachment alive, should have taken an appeal from the judgment after it had been set aside on his motion for a new trial. The majority opinion did not expressly state what effect if any the motion for and the granting of a new trial had on the life of the attachment, but decided the appeal solely on the ground that the right to appeal had not yet been lost. See 42 Cal.2d at page 5, 264 P.2d at page 923 "Regardless of the effect or lack of effect on the attachment of the order granting a new trial * * *." However, the point is treated at length in one of the dissenting opinions, 42 Cal.2d at pages 8-9, 264 P.2d at page 924, stating the rule "that the pendency of a motion for a new trial or the granting of that motion does not operate to stay the extinguishment of an attachment * * *." This court came to the same conclusion in its opinion on the appeal of the order denying the first motion to dissolve the attachment, *Henderson v. Drake*, Cal.App., 255 P.2d 875, after which the Supreme Court granted the hearing which resulted in the opinion in 42 Cal.2d 1, 264 P.2d 921. There is no conflict between the majority opinion and that of this dissenting justice or of our court as the point is not treated in the majority opinion. No good purpose would be served by repeating the arguments given in the two opinions mentioned. On the grounds there stated we hold that our code does not provide for the keeping of an attachment in effect in case of a motion for or the granting of a new trial, and that to maintain the attachment plaintiff should have appealed.

As he did not do so the attachment was correctly dissolved.

[2] Appellant urges that even if the order dissolving the attachment was correct its effect was stayed by his appeal and that therefore the Sheriff should not have been ordered to release the attachment levied. His contention was rejected by the trial court when it denied a motion to vacate the order of February 11. Appellant contends that the question whether the appeal of the order dissolving an attachment stays its effect is governed by the general stay provision of Section 949 Code of Civil Procedure not by the quoted provision of Section 946 with respect to the effect of an appeal on an attachment. We do not agree. Sections 553 and 946, supra, clearly show the intent that no attachment will remain in effect after judgment for defendant during the often prolonged period of an appeal unless the undertaking of Section 946 has been executed and filed. There is as much reason for such security when the appeal is taken from the order dissolving the attachment as when the appeal is taken from the judgment for defendant. In *Hallam Cooley Agency v. Superior Ct.*, 30 Cal. App.2d 20, 85 P.2d 457 and *Albertsworth v. Glens Falls Indem. Co.*, 84 Cal.App.2d 816, 821 et seq., 192 P.2d 66 the court assumes that Section 946 is applicable to an appeal from an order dissolving an attachment where an undertaking to keep the attachment in effect has been furnished. In *Flagg v. Puterbaugh*, 101 Cal. 583, 584, 36 P. 95, the Supreme Court clearly indicates that an appeal from an order dissolving an attachment is authorized although it will not preserve the lien of the attachment. In *Doud v. Jackson*, 102 Cal.App. 213, 283 P. 107 it was held that the question whether the attachment had lapsed by failure to file undertaking on appeal under Section 946 when appeal was taken from an order to dissolve attachment becomes immaterial on the affirmance of said order; it does not appear that in that case there had been a judgment for defendant. In the case before us, although written notice of the order dissolving the attachment had been given, appellant failed and refused to furnish the undertaking of Section 946 or any under-

taking on appeal, notwithstanding the fact that a judgment for defendant had been rendered which was not appealable at that time. Under these circumstances the attachment was not kept in effect by the appeal from the order dissolving the attachment, which order moreover will be affirmed.

Orders affirmed.

DOOLING and KAUFMAN, JJ., concur.



134 Cal.App.2d 110

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

John Hayden KERNS, Defendant and
Appellant.

Cr. 5346.

District Court of Appeal, Second District,
Division 2, California.

June 24, 1955.

Defendant was convicted of burglary in the second degree. The Superior Court, Los Angeles County, Joe Raycraft, J., rendered judgment on the verdict, and defendant appealed. The District Court of Appeal, Moore, P. J., held that trial court's overruling of defendant's objections to questions, asked him as witness by deputy district attorney, as to whether he recalled telling a police officer about a woman being with defendant when he broke window of another store than that of alleged burglarized store, on ground of their irrelevancy, was not error or prejudicial to defendant, in view of instruction to jury, limiting application of defendant's testimony, answering questions in negative, to its bearing on question of defendant's guilt of crime charged, and defendant's previous testimony that he broke window of burglarized store and entered it to search for receipts

desired by woman waiting for him in automobile across street from store.

Judgment affirmed.

1. Burglary $\S$ 41(1)

Evidence was sufficient to warrant conviction of burglary in second degree.

2. Criminal Law $\S$ 372(10)

In prosecution for burglary of store entered by defendant after breaking window, questions, asked defendant as witness by deputy district attorney, as to whether defendant recalled telling police officer, about five years before crime charged, about a woman being with defendant when he broke window of another store, were not objectionable as irrelevant, in view of defendant's testimony that he broke window of and entered burglarized store to search for receipts desired by woman waiting for him in automobile across street from store and such officer's testimony as to defendant's similar descriptions of the two women.

3. Criminal Law $\S$ 673(5)

In prosecution for burglary of store entered by defendant after breaking window, trial court's overruling of defendant's objections on ground of irrelevancy, to questions, asked him as witness by deputy district attorney, as to whether he recalled telling police officer, five years before crime charged, about a woman being with defendant when he broke window of another store, was not error or prejudicial to him, in view of instruction to jury, limiting application of defendant's testimony, answering questions in negative, to bearing thereof on question of his guilt of crime charged, defendant's previous testimony that he entered burglarized store to search for receipts desired by woman waiting for him in automobile across street from store, and such officer's testimony as to defendant's similar descriptions of the two women.

4. Criminal Law $\S$ 372(1)

When accused's conduct in offense previous to crime charged bears such similarity in significant respects to his behavior

at time of commission of such crime as naturally to be explained as caused by general plan, similarity is not merely coincidental, but indicates that defendant's conduct was directed by design, so as to render evidence of such previous conduct relevant.

5. Criminal Law $\S$ 369(2)

Remoteness of offense committed by accused before crime charged affects only weight, not relevancy, of testimony as to such prior offense.

6. Criminal Law $\S$ 372(1)

Evidence merely tending to show accused's attempt to commit other offenses than that charged may be received to prove common scheme or plan, though insufficient to prove corpus delicti of such other offenses.

7. Criminal Law $\S$ 371(6), 1169(11)

In burglary prosecution, where defendant placed his intent in issue by testifying on direct examination that he had no intention to steal anything, trial court's permission of prosecution to cross-examine defendant as to circumstances of prior attempt by him to commit burglary, was not error prejudicial to defendant, and evidence elicited on such cross-examination was proper and admissible.

8. Criminal Law $\S$ 781(1)

In burglary prosecution, instruction informing jury that defendant had made statements at variance with his testimony and defining confession was pertinent and appropriate, in view of police inspector's testimony as to defendant's statements that he was in burglarized store to help a woman, his refusal to identify her, his failure to state whether he was ever inside store before, and his statements that he was supposed to meet such woman in front of store to help her and that his purpose in going there was to pick up some clothing.

9. Criminal Law $\S$ 1186(4)

In burglary prosecution, defendant was not prejudiced by his cross-examination respecting his statement to police five years before crime charged when questioned about similar act of trespass, nor by court's instruction to jury, where evidence proved

him guilty and he did not question sufficiency of proof to warrant conviction nor state any fact indicating his innocence at time of his arrest or at trial, there being no miscarriage of justice. West's Ann.Const. art. 6, § 4½.

James K. Turner and Ernest L. Graves, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was convicted of burglary in the second degree. Also, he was found to have had two prior felony convictions, to wit, robbery and forgery. His motion for a new trial having been denied, he now seeks a reversal of both judgment and order on the grounds of error in admitting testimony and in giving an erroneous instruction.

[1] Mrs. Harvey and Mrs. Streeter, sisters, closed their store in Long Beach about five p. m. and securely locked the doors. About 11:15 p. m., Miss Mershimer who lived near the store was on her way home accompanied by a girl friend. She observed appellant with some keys trying to gain entrance into that establishment. He soon despaired of success with his gentle approach, kicked out the window and crawled in. Thereupon, the observant girls called police who promptly arrived and took the house-breaker in charge. About eight minutes after he had entered, the officers brought him from the rear to the front door. There Miss Mershimer recognized him as the person she had observed break the window. She had seen him often in the vicinity and knew him as the brother of a girl friend who resided just across the street from the store. The testimony of Officer Hainley who found appellant inside the store, observed the broken glass, heard the deceptive story of the culprit and his refusal to answer questions that were harmless for an innocent man was sufficient when added to that of Miss Mershimer to warrant a conviction. But in addition, appellant took the stand and reeled off a bizarre narrative of having

imbibed liquor at several bars, met a woman named Ardis with whom he drank beer at three saloons. He had seen her near the Harvey store while he roomed at his sister's home. She was 35 or 36 years of age, five feet, four inches tall, with dark hair, prematurely gray. He testified that he sat for a while in Ardis' car; that she stated she was leaving for Nevada that night to get a divorce, but had to pick up a few things at the "clothing exchange store" of herself and her husband before she left; that she must go to her husband's place to get the keys. He testified that she left and soon returned, saying that she could not get the keys, but must get two envelopes in the store, two dresses of her own and would appellant assist her in getting them. He testified that they drove to a point near the Harvey store and parked; that Ardis said it would be all right for him to break in; that while Ardis remained in the car across the street he broke the window and crawled through to the inside; that he tried to open the door; could not; searched for the envelopes containing receipts she desired. He never asked her name, nor did she ask his.

[2-6] After testifying that he had been convicted of robbery and forgery, he was asked by the deputy district attorney:

"Q. Do you recall back in 1949 telling the officers about a Marie that was with you when you broke the window of another store? A. No.

"Q. Well, to refresh your recollection, this officer sitting here to my left, Inspector Wishon, you recall him do you not? A. Yes.

"Q. You have talked to him before, have you not? Don't you recall back in 1949 when he was questioning you about breaking a window at a place over at 3301 Eleventh in Long Beach and you told him that you had gone by there with a girl named Marie and that she had vanished when the police arrived? Do you remember that story? A. No, I don't."

To the first of such questions, appellant objected on the ground that it was irrelevant. But it was not irrelevant. Inspector Wishon had testified concerning the circum-

stances of appellant's arrest for trespass in February 1949 when appellant had said that prior to such arrest he had picked up a girl named Marie, in the Cinnabar Cafe; that they had engaged in intercourse back of that establishment; that when they were frightened, Marie ran away while he was caught by the officers; that she was 28 to 30 years of age, about five feet, six inches tall, weighed 128 pounds, had black hair. Wishon further testified that appellant in conversation with him on October 4, 1954, gave a description of the woman who had had him enter the store for her, said she was 28 to 30 years of age; five feet, six inches tall, dark hair and weighed 128 pounds. Appellant assigns as prejudicial the court's overruling his objections to such questions, and contends that such testimony did not come within exceptions to the general rule that prior unlawful acts of an accused are not admissible to prove his guilt of the act for which he is on trial; that they did not tend directly to establish the crime alleged or show intent or a common scheme embracing both offenses; that the evidence as to the previous incident must be identical with or very similar and close in time to the act alleged in the matter at bar.

There are two answers to such contentions. (1) The court read an instruction¹ limiting the application of the testimony objected to. It is observed that the jury were forbidden to infer therefrom a distinct offense but the evidence was received for such

bearing as it might have on the question: "whether the defendant is innocent or guilty of the crime charged against him in this action." (2) It is the law that when the conduct of an accused person in a previous offense bears such similarity in significant respects to his behavior at the time of the commission of the crime under investigation "as naturally to be explained as caused by a general plan, the similarity is not merely coincidental but indicates that the defendant's conduct was directed by design." Remoteness of prior offense affects only the weight and not its relevancy. *People v. Burns*, 109 Cal.App.2d 524, 537 et seq, 241 P.2d 308, 242 P.2d 9; *People v. Rickson*, 112 Cal.App.2d 475, 479, 246 P.2d 700. Evidence which merely tends to show an attempt to commit other offenses may be received to prove a common scheme or plan "even though it falls short of proving the *corpus delicti* of such other offenses." *People v. Lisenba*, 14 Cal.2d 403, 431, 94 P.2d 569, 583.

In the light of such authorities, it appears without extended suasion that appellant's story to the officer in 1949 is so nearly identical with that related after his apprehension in 1954 in attempting to exculpate himself from the burglary charge that the inference is irresistible that he had one permanent excuse for explaining his behavior. He had one woman to hide behind; in each instance she was in detail the same—the progeny of his imagination. He had met her in a cafe; she went to their rendezvous

1. CALJIC 33. In re Evidence of Other Offenses

"Evidence was offered in this case for the purpose of showing that the defendant committed another crime than the one of which he is accused and for which he is on trial in this action, namely, that of trespass, a misdemeanor.

"Such evidence was received for a limited purpose only: not to prove distinct offenses or continual criminality, but for such bearing, if any, as it might have on the question whether the defendant is innocent or guilty of the crime charged against him in this action.

"You are not permitted to consider that evidence for any other purpose, and as to that purpose you must weigh such evidence as you do all other in the case.

"The value, if any, of such evidence

depends on whether or not it tends to show—

"That the defendant possessed knowledge that might have been useful in the commission of the crime for which he is now on trial; (or)

"That there existed in the mind of the defendant a plan, scheme, system or design, into which fitted the commission of the offense for which he is now on trial.

"On the question whether or not the defendant possessed knowledge that might have been useful in the commission of the crime for which he is now on trial you may consider, for such bearing, if any, as it may have on that question the evidence that was offered to prove that previously he had committed another crime."

gladly; on neither occasion was the woman's name known to appellant; nor was any such woman ever found. Such conduct shows a common design, the same recipe for explaining in event of capture, or for establishing an alibi.

[7] Appellant himself placed his intent in issue when he testified on direct that he had no intention of stealing anything. In one action for rape, even though a former offense resulted in no prosecution, when the defendant was brought to trial for having entered prosecutrix' home to commit rape, he testified that he had no intent to commit rape. Evidence of his having, three months before, crawled into a bed where a woman and her husband slept, was admissible to rebut his disclaimer of intent when he entered the prosecutrix' abode. *People v. Kinder*, 122 Cal.App.2d 457, 464, 265 P.2d 24. No prejudicial error occurred in allowing the prosecution to cross-examine the defendant with reference to the circumstances of his prior attempt and the evidence elicited was proper and admissible. *Ibid.*; see *People v. Peete*, 28 Cal.2d 306, 319, 169 P.2d 924; *People v. Kynette*, 15 Cal.2d 731, 746, 104 P.2d 794; *People v. Zatzke*, 33 Cal.2d 480, 484, 202 P.2d 1009; *People v. Thorne*, 10 Cal.2d 705, 706, 76 P.2d 491.

[8] Appellant assigns as prejudicial error the giving of the instruction set out on

the margin below.² The purpose of such instruction was to inform the jury that appellant had made statements at variance with his testimony at the trial and to define confession. It was followed by the instruction that the jury be cautious in considering any oral admission. The instruction quoted was pertinent and appropriate in view of appellant's statements to Inspector Wishon that he was in the store to help out a woman, his refusal to identify the lady, his failure to tell whether he had ever been inside the store before, his statement that he was supposed to meet the woman in front of the store to help her and that his purpose in going there was to pick up some clothing.

[9] In any event, neither by the cross examination of appellant with reference to his statement to the police in 1949 when questioned about his act of trespass, nor by the court's instruction was he prejudiced. Not only does all the record prove him guilty but he did not question the sufficiency of the proof. After the report had been telephoned that he was seen entering the place through a hole he had created by breaking out the glass, he was apprehended and arrested within the premises near midnight. He did not state a single fact, as against the People's proof, that would indicate his innocence then or at the trial. There is no legitimate basis for reversing

2. CALJIC

"Evidence has been received in this case tending to show that on occasions other than this trial the defendant himself made statements tending to prove his guilt of the alleged crime for which he is on trial.

"A statement thus made by a defendant may be either a confession or an admission.

"A confession is a statement that was made by one who is a defendant in a criminal trial, at a time when he was not testifying in that trial, by which he acknowledged certain conduct of his own that constituted a crime for which he is on trial, a statement which, if true, discloses his guilt of that crime and excludes the possibility of a reasonable inference to the contrary.

"If under my instructions you find that

a voluntary confession was made, you are the exclusive judges as to whether or not the confession was true; and in deciding that question you should consider all the circumstances connected with the making of the statement, as shown by the evidence.

"An admission is something less than a confession in that it does not concede so much pointing toward defendant's guilt, and does not alone, even if true, support a deduction of guilt. It may consist of any statement or other conduct by a defendant whereby he expressly or impliedly acknowledges a fact that contributes in some degree to the proof of his guilt of an alleged crime for which he is on trial, and which statement was made or conduct occurred outside of that trial."

the judgment. There was no miscarriage of justice. Const. Art. VI, § 4½.

The judgment and the order denying his motion for a new trial are affirmed.

McCOMB and FOX, JJ., concur.



134 Cal.App.2d 15

Dan W. LEWIS and Helen E. Lewis, his wife, Plaintiffs and Respondents,
v.

Albert L. JAMES and Elizabeth T. James, his wife, Defendants and Appellants.
Civ. 8453.

District Court of Appeal, Third District, California.

June 23, 1955.

Hearing Denied Aug. 17, 1955.

'Action by vendors against purchasers for breach of contract for sale of land requiring vendors, who were lessees from third party, to exercise their option to purchase and thereafter execute and deliver to purchasers, deed conveying title to premises, and requiring purchasers to advance money required to exercise option, to pay vendors balance of purchase price, and to execute and deliver to vendors, lease of premises upon same terms as prior lease. The Superior Court, Tehama County, Albert F. Ross, J., sitting without jury, rendered judgment for vendors, and purchasers appealed. The District Court of Appeal, Schottky, J., held that vendors were under no duty to tender or pay rental until execution of lease, that where draft of proposed lease did not conform to parties' agreement, it could not be deemed offer of performance of agreement, and that where sale was completed on September 5, and vendors' planting of crops usually took place right after first rains in December, vendors were reasonably entitled to lease by that time, and

purchasers' failure to perform was actionable breach of contract.

Judgment affirmed.

1. Appeal and Error ⇨931(1)

On defendants' appeal from judgment for plaintiffs on findings of court trying case, all conflicts in evidence had to be resolved in favor of plaintiffs.

2. Landlord and Tenant ⇨202(1)

Under contract for sale of land requiring vendors, who were lessees from third party, to exercise their option to purchase and thereafter execute and deliver to purchasers, deed conveying title to premises, and requiring purchasers to advance money required to exercise option, to pay vendor's balance of purchase price, and to execute and deliver to vendors, lease of premises upon same terms as prior lease, vendors were under no duty to tender or pay rental until execution of lease.

3. Landlord and Tenant ⇨22(3)

Where draft of proposed lease did not conform to parties' agreement to execute lease, it could not be deemed offer of performance of agreement.

4. Contracts ⇨279(2)

Offer to perform upon terms and conditions not designated in contract is not only not binding upon offeree, unless he accepts the new conditions or fails to make objection thereto, but is also tantamount to refusal to perform. West's Ann.Civ.Code, §§ 1494, 1501.

5. Landlord and Tenant ⇨22(3)

Vendor and Purchaser ⇨15

Where contract for sale of land required purchasers to execute and deliver lease of land to vendors immediately upon consummation of sale, and where sale was completed on September 5, and vendors' planting of crops usually took place right after first rains in December, vendors were reasonably entitled to lease by that time, and purchasers' failure to perform amounted to failure of consideration, and was actionable breach of contractual relation.

6. Landlord and Tenant Ⓒ22(4)

In action by vendors against purchasers for breach of contract for sale of land requiring purchasers to execute and deliver lease of land to vendors immediately upon consummation of sale, whether vendors surrendered their rights under contract by renting other land when, some three months after completion of sale, purchaser submitted draft of proposed lease which did not conform to parties' agreement, was issue of fact.

7. Landlord and Tenant Ⓒ22(5)

Measure of damages for breach of agreement to lease is difference between agreed rental and rental value for term at time of breach. West's Ann.Civ.Code, § 3300.

8. Landlord and Tenant Ⓒ22(5)

In action by vendors against purchasers for breach of contract for sale of land requiring purchasers to execute and deliver lease of land to vendors immediately upon consummation of sale, verdict of \$2,100 damages, based on difference between agreed rental and rental charged by third party from whom vendors leased other land after breach, was supported by evidence. West's Ann.Civ.Code, § 3300.

Alfred E. Frazier, Red Bluff, and Robert O. James, Hughson, for appellants.

Stanley Pugh, Red Bluff, for respondents.

SCHOTTKY, Justice.

In 1949 plaintiff Dan W. Lewis, who had been a truck gardener in Tehama County for many years, and his wife, Helen, were occupying a tract of land as lessees under a lease with an option to purchase.

On August 2, 1950, plaintiffs and defendants entered into a written memorandum of agreement whereby plaintiffs, sellers, agreed to exercise their option under the Dyer lease, and defendants, buyers, agreed to pay the purchase price of \$30,000 and take title thereto, paying plaintiffs the sum of \$4,000 in addition to the purchase price. It was also agreed that defendants as buyers were "to execute and deliver to the Sellers immediately upon the consummation of the

aforesaid sale a Lease of the premises upon the same terms as the present lease from Mrs. Dyer, without any options, and subject to adjustment of the rental on an acreage and pro-rata basis to allow for land to be used by the Buyers and which cannot be used by the Sellers, it being understood that the Buyers intend to plant orchard and that there will be a progressive limitation of use by the Sellers and Lessees."

Under the Dyer lease the lessees were required to pay rental in the total amount of \$1,200, payable "\$600.00 upon the execution of this Lease, receipt whereof is hereby acknowledged; and the balance on or before the 15th day of August, 1950."

The sale to defendants was consummated on September 5, 1950, but no lease was executed by defendants to plaintiffs, and plaintiffs commenced an action to recover damages from defendants, alleging, among other things, that it became necessary for plaintiffs to rent other lands at a higher rental, to their damage in the sum of \$5,000.

Defendants in their answer admitted the agreement with plaintiffs but denied any breach thereof. The answer also set up two separate defenses: one, that plaintiffs were obligated to pay a rental of \$600 upon the execution of a lease and failed to do so; the other, that plaintiffs had abandoned and disaffirmed the portion of the agreement providing for a lease.

The case was tried by the court sitting without a jury. The court found, among other things, that the plaintiffs had fully performed all their obligations under the provisions of the memorandum of agreement; that defendants had failed and refused to execute, deliver or tender a lease of the premises in accordance with the terms of said agreement; that said failure and refusal were without any legal cause, excuse or justification, and constituted a breach of the agreement by the defendants; that as a direct and proximate result of said breach plaintiffs were damaged in the sum of \$2,100; and that plaintiffs were not obligated to pay or tender to defendants the rental of \$600 at any time prior to the execution and tender by defendants of the lease required of them under the contract, and that plaintiffs were at all times ready, will-

ing and able to perform all their obligations under the lease that they were entitled to receive. Judgment was entered in favor of plaintiffs for \$2,100 in accordance with said findings, and defendants have appealed from said judgment.

[1] Appellants make three major contentions in arguing for a reversal of the judgment: (1) That the complaint did not state a cause of action; (2) that the evidence is insufficient to support the findings; and (3) that the court applied an incorrect measure of damages. Before discussing these contentions we shall set forth additional facts shown by the record, bearing in mind the familiar rule that all conflicts must be resolved in favor of respondents.

On September 5, 1950, plaintiffs were still in possession of the premises, with produce yet to be harvested, and remained in possession until October 10, 1950, at which time plaintiff had finished harvesting and told defendant that he could "have it." Plaintiffs' son continued to occupy the dwelling on the premises, at least until the latter part of 1950, but after October, 1950, plaintiff Dan Lewis did no farming. At the trial said plaintiff at first insisted that the reason he did not commence cultivation, according to usual practice after the first rains in December, was that defendant's extensive leveling operations prevented him from so doing, but later, on cross-examination, plaintiff admitted that the only thing that kept him from going on the land and planting it to crops was the lack of a written lease. According to the testimony of defense witnesses, there was little leveling done prior to January, 1951, only to the extent of discing and staking of some 20 acres on the south, and no extensive leveling was done until April, 1951, and plaintiff admitted on cross-examination that he could not estimate how many acres were being worked by defendant in December, 1950.

Regarding negotiations for the execution of a lease back to plaintiffs after the sale, record indicates that early in December, 1950, defendants' attorney wrote to plaintiff Dan Lewis advising him that defendant Al James would be there on December 14, and asking plaintiff to come to his office with a list of the desired modifications in the lease.

Later in the same month defendants' attorney again wrote to plaintiff, enclosing in the letter a draft of a proposed lease. In response thereto, plaintiff went to counsel's office and with the aid of a secretary wrote a letter to defendant, dated December 28, 1950, explaining that "since the ground is now very wet, if it is leveled at this time, this operation would sour the ground so that it would not be usable for the purpose of raising garden this year. Also, the way the leveling stakes are marked, in some sections as much as twenty-four inches of top soil would be removed in the leveling, which would make this area unsuitable for raising garden this season. In fact, if more than six inches of top soil is removed, the ground would not be good for gardening the first year. Since the year has been so wet, it would seem to me best for you to rent this land to someone else who might be interested in raising grain or some other crop for this year; I would be interested in having it next year, however."

The above and subsequent correspondence between the parties was to no avail, and plaintiff ultimately leased other land of comparable size and type. Regarding the contents of the draft of the proposed lease sent to plaintiff in December, 1950, plaintiff testified that in many respects it was detrimentally dissimilar to the Dyer lease. As a witness, defense counsel testified that at no time did plaintiff make any objections to any provision in the draft and that he had never indicated specifically what changes were desired.

Additional evidence will be set forth in the course of this opinion.

[2] Appellants' first contention that the complaint did not state a cause of action because it did not allege a tender of the \$600 rental payment cannot be sustained.

The pertinent portions of the memorandum of agreement are as follows:

"Whereas, it is the desire of the Sellers herein to sell to the buyers, and the Buyers to buy said premises for a total cash purchase price of \$34,000, with the additional consideration of a Lease to the above-named Sellers for a period of two (2) years.

* * * * *

"Buyers further agree to execute and deliver to the Sellers immediately upon the consummation of the aforesaid sale a Lease of the premises upon the same terms as the present lease from Mrs. Dyer. * * *

The contract, for the breach of which respondents sought damages, was an agreement to sell. The agreed exchange consisted of the promise by respondents to exercise their option to purchase and thereafter execute and deliver to appellants a deed conveying the title to the premises, and the promise by appellants to advance through escrow the money required to exercise said option (\$30,000), to pay respondents the balance of the purchase price provided (\$34,000), and to execute and deliver to respondents a lease of the premises upon the same terms as the Dyer lease. To fully perform their part of the agreed exchange appellants were required to execute a lease. If any such lease were executed then it could possibly be said that delivery thereof was concurrently conditional upon payment or tender of the rental therein required. But in the agreement sued upon nothing further was required of respondents than that they exercise their option and execute and deliver a deed of the premises, and until the relationship of lessor-lessee was created by the execution of a leasing contract, no duty, conditional or unconditional, was placed upon respondents to pay rental. In such case an allegation of tender of payment allegedly due under a leasing contract not yet in existence would have been entirely superfluous, and a failure to so allege would not defeat the cause of action stated in the plaintiffs' complaint. See *de la Falaise v. Gaumont-British Picture Corp.*, 39 Cal.App.2d 461, 470, 103 P.2d 447.

Appellants next contend that the evidence is insufficient to support findings numbers 6, 7 and 9. In finding 6 the court found in part that "Plaintiffs have fully performed all of their obligations under the provisions of said agreement." Finding 7 is in part that "the failure and refusal of defendants to execute and deliver to plaintiffs a lease * * * constituted a breach of said agree-

ment on the part of said defendants." Finding 9 is that "all of the allegations of the first and second affirmative defenses alleged on page 2 of defendant's Amended Answer herein are and each of them is untrue."

As to finding 6 appellants argue that since respondents "failed to pay the initial rental required by the basic lease which supplied all of the terms of the agreement," they had not performed all their obligations under the provisions of the agreement and this finding to the contrary is therefore unsupported by the evidence. There is no merit in this contention for, as hereinbefore pointed out, respondents were not required to tender or pay the rental until a lease was executed by appellants in accordance with the agreement. There is likewise no merit in appellants' contention that the evidence is insufficient to support finding 9 since the agreement, as properly construed by the court, created no obligation on the part of respondents to pay rental before a lease was executed by appellants.

Appellants' contention that "finding No. 7 is not supported by the evidence because the evidence shows, without contradiction, that a draft of lease was submitted to plaintiffs and that plaintiffs did nothing in response thereto and did nothing to put defendants in default" is but an argument as to the weight of the evidence. The evidence is sufficient to support this finding. The record shows that the only offer by appellants to perform their obligation to execute a lease back to respondents was in December, 1950, when they submitted a draft of a proposed lease to respondents. At that time, according to the testimony of respondent Dan Lewis, objection was made to certain of the provisions therein contained which did not conform to the terms of the Dyer lease as called for in the agreement between the parties.

[3,4] Since the draft of the proposed lease did not conform to the agreement of the parties, it may not be deemed an offer of performance. For, an offer to perform upon terms and conditions not designated in the contract is not only not binding upon the offeree, unless he accepts the new condi-

tions or fails to make objection thereto, but also is tantamount to a refusal to perform. Civ.Code, §§ 1494, 1501; *Pitt v. Mallalieu*, 85 Cal.App.2d 77, 83, 192 P.2d 24; *K. & M., Inc., v. LeCuyer*, 107 Cal.App.2d 710, 717, 238 P.2d 28; *Steelduct Co. v. Henger-Seltzer Co.*, 26 Cal.2d 634, 646, 160 P.2d 804.

[5] Furthermore, the agreement required that appellants, as buyers, execute and deliver a lease immediately upon consummation of the sale. The sale was completed upon September 5, 1950. Respondent testified that the planting of his crops usually took place right after the first rains in December. That respondents were entitled to a lease by that time, if not sooner, would seem to be a reasonable construction of this contract provision. A lease of the premises was part and parcel of the agreed exchange and a failure to perform in this regard, within the time reasonably contemplated by the parties, amounted to a failure of consideration, and was an actionable breach of the contractual relation. *Bliss v. California Co-operative Producers*, 30 Cal.2d 240, 248, 181 P.2d 369, 170 A.L.R. 1009; *Buxbom v. Smith*, 23 Cal.2d 535, 548, 145 P.2d 305.

[6] Appellants contend also that the finding (number 10) that there was no abandonment, disaffirmance or surrender by respondents of rights under the agreement is not supported by the evidence. This contention cannot be sustained as it appears from the record that appellants did not execute a lease as agreed and further that appellants conducted operations on the land that interfered with respondents' contemplated use thereof. Under such circumstances respondents were justified in renting other land, and it cannot be held as a matter of law that their action in so doing constituted a surrender of their rights under their contract with appellants. At most, there was presented to the court an issue of fact upon which the evidence was conflicting.

Appellants contend finally that the trial court applied an incorrect rule as to the measure of damages. They argue that the correct rule of damages to be applied is the difference between the reasonable rental

value, concerning which the record is silent, and the agreed rental, and that the trial court was in error in allowing respondents damages equal to the difference between the agreed rental and rent they had to pay for leasing other property.

[7, 8] The measure of damages for the breach of an obligation arising from contract "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Civ.Code, § 3300. More specifically, the detriment caused by the breach of an agreement to lease is the difference between the agreed rental and the rental value for the term at the time of the breach, or, as sometimes expressed, "the fair value of the use of the premises." *McCulloch v. Liguori*, 88 Cal.App. 2d 366, 375, 199 P.2d 25, 31, 14 Cal.Jur.2d p. 770. In application of this general rule the courts have computed actual pecuniary damage by use of evidence relating to the rental value of similar property, as, for example, the allowance to the lessee in the *McCulloch* case of the difference between rental value of similar property at the time of the breach and the amount of monthly rental agreed on by the parties to the contract. In the instant case the court received evidence of the similarity between the premises in question and the Hoy property adjacent thereto which respondents leased, and awarded respondents damages in the amount of \$2,100 for the season of 1951, representing the difference between the agreed rental and the rental charged by respondents' lessor Hoy.

We are satisfied that the instant case presented questions of fact for the trial court to determine and that the evidence amply supports the finding and judgment. There was evidence that the fair and reasonable market value of the property that respondents had an option to purchase for \$30,000 was \$40,000 on August 2, 1950, the date of the agreement between respondents and appellants. Under the agreement with respondents appellants secured said property for \$34,000, and a substantial part of said agreement was "the additional consideration of a lease to the above-named Sellers for

a period of two years." The evidence supports the determination of the trial court that appellants breached said agreement and respondents were entitled to the damages awarded for said breach.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.



133 Cal.App.2d 657

Joseph BARBARIA, Plaintiff and Appellant,
v.

INDEPENDENT ELEVATOR COMPANY,
Inc., a corporation, Atwell, Vogel & Sterling, Inc., a corporation, B. C. Van Emon Elevators, Inc., a corporation, and Pat M. Keane, Defendants and Respondents.

Civ. 16659.

District Court of Appeal,
First Appellate District,
Division 2, California,
June 15, 1955.

Action for injuries sustained by plaintiff when an elevator he was operating fell. From adverse determinations in the Superior Court, City and County of San Francisco, Herman A. van der Zee, J., plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that where trial court had granted new trial to losing defendants and had denied plaintiff a new trial as to prevailing defendants, and thereafter, at beginning of second trial, trial court denied plaintiff's motion for default judgment against the two prevailing defendants (who had declined to defend on ground that, as to them, a final adjudication had been reached at first trial), denial of plaintiff's motion was not appealable.

Motion to dismiss appeal granted.

1. Judgment ¶103

Statute providing for default judgment on defendant's failure to answer does not

apply where answer is on file, regardless of whether defendant appears at time action is called for hearing. West's Ann.Code Civ.Proc. § 585.

2. New Trial ¶171

Granting of new trial did not change pleadings prior to first trial, but returned action to exact state in which it was before trial.

3. Appeal and Error ¶93

Where trial court had granted new trial to losing defendants and had denied plaintiff a new trial as to prevailing defendants, and thereafter, at beginning of second trial, trial court denied plaintiff's motion for default judgment against the two prevailing defendants (who had declined to defend on ground that, as to them, a final adjudication had been reached at first trial), denial of plaintiff's motion was not appealable.

Chauncey McKeever, San Francisco, for appellant.

Barfield & Barfield, San Francisco, for respondent Independent Elevator Co.

Daniel J. O'Brien, Jr., Daniel J. O'Brien, III, San Francisco, for respondent Van Emon Elevators.

NOURSE, Presiding Justice.

Motion to dismiss appeal. The defendants and respondents Independent Elevator Company, Inc. and B. C. Van Emon Elevators, Inc. move to dismiss the appeal from the order denying plaintiff's motion to enter default as to them.

The action was brought by Barbaria for injuries sustained when an elevator he was operating fell. He sued four defendants, the two petitioners who are elevator maintenance companies who at some time worked on the repair and maintenance of the elevator, Atwell, Vogel and Sterling, Inc., who was to inspect the elevator and Pat Keane the individual inspector, both the latter because they did not report the defect that caused the accident. All four defendants answered denying negligence. The verdict was for the plaintiff as to Atwell,

Vogel and Sterling, Inc. and Pat Keane, and for the defendants elevator companies. Judgment was entered accordingly. The two losing defendants moved to vacate the verdict and grant a new trial on all the legal grounds, and plaintiff moved to set aside the part of the verdict rendered against him and grant a new trial on the ground of insufficiency of the evidence and errors of law. The court granted the motion for new trial by Atwell, Vogel and Sterling, Inc. and Pat M. Keane on the ground of excessive damages, insufficiency of the evidence and errors of law excepted to by said defendants. The court denied the plaintiff's motion for a new trial as to the two elevator companies.

At the beginning of the second trial plaintiff moved for a default judgment against the two elevator companies because they declined to defend on the ground that as to them a final adjudication had been reached at the first trial. The court denied the motion and declared that the trial would proceed as to the other two defendants only. At the end of the trial the court directed a verdict for said two defendants and verdict and judgment were entered as to said two defendants only. Plaintiff appealed from said judgment and "from the order of said court denying plaintiff's motion for entry of default against defendants Independent Elevator Co. and B. C. Van Emon Elevators, Inc." Said two elevator companies moved to dismiss the appeal from the order denying plaintiff's motion on the ground that it was not appealable. It was dismissed on the May calendar on that ground. See 3 Cal.Jur.2d 513; *Brown v. Sterling Furniture Co.*, 175 Cal. 563, 166 P. 322, and *Broadribb v. Tibbets*, 60 Cal. 412. At the request of plaintiff's attorney the order of dismissal was set aside for the purpose of hearing further argument.

[1-3] Plaintiff appellant urges that in this case the order was appealable as a final

determination with respect to these two defendants. He cites two cases to the effect that orders of dismissal or nonsuit are so appealable. However, no dismissal or nonsuit as to plaintiff's action against these two defendants was entered or proposed by defendants. Plaintiff's motion was evidently not well taken. "Section 585 of the Code of Civil Procedure does not authorize the entry of any default in cases where an answer is on file, whether the defendant does or does not appear at the time the action is called for hearing." *Warden v. Lamb*, 98 Cal.App. 738, 741, 277 P. 867, 868; 2 Witkin California Procedure 1691. Here all defendants had filed answers. The granting of a new trial did not change the pleadings prior to the first trial, it returns the action to the exact state in which it was before the trial. *Bloomquist v. Haley*, 204 Cal. 258, 261, 268 P. 364; *Mitchell v. Rasey*, 139 Cal.App. 350, 353, 33 P.2d 1056; 3 Witkin California Procedure 2095. The fact that plaintiff moved for a default in a situation where the court clearly had no power to grant it cannot be a reason to hold appealable an order otherwise not appealable.

The crux of the matter is that plaintiff took the position that the order granting a new trial on the motion of the two losing defendants, which was directed against the verdict without any limitation, set aside the whole judgment also as to the two elevator companies, whereas these companies take the position that because of the denial of the plaintiff's motion this part of the judgment remained intact. There can be no doubt that the latter was the intention of the court. Whether the orders made were effective to reach that result need not be decided on this motion for dismissal of an appeal from a certainly nonappealable and correct order.

Motion to dismiss appeal granted.

DOOLING and KAUFMAN, JJ., concur.

134 Cal.App.2d 91

Richard M. CHEW and Margaret B. Chew,
Plaintiffs and Respondents,

v.

Stuart H. LEACH, Executor of the Estate of
William M. Anderson, Deceased, and Cal-
ifornia Federal Savings and Loan Asso-
ciation, a Corporation, Defendants.

Stuart H. Leach, Executor of the Estate of
William M. Anderson, Deceased,
Appellant.
Civ. 20866.

District Court of Appeal, Second District,
Division 2, California.
June 24, 1955.

Rehearing Denied July 11, 1955.
Hearing Denied Aug. 17, 1955.

Action for partition of real property. From adverse interlocutory judgment of Superior Court, Los Angeles County, Allen T. Lynch, J., the defendants appealed. The District Court of Appeal, McComb, J., held that where defendants' predecessor went into possession February 1, 1948, and plaintiff's original complaint was filed March 31, 1949, defendants and predecessor were not in uninterrupted possession of the property for five years prior to commencement of the action.

Affirmed.

Adverse Possession §45

Filing of complaint for partition of realty before statutory period had elapsed after defendant's predecessor had taken possession interrupted defendant's possession and prevented any title arising by adverse possession. West's Ann.Civ.Code, § 1007.

LeRoy B. Lorenz, San Gabriel, for appel-
lant.

Thomas G. Neusom, Los Angeles, for
respondents.

McCOMB, Justice.

Defendant appeals from an interlocutory judgment of partition of real property.

Facts: On March 31, 1949, plaintiffs filed a complaint against William M. Anderson

who was in possession of the real property which is the subject of this action. In such complaint plaintiffs claimed an undivided one-half interest in the real property. On April 11, 1949, defendant William M. Anderson filed an answer in which he admitted plaintiffs were the record owners of an undivided one-half interest in the property, but denied that they owned any interest in fact.

On July 2, 1953, defendant William M. Anderson died, and Stuart H. Leach was appointed the executor of his estate and substituted in the present proceedings.

On January 14, 1954, plaintiffs filed an amended complaint for partition of the property. Defendant answered, denying the ownership of plaintiffs, and alleged the property to have been the sole property of the deceased William M. Anderson, and for an affirmative defense alleged that decedent William M. Anderson and defendant, as his successor, had been continuously in possession of the property from February 1, 1948, to January 15, 1954, and hence had a prescriptive title to the property.

This is the sole question necessary for us to determine:

Did the evidence sustain the trial court's finding that defendant was not in the peaceable and undisputed possession of the real property in question for five years prior to the commencement of the present action?

Yes. The record discloses that in the instant case defendant's predecessor went into possession February 1, 1948; that the original complaint was filed March 31, 1949, and the five year period in order to vest title in defendant by adverse possession did not elapse until February 1, 1953. Therefore it is clear that defendant and his predecessor were not in uninterrupted possession of the property for five years, since the filing of the complaint before the statutory period had elapsed interrupted defendant's possession so as to prevent any title arising by adverse possession. (Knoke v. Swan, 2 Cal.2d 630, 632 [2], 42 P.2d 1019, 97 A.L.R. 841; In re Estate of Richards, 154 Cal.

478, 488, 98 P. 528.) Hence the provisions of section 1007 * of the Civil Code have no application to the present case.

No error appearing in the record, the judgment is affirmed.

FOX, J., concurs.



133 Cal.App.2d 745

Michael T. RAFFERTY and Martin Louis Roelle, Plaintiffs and Respondents,

v.

CITY OF COVINA, Defendant and Appellant.

Civ. 20930.

District Court of Appeal, Second District,
Division 2, California.

June 21, 1955.

Hearing Denied Aug. 17, 1955.

Action to annul annexation proceedings of city. The Superior Court, Los Angeles County, Arnold Praeger, J., entered judgment annulling annexation and city appealed. The District Court of Appeal, Fox, J., held that even though statute prohibiting annexation by municipality of area more than 300 feet in length and less than 200 feet in width went into effect two days prior to date of filing by secretary of state of ordinance whereby municipality annexed such an area, filing of such ordinance was simply routine procedure to give notice that city counsel had approved annexation of such territory and such acts could not invalidate action taken by city council prior to effective date of prohibiting statute.

Judgment reversed with directions.

1. Municipal Corporations Ⓒ33(1)

Where all of property encompassed by annexation district formed compact, unified parcel of land, city legislative body had

sufficient right and reason to expedite pending matters by giving priority to petition which provided most efficacious means of accomplishing annexation with no sacrifice of any essential right of parties. West's Ann.Gov.Code, §§ 35000-35006, 35300-35326, 35308, 35309, 35313.

2. Municipal Corporations Ⓒ29(4)

"Contiguity," within meaning of statutes governing annexation of land by municipalities, exists where boundary lines are coterminous. West's Ann.Gov.Code, §§ 35002.5, 35302.

See publication Words and Phrases, for other judicial constructions and definitions of "Contiguity".

3. Municipal Corporations Ⓒ29(4)

Where boundary lines of area to be annexed by municipality and boundary of municipality itself were continuously coterminous for aggregate length of over 2,000 feet and did not fall within prohibition of statute prohibiting annexation of strip over 300 feet in length and less than 200 feet in width, such annexed territory was contiguous to municipality and was properly annexed. West's Ann.Gov.Code, 35002.5, 35302.

4. Constitutional Law Ⓒ70(1)

Court's function is to interpret rules laid down by Legislature, not to make new or additional rules.

5. Municipal Corporations Ⓒ29(4)

Map of area involved in annexation proceeding by city showed that proposed annexation did not leave surrounded area of unincorporated lands, and annexation of such territory was not thereby prohibited by statute forbidding annexation where effect would be to virtually surround large area of unincorporated lands. West's Ann.Gov. Code, § 35326.

6. Municipal Corporations Ⓒ29(1)

Even though statute prohibiting annexation by municipality of area more than 300 feet in length and less than 200 feet in width went into effect two days prior to date of

* Section 1007, Civil Code, reads in part as follows:

"Occupancy for the period prescribed by the Code of Civil Procedure as suf-

ficient to bar any action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all * * *."

filing by Secretary of State of ordinance whereby municipality annexed such an area, filing of such ordinance was simply routine procedure to give notice that city council had approved annexation of such territory and such acts could not invalidate action taken by city council prior to effective date of prohibiting statute. West's Ann.Code Civ.Proc. § 349½; West's Ann.Gov.Code, §§ 35002.5, 35316-35318.

7. Statutes 263

Statutes are prospective in their operation in absence of clear intention to contrary.

Allard, Shelton & O'Connor, Pomona, and Burke, Williams & Sorensen, Los Angeles, for appellants.

Charles K. Hackler, Los Angeles, for respondents.

FOX, Justice.

This is an appeal from a judgment in certiorari annulling annexation proceedings of the City of Covina which were taken pursuant to the provisions of the Annexation of Uninhabited Territory Act of 1939, Government Code, §§ 35300-35326 and §§ 35000-35006, for brevity hereinafter called the Act. The territory here involved is designated as Westerly Annexation District No. 18, hereinafter referred to as WAD 18.

Factual Background

On September 17, 1951, Ordinance No. 314 was passed by the City Council of Covina annexing to the city under the act certain uninhabited territory. After two publications of the ordinance, on September 21 and 28, 1951, and the expiration of 30 days from and after its passage, the ordinance was, on October 24, 1951, duly filed by the Secretary of State of California. The territory included in this proceeding, known as Westerly Annexation District No. 6, hereinafter called WAD 6, was a strip of land approximately one mile in length and 33 feet in width, except at the extreme

westerly end thereof where a portion of the strip is some 230 feet in width.

On January 4, 1954, William F. and Genevieve Lavelle filed with the City Clerk a petition requesting annexation to the city of two parcels of uninhabited land owned by them. On the same date a separate petition was filed on behalf of Sadie Vincent requesting annexation of uninhabited land owned by her. On January 8, 1954, another such petition was filed by Frank E. and Gertrude P. Anderson covering uninhabited land owned by them. The total acreage encompassed in these three petitions was approximately 29 acres. Subsequently, the City Council, acting on these petitions, treated them as consolidated, added 26 acres, not included in any of the petitions, and proceeded under the act to annex this territory to the city in one proceeding known as Westerly Annexation District No. 15, hereinafter called WAD 15. To that end the City Council passed annexation Ordinance No. 352 on May 3, 1954. The plaintiffs in this case attacked the action of the city in annexing the territory covered by WAD 15 by certiorari. Pursuant to stipulation, the superior court, on June 18, 1954, rendered a judgment annulling and setting aside Ordinance No. 352 and declaring that the proceedings known as WAD 15 were null and void.¹

On May 27, 1954, and prior to the rendition of the aforesaid judgment, a new petition was presented to the City Clerk of Covina and accepted by him for filing, which requested annexation to the city as uninhabited territory the identical lands described in WAD 15 and Ordinance No. 352. This new petition was signed by all those who had signed the three separate petitions and, in addition, by F. M. McCown. Thereafter the City Council, acting on this petition and pursuant to the provisions of the act, initiated the proceedings known as Westerly Annexation District No. 18, here under attack. After public hearings on July 19, Ordinance No. 367 was adopted, on

1. These proceedings were annulled because there was no petition which described

the lands covered by WAD 15 as required by Gov't Code, sec. 35305.

WAD 18 abuts upon that portion of the city which was added by the proceedings known as WAD 6 and extends southerly therefrom. The northerly boundary line of WAD 18 and the southerly boundary line of that portion of the city added by WAD 6 are coterminus for an aggregate distance of over 2,000 feet. For purposes of clarification, a map showing WAD 18 and its relation to the city is reproduced.

The first question is: Did the City Council have jurisdiction to act upon the petition of May 27, 1954, and pursuant thereto initiate proceedings for the annexation of the territory therein described?

It may be conceded, as plaintiffs argue, that the vitality of three petitions was not affected by the judgment of June 18, 1954, invalidating WAD 15, and that they were still before the City Council for consideration. The factual picture, however, had changed. A new petition, in proper form, encompassing the same territory as WAD 15 and signed by the same property owners who had previously signed the separate petitions and also by the owner of the remaining land included therein was on file. It was properly presented for there is no statutory prohibition against presenting a petition which includes territory in another petition for annexation to the same municipality. The only provision of the law relating to the presentation of a subsequent petition covering territory included in another petition is Gov't Code sec. 35308.² That section, however, relates only to a subsequent petition to another city which includes some of the same territory. There is likewise no statutory prohibition against a city council's acting upon a petition which includes territory in another petition filed with it. However, Government Code, section 35309³ prohibits the legislative body of a city from taking "any action" on an annexation petition which describes any terri-

tory that is included in an earlier petition to another city, until the ordinance of the first city disapproving annexation becomes effective. The purpose of such restrictions is obvious, for two cities cannot at the same time exercise jurisdiction over the same territory. See *City of Anaheim v. City of Fullerton*, 102 Cal.App.2d 395, 227 P.2d 494. But in the instant case we have no such problem since we are dealing with a single city. Hence the statutory inhibitions and priorities are not here applicable. So, when the WAD 15 proceedings were set aside by the judgment of June 18, 1954, the City Council had four annexation petitions before it covering all or portions of the territory in question. Since the law did not establish any priority for the consideration of these petitions the City Council had the right in the orderly conduct of the city's affairs to exercise a reasonable discretion as to which of these petitions it would first consider. In the good faith exercise of such discretion they were entitled to take into account the practical aspects of the situation. By the adoption of Ordinance 352 in the WAD 15 proceedings the City Council obviously believed the parcels represented by the three separate petitions plus the additional territory should be annexed to the city. That attempt, for technical reasons, proved abortive. The deficiencies, however, had now been corrected by the petition of May 27th. To have gone back and conducted three separate annexation proceedings pursuant to the request of the three petitions rather than a single proceeding would have resulted in unnecessary additional work and expense to the city and created complications with respect to the annexation of the property owned by Mr. McCown, one of which would have been a fourth annexation proceeding in the event he persisted in his desire to have his property become a part of the city.

2. Gov't Code, sec. 35308 reads: "When a petition for the annexation of any territory to a city has been received by its legislative body a petition asking for the annexation of any of the territory described in the petition shall not be presented to the legislative body of any other city until an ordinance disapproving such annexation becomes effective."

3. Gov't Code, sec. 35309 reads: "After one legislative body has received a petition, no other legislative body shall take any action for the annexation of any part of the territory described in the petition, until the ordinance of the first city disapproving annexation becomes effective."

While the attempt by the Lavelles, Andersons and Sadie Vincent to withdraw their earlier separate petitions so that the collective petition of May 27th would be before the council may not have been effective for that purpose, see *Sweetwater Fruit Co. v. City Council*, 126 Cal.App.2d 655, 272 P.2d 828, the City Council could take their request to withdraw their individual petitions into consideration in exercising its discretion as to which of the several petitions should be taken up and in deciding to proceed pursuant to the petition of May 27th.

A closely parallel situation was considered in *People ex rel. Cuff v. City of Oakland*, 123 Cal. 598, 56 P. 445. In that case a petition for annexation of inhabited territory was filed with the City Council. A committee of the counsel reported to that body, recommending that no action be taken on the petition as the description of the property contained therein was insufficient. Before final action was taken by the council on this petition, which was subsequently held to be valid, a second petition covering all the territory included in the first and territory in addition thereto, was presented to the City Council and proceedings for annexation were initiated pursuant to the second petition. It was contended the council had no jurisdiction to act on the second petition. The court in effect held that the fact that the first petition later was held to be a valid petition did not deprive the council of jurisdiction to act upon the second petition.

In sustaining the annexation proceedings under the second petition the court pointed out also that no one had been injured by reason of the council's error as to the sufficiency of the first petition and the consequent failure to submit it to a vote. On this point the court stated, 123 Cal. at pages 606-607, 56 P. at page 448, that "*the second petition embraced all the territory described in the first, and additional territory not described in the first * * **" as no one who was included in the first petition as a resident of the territory proposed to be annexed was excluded by the second, it could not be necessary to submit both to a vote of the electors. No one could be injured by the

failure to submit the first to a vote * * *." (Emphasis added.)

[1] The rationale of the Oakland case applies, *a fortiori*, to the situation here present. Plaintiffs in the instant case have suffered no prejudice by the council's proceeding upon the combined petition rather than upon the three separate petitions. Plaintiffs are not property owners within the area being annexed—the sole property owners therein are the signers of the May 27th petition. Neither are they owners of property embraced within any of the territory covered by the separate petitions. Therefore, they had no right of protest as property owners in any of the proposed annexation areas which could have compelled cessation of such proceedings. Gov't Code, sec. 35313. As in the Oakland case, *supra*, all property included in the three separate petitions was included in the later consolidated petition, all of whose signatories, as the sole property owners involved, were eager to go ahead with the WAD 18 proceeding. As citizens of or taxpayers in Covina, plaintiffs had available to them the same right of protest against the WAD 18 proceeding as would have been available if there had been three or four separate annexation proceedings. Since all of the property encompassed by WAD 18 formed a compact, unified parcel of land, the legislature clearly had sufficient right and reason to expedite the pending matters by giving priority to the petition which provided the most efficacious means of accomplishing the annexation with no sacrifice of any essential right of the parties now complaining.

The second question is: Is WAD 18 contiguous to the City of Covina?

Section 35302 of the Government Code reads: "The boundaries of a city may be altered and contiguous uninhabited territory annexed to, and incorporated within it, pursuant to this article."

Government Code section 35002.5, which became effective on September 22, 1951, provides: "Territory shall not be deemed contiguous as the word 'contiguous' is used in this chapter if the only contiguity is based on a strip of land over 300 feet long and

less than 200 feet wide exclusive of highways."

An examination of these sections discloses that they are dealing with the *territory proposed to be annexed* rather than with the physical shape and dimensions of the part of the city to which such territory would be attached. Section 35002.5, *supra*, provides in effect only that if contiguity to the city is based on a strip of land over 300 feet long *and* less than 200 feet wide it shall not be deemed contiguous within the meaning of the statute. It does not provide that territory may not be annexed to a portion of the city which is over 300 feet long and less than 200 feet wide. The obvious purpose of this section is to place some restrictions on "strip" annexations and thus "at least partially" prohibit "the extremes of gerrymandering" made possible by the decision in 1949 in *City of Burlingame v. County of San Mateo*, 90 Cal.App.2d 705, 203 P.2d 807. *People ex rel. Forde v. Town of Corte Madera*, 115 Cal.App.2d 32, 47, 251 P.2d 988.

This interpretation is completely consonant with the realities of the evil designed to be abolished and the logic of the situation. For it must be kept in mind that the annexing city, regardless of the irregularities of its own preexisting contours, must be treated as a geographical entity. The description in the statute of the physical shape and dimensions on which a nexus with the city may not be based applies solely to the contiguous strip of territory whose annexation is being undertaken and not to the portion of the city to which it is juxtaposed.

[2,3]- Before the adoption of section 35002.5 any contiguity to the city of the area to be annexed was sufficient. By the amendment the legislature has stated what is not contiguity. It has not stated what is contiguity, except by the statement of what is deemed not to be contiguity. Therefore, in order to determine what is contiguity the same test is applied as was applied prior to the adoption of that section, except it must be tested further to determine whether it falls within the prohibition. Contiguity exists where boundary lines are coterminous. *City of Burlingame v. County of San Mateo*, *supra*. Here the common boundary

lines of the area to be annexed (WAD 18) and the City of Covina are continuously coterminous for an aggregate length of over 2,000 feet. Furthermore, such territory does not fall within the prohibition of section 35002.5 for the contiguity of WAD 18 to the city is not based on a strip of land over 300 feet in length and less than 200 feet wide, but is in fact based on coterminous boundary lines. The trial court was therefore in error in holding that WAD 18 is not contiguous to the City of Covina.

[4,5] Plaintiffs argue that if WAD 18 proceedings were held valid "its effect would be to virtually surround a large area of unincorporated lands as was true in the *Burlingame* case * * *." A glance at the map reproduced herein shows there is no such situation in this annexation. Furthermore, anticipating this problem, the legislature, in 1951, enacted section 35326 of the Government Code which provides that "Territory shall not be annexed to a city * * * if, as a result of such annexation, unincorporated territory is *completely surrounded* by such city." (Italics added.) This, of course, is a matter of public policy on which the legislature, and not the courts, has the right to speak. *People ex rel. Forde v. Town of Corte Madera*, *supra*. The legislature has said there shall be no encirclement of unincorporated territory. Beyond that it has not gone. The court's function in the premises is to interpret the rules laid down by the legislature, not to make new or additional rules. *Johnson v. City of San Pablo*, 132 Cal.App.2d 447, 283 P.2d 57. Plaintiffs' argument on this point is completely lacking in merit.

[6] Plaintiffs also contend that WAD 18 is not contiguous to the City of Covina on the theory that the portion of the city with which its boundaries are coterminous is not itself legally a part of the city. Reference to the map discloses that the more than 2,000 feet of the city boundary line with which WAD 18 is coterminous was formerly WAD 6 which was annexed to the city in 1951. Plaintiffs, however, contend that the annexation of WAD 6 is void. If their position is correct then there would be no contiguity of WAD 18 with the city, and the attempted annexation of the latter terri-

tory would necessarily fail. Plaintiffs' argument that WAD 6 is void is based on the fact that section 35002.5 of the Government Code went into effect on September 22, 1951, and that Ordinance 314 of the City of Covina annexing the territory designated as WAD 6 was not filed by the Secretary of State until October 24, 1951, and that such annexation did not become effective until such date; that WAD 6 was a strip of land more than 300 feet in length and less than 200 feet wide and consequently, in view of the provisions of section 35002.5, could not legally be annexed to the city.

The attorney general refused to authorize quo warranto proceedings to test the validity of the WAD 6 proceedings. Ops. Atty. Gen., pp. 54-63, 6-29-54. The trial court concluded that "the validity of Westerly Annexation District No. 6 cannot now be attacked by certiorari." Plaintiffs apparently do not attack this conclusion. Rather, they take the position that the purported annexation of WAD 6 was void and may be so held in the instant case and that since the proceedings to annex WAD 6 were void section 349½ Code of Civil Procedure,⁴ which provided a three months' statute of limitations for attacking annexation proceedings, is not applicable.

Plaintiffs' position is not sound for their first premise is erroneous. Ordinance No. 314, which annexed to the city the territory known as WAD 6, was passed on September 17, 1951 (and given its first publication on Sept. 21st). That was the final legislative act on the part of the city. True, the ordinance required a second publication and the expiration of 30 days after its passage before it went into effect. But this second publication was merely a matter of routine and the 30 days would elapse in due course of time. It is also true that when "an ordinance approving annexation becomes effective" the city clerk must immediately "transmit" a certified copy to the Secretary of

State. Gov't Code, sec. 35316. Upon receipt of such copy, "the Secretary of State shall file it * * *." Gov't Code, sec. 35317. From the date of such filing, "annexation is complete * * *." Gov't Code, sec. 35318. It is obvious that these acts were purely ministerial in character. They were simply routine procedure to give notice to the world that the City Council of Covina had approved the annexation of the territory encompassed within WAD 6. These ministerial acts could not invalidate the action which the City Council took and had a perfect legal right to take on September 17th, which was five days before section 35002.5 went into effect.

[7] This conclusion is fortified by the principle that statutes are prospective in their operation in the absence of a clear intention to the contrary. 23 Cal.Jur. sec. 26, p. 629. There is nothing whatever in section 35002.5 to suggest that it should apply to an annexation proceeding, such as here, where the City Council had taken final legislative action approving the annexation prior to that section becoming the law of the state.

It is therefore clear that on the record before us the WAD 6 proceedings were not void. Because more than three months have elapsed since the completion of that annexation proceeding, it may not now be challenged. The territory represented by WAD 6 was therefore legally incorporated into and became a "part of the city." Since, therefore, the boundary line of WAD 18 is coterminus with that of the city for more than 2,000 feet the requirement of contiguity is fully satisfied.

The judgment is reversed with directions to enter findings of fact, conclusions of law and judgment in accordance with the views herein expressed.

MOORE, P. J., and McCOMB, J., concur.

4. The material portion of section 349½, C.C.P. reads:

"The validity of any proceedings for the annexation of territory to a municipal corporation, * * * shall not be con-

tested in any action unless such action shall have been brought within three months after the completion of such proceedings * * *."

134 Cal.App.2d 53

Nancy BUTTE, Petitioner,

v.

SUPERIOR COURT of the State of California In and for the CITY AND COUNTY OF SAN FRANCISCO, State of California, Respondent,

Felix Butte, Real Party In Interest.

No. 16686.

District Court of Appeal, First District,
Division 1, California.

June 24, 1955.

Proceeding by wife as plaintiff in divorce action for writ restraining court from proceeding with trial until reasonable time after defendant had furnished certain records for plaintiff's inspection; paid her attorney's fees, money for employment of accountant, and money for cost of suit, as previously ordered by court. The District Court of Appeal, Fred B. Wood, J., held that action of trial court in denying plaintiff's motion for postponement was not abuse of discretion, where it appeared that parties had not anticipated immediate payment of such costs, where suit had been pending approximately three years since inception, and where it appeared that trial judge was convinced that interested parties and children would be best served by bringing action on for trial and final adjudication.

Writ denied.

1. Divorce ⇨145

In divorce action, decision of wife's motion to postpone trial until reasonable time after husband furnished certain records for her inspection, paid attorney's fees, money for employment of accountant, and money for cost of suit, rested primarily with trial court acting in exercise of sound discretion. West's Ann.Civ.Code, § 137.3.

2. Divorce ⇨184(5)

Ruling of trial court on wife's motion for postponement of divorce action until reasonable time after husband furnished certain records for her inspection, paid her attorney's fees, money for employment of

accountant, and money for cost of suit, would not be disturbed by reviewing court unless it found that there had been abuse of discretion.

3. Divorce ⇨145

In proceeding by wife to restrain court from proceeding with divorce action until reasonable time after defendant husband furnished certain records for plaintiff's inspection, paid her attorney's fees, money for employment of accountant, and money for cost of suit, as previously ordered by court, denial of plaintiff's motion for postponement was not abuse of discretion, where it appeared that parties had not anticipated immediate payment of such costs, where suit had been pending for three years, and where it appeared that trial judge was convinced that interested parties and children would be best served by bringing action on for trial. West's Ann. Code Civ.Proc. § 583.

Kathryn Gehrels, San Francisco, for petitioner.

Lois Preston, San Francisco, for respondent.

FRED B. WOOD, Justice.

Nancy Butte, plaintiff and cross-defendant in a divorce action, seeks a writ restraining the superior court from proceeding with the trial until a reasonable time after defendant and cross-complainant has made certain records and documents available for her inspection and has paid her attorney fees, money for the employment of an accountant, and money for costs of suit, as previously ordered by the court.

[1] The issues here presented have been twice considered by the trial court: first, upon hearing and granting defendant's motion to set the cause for trial; second, upon hearing and denying plaintiff's motion to postpone the trial. The decision in such a case rests primarily with the trial court acting in the exercise of a sound discretion; especially in view of the statutory provision that an award of costs or of attorney fees "may be enforced by the [trial] court by execution or by such order or orders as, in

its discretion, it may from time to time deem necessary." Civil Code, § 137.3, emphasis added. The question before us as a reviewing court is not what action we would take if it were for us in the first instance to decide. It is: Can we say, in view of all the circumstances of the case, that the trial court committed an abuse of the discretion vested in it?

Two orders for the payment of money are involved.

An order dated February 20, 1953, directs defendant to pay plaintiff's attorney \$500 on account of fees, the latter "payable immediately."¹

An order dated December 29, 1954, directed defendant to make available for inspection all documents, book accounts, bank accounts, income tax returns, and other records of income and expenses of defendant or of any business, partnership or corporation in which he has had an interest since the marriage of the parties.

The December 29, 1954, order also directs defendant to pay plaintiff \$500 for the employment of an accountant, to be paid in advance of performance of services by the accountant; if defendant has not paid or arranged for payment of this sum by January 26, 1955, "the matter of time of payment will at that time be ordered by the court." (We find in the record no order fixing the time for such payment.)

The December 29, 1954, order also directs defendants to pay plaintiff the additional sum of \$75 court costs, "payable immediately," and to pay plaintiff's attorney an additional \$1,000 as attorney's fees, "payable immediately" except that the payment of this \$1,000 "shall not be enforced by plaintiff's attorney by execution or contempt order prior to the trial of this action."²

Plaintiff claims that none of these moneys for costs or attorney fees or services of an accountant have been paid. Defendant claims the \$27 item for costs has been paid but admits the other items have not been paid. He also claims and the evidence would support a finding that he lacks current ability to pay.

Plaintiff contends that the following principle applies: "In protection of the rights of the respective parties it has been generally held in actions involving matrimonial status that the court will not proceed with an action against a spouse who is unable to pay the amounts actually necessary to conduct a defense, unless the spouse seeking the assistance of the court is able to and does pay such amounts. [Citations.] The theory supporting this rule is that it is less harmful to leave the parties *in status quo* than to run the risk that the moving party will obtain an unfair advantage because of the inability of the other party to make an adequate defense." *Kopasz v. Kopasz*, 34 Cal.2d 423, 424-425, 210 P.2d 846, 847.³

[2] The application of this principle, we must bear in mind, is the function of the trial court, acting in the exercise of a sound legal discretion. Its ruling can not be disturbed by a reviewing court unless the latter finds there has been an abuse of discretion. In the instant case there are a number of factors which tend to the conclusion that there has been no abuse of discretion.

First, we can not say as a matter of law that the court when making the orders for attorney fees and for payment of an accountant intended to impose obligations to pay prior to trial.

The December, 1954, order by its terms held in abeyance the fixing of the time for

1. It also orders him to pay \$300 a month for the support of plaintiff and their two minor children and enjoins him from conveying or encumbering any of the community property or any of his separate property pending the trial of the action, but these features of the order are not here directly involved.

2. An appeal from the order of December 29, 1954, was pending when the trial court fixed the time of trial and refused a postponement of the trial.

Later, defendant abandoned that appeal and gave notice of a motion to vacate or to modify the order of December 29, 1954.

3. In the *Kopasz* case the Supreme Court was not reviewing the action of a lower court. It was acting in the exercise of its own discretion. It stayed proceedings on the merits of an appeal until compliance by the appellant-husband with an order requiring him to pay the respondent's costs and attorney's fees on appeal.

payment of the \$500 for an accountant and proscribed collection of the \$1,000 attorney fee by execution or contempt process before trial.

There is evidence that at the hearing of plaintiff's application for attorney fees in February, 1953, prompt payment was not expected. Defendant's then counsel said he was worried about any payment "at this time" because of the difficulty in meeting the order for support money. The judge said, "Why not make an order and let her wait?" Fixing it at \$500, the judge said, "he can't pay it right now." Defendant asked the judge, "where am I going to get the money this time?" and the judge replied, "it will be a *judgment against you*." During this discussion, plaintiff's attorney said, "I'm not going to come in in a month."

It further appears that when in December, 1954, plaintiff's counsel was asking for an additional fee of \$1,000 and stated she was willing that there be a restriction that she would not execute or proceed in contempt on the \$1,000, the court asked, "What good would another allowance be if you don't have the first?" and she replied, "Well, we have confidence that *Mr. Butte is going to pay up some day*."

The need for an extensive examination of accounts, records, and papers prior to the trial is problematical. According to an affidavit by plaintiff's counsel this action involves complicated questions of fact and law pertaining to property including the extent of defendant's interest in a Fresno winery and the community and separate property nature of said interest; the winery was involved in a complicated bankruptcy proceeding which must be gone into thoroughly in order to determine the nature of defendant's and plaintiff's present interests therein; in affiant's opinion plaintiff can not be properly represented in the trial of the action without the previous services of an accountant to go thoroughly into the financial affairs of the defendant and through all pertinent books and records; that without such the case will take a long time, perhaps 6 or 8 weeks, to try, which in large part could be avoided by the proposed accounting. Affiant estimated it would take two weeks to prepare for trial after the books,

records and papers are made available to the plaintiff.

The only business venture in which the record indicates defendant has had an interest is a corporation that operated a winery at Fresno. The enterprise began to encounter difficulties in 1947 due to a drop in market prices. In 1950 the inventory was lost by fire. Bankruptcy proceedings ensued. In February, 1955, notice of intention to sell the corporation's real and personal property for the benefit of the trustee in bankruptcy was given, which defendant by affidavit states "liquidates the * * * Winery, which is the subject of the accounting, and there is at this date, no need for an accountant;" that the books, records and papers requested by plaintiff's attorney are the records, books and papers of the bankruptcy court and defendant is powerless to obtain them. Plaintiff denies the last statement but does not say what books, papers and records are involved. It is quite possible, therefore, that the need for an accounting could better be determined by the trial judge during the course of the trial. If he finds it desirable he can appoint a referee to conduct the inquiry, postponing the trial meanwhile. Certainly we can not say as a matter of law that such a procedure would not better serve the interests of the parties than the method plaintiff presently seeks to pursue. Incidentally, if the winery business has been completely liquidated, the problem of ascertaining the relative community and separate property ownerships is not likely to prove complicated, especially in view of the fact that the parties have been married less than six years.

That would leave the issues of divorce and of custody of the children as the principal issues. In this connection, defendant's counsel states that defendant will adopt the report of the court's domestic relations commissioner which recommends that custody of the children be given the plaintiff (their two children are under four and five years, respectively) and will ask the court that the parents be granted joint legal custody with physical custody to plaintiff, the defendant to have reasonable right of visitation.

The record indicates that defendant's only income is a salary of \$364.20 net per month;

and that by a former marriage he has a six year old child for whom he endeavors to maintain a home.

A good deal of the time and energy of the parties and their counsel has been spent in proceedings for the enforcement of the order for support pendente lite. The action has been pending since April 17, 1952. In this connection we note that section 583 of the Code of Civil Procedure requires that every action be brought to trial within five years of its filing, save for certain exceptions not present here according to the record furnished us.

[3] It is apparent, from these circumstances and from certain observations which he made at the hearing, that the judge who denied plaintiff's motion for postponement was convinced that the interests of the parties and of the children would be best served by bringing the action on for trial and final adjudication. We find no error, no abuse of discretion, in such a decision upon the facts presented.

The alternative writ is discharged and the peremptory writ denied.

PETERS, P. J., and BRAY, J., concur.



134 Cal.App.2d 116

Paul B. SOGG and Florence A. Sogg,
Plaintiffs and Appellants,

v.

Lester J. HARVEY, Clara Harvey, Howard Thomas, Clem Palne, Doe I, Doe II and Doe III, Defendants.

Lester J. Harvey, Clara Harvey and Howard Thomas, Respondents.

Civ. 20563.

**District Court of Appeal, Second District,
Division 3, California.**

June 24, 1955.

Action for rescission of contract for exchange of certain realty for mining claims, or, in alternative, for damages for

fraud. From an adverse judgment of the Superior Court, Los Angeles County, Jerold E. Weil, J., the plaintiffs appealed. The District Court of Appeal, Vallée, J., held that evidence sustained the trial court's findings that the plaintiffs had not acted with reasonable diligence in giving notice of rescission and that the plaintiffs had sustained no damage.

Affirmed.

1. Contracts ⚡270(1)

Mines and Minerals ⚡59

Requirement of prompt rescission is mandatory, and party may not wait to see whether contract turns out to be good or bad; and this is particularly true as to contracts relating to mining property. West's Ann.Civ.Code, § 1691.

2. Contracts ⚡270(1)

Diligence is condition of right to rescind, and the right is lost and transaction ratified by failure to rescind promptly after discovery of facts which entitle party to rescind. West's Ann.Civ.Code, § 1691.

3. Appeal and Error ⚡991

Whether party claiming to have been defrauded has rescinded promptly depends upon circumstances of particular case and is question primarily for trial court. West's Ann.Civ.Code, § 1691.

4. Appeal and Error ⚡1010(1)

Conclusion of trial court, as to whether party has acted promptly to rescind a contract, will not be set aside by reviewing court if it finds reasonable support in the evidence. West's Ann.Civ.Code, § 1691.

5. Exchange of Property ⚡8(4)

In action for rescission of contract for exchange of certain realty for mining claims, or in alternative for damages for fraud, evidence sustained trial court's finding that plaintiffs had not acted with reasonable diligence in giving notice of rescission. West's Ann.Civ.Code, § 1691.

6. Pleading ⚡409(3)

In action for rescission of contract or in alternative for damages for fraud, wherein plaintiffs claimed they had sustained damages in sum of \$33,000, if defendants' denial of each and every allega-

tion of complaint constituted negative pregnant as to damages allegation, objection was waived by trial of case on theory that denial was sufficient and that question of damages was in issue.

7. Fraud $\Rightarrow$ 58(1)

In action for rescission of contract or in alternative for damages for fraud, wherein plaintiffs claimed they had been damaged in sum of \$33,000 by exchanging realty worth \$33,000 for certain mining claims, evidence sustained trial court's finding that plaintiffs had not sustained any damage.

Gitelson, Ashton, Moore & Coyle and Robert E. Moore, Jr., Los Angeles, for appellants.

Dulaney W. Palmer, Hollywood, for respondents.

VALLÉE, Justice.

Appeal by plaintiffs from an adverse judgment in a suit for rescission of a contract for the exchange of real properties on the ground of fraud or, in the alternative, for damages. Paul B. Sogg will be referred to as plaintiff. Lester J. Harvey will be referred to as defendant.

On July 11, 1951 plaintiffs Paul B. Sogg and Florence A. Sogg entered into a written contract with defendants Lester J. Harvey and Clara Harvey by which the Soggs agreed to convey to the Harveys a parcel of realty in the County of Los Angeles in exchange for some mining claims in the County of Coconino, Arizona, and miscellaneous equipment thereon. A quarry was located on the mining claims from which stone was being produced. The exchange was consummated on August 21, 1951.

The complaint contains the usual allegations in an action grounded on fraud, charging numerous false representations by defendant with respect to the mining claims.

The court found: 1. Defendants did not make any of the representations alleged except certain ones which they had fulfilled and that they "did represent that

the net profit from the operation of said quarry was at the time of the sale, Five Hundred Dollars (\$500.00) per week." 2. "That it is not true that at the time of entering into the contract for the exchange of said properties plaintiffs had no knowledge or information concerning the management, operation or supervision of a stone quarry." 3. "That it is not true that plaintiffs obtained all their information and knowledge in respect thereto from the statements, assertions, representations, warranties and promises of defendants." 4. "That it is true that plaintiffs undertook an investigation of said facts before entering into the contract." 5. Plaintiffs did not rely on any representation of defendants in entering into the contract. 6. Plaintiffs did not, as alleged, for the first time between September 1951 and June 1952 discover that any representation of defendants was false, fraudulent, or untrue. 7. On July 3, 1952 plaintiffs caused a notice of rescission to be served on defendants Harvey. 8. The notice of rescission was not served promptly after plaintiffs discovered and had knowledge of all the true facts concerning the property and the profits thereof. 9. At the time of the exchange the parcel of realty exchanged for the mining claims had a value of not less than \$33,000. 10. Plaintiffs have not sustained any damage. Judgment was for defendants. Plaintiffs appeal.

Plaintiffs' sole claim is that the findings are not supported by any substantial evidence. On the question of the right to rescind, it will be necessary to consider only whether the finding that plaintiffs did not give notice of rescission promptly after they discovered and had knowledge of all the facts concerning the quarry and the profits thereof is supported; since, if it is, it is sufficient to sustain the judgment decreeing that plaintiffs were not entitled to rescission.

On June 29, 1951, prior to entering into the contract, plaintiff made an inspection of the quarry. Before this visit he had contacted a Mr. Webster, an official of Western States Stone Company, and was told by Webster that the company would

be interested in purchasing all the stone produced by the quarry. At the request of plaintiff, Webster suggested a foreman for the quarry whom plaintiff later employed. On July 25, 1951, prior to the close of the escrow for the exchange, plaintiff again visited and inspected the quarry with Webster and met the proposed foreman, a Mr. Beach, an experienced operator of quarries, and employed him. On this occasion Webster told plaintiff they could take production from the quarry up to one carload a day. Plaintiff told Webster he understood there was a set market on the stone, and asked if he could expect the prevailing market for his stone if the quality met with Webster's approval. Webster replied, "Yes."

Webster testified that within 30 days or 6 weeks from July 25, 1951, he again went to the quarry because "[i]t was understood that we were going to get a reasonable amount of material out there to fill our orders; we had made commitments and they were not forthcoming, so I attempted to check as to why"; "Mr. Beach took me up to the quarries and he was having difficulty producing the grade of stone that we were demanding because of the checked formation that he was endeavoring to uncover"; he went to half a dozen diggings; the situation was general in that location as a whole; "[y]ou will find areas where perhaps a few tons can be taken out in large pieces and then you run into faults or flaws they call them." About the time of the exchange Western Stone bought 20,000 to 25,000 tons of stone from plaintiff. Webster testified it was "just fair" quality, that "We found it rather difficult [to meet specifications] because the majority of the stone would not meet the competitive market from a quality standpoint, so we were controlled by the volume we could move provided he produced it, which he didn't." There was evidence the quarry produced stone that had an excellent market and could be sold at any time.

When plaintiff first discussed the deal with defendant, defendant told him they were shipping a minimum of one car of 55 tons a week with a net profit of \$10 or more a ton, or \$500 or more per week, that

there was about 300 years of good production with the present claims, and that the equipment was in excellent condition. Defendant also told him that "you cannot depend on the help because of the type of men that come up and work" in that part of the country, and that water was a problem at the quarry, that there was no water there, and it was necessary to transport it 7 or 8 miles for the use of the men.

On November 14, 1951 plaintiff wrote to defendant stating that the equipment was in poor condition. Between August 28 and November 28, 1951, plaintiff was required to expend \$1,782.95 for a new building on the property and to install a scale at a cost of \$1,638.23. Between August 16 and December 15, 1951, he expended \$519.36 for repairs to the equipment.

On November 27, 1951 plaintiff listed the quarry for sale. He testified he was interested in selling at that time because his interest in the quarry was lessening, he could not see any profit, he was operating at a loss, the equipment was not in good shape, and an expenditure of \$10,000 was required to increase production to paying quantities.

Plaintiff discharged Beach in February 1952. He discontinued quarrying stone in February 1952 because "We found that the cost of production left no room for any margin of profit; I was going deeper into the hole at all times. The quality of the stone was such that I found a very difficult market. My main source, practically the only source that I had ever sold stone to, the Western States Stone Company, were raising objections to the quality of the stone and I was running into too many obstacles." He testified that by "too many obstacles" he meant "Cost of operation, the quality of the stone, the loss actually, of not making any money; you couldn't make any money there; I couldn't make any money there; I made a diligent effort to keep going; I had invested of my own money close to \$7,000 at that time in money and I did not want to go into the red any further. Those were sufficient obstacles for me to stop. * * * The lack of good quality, sufficient salable, marketable stone." Between the time he acquired the

quarry and the time he discontinued quarrying stone, his gross receipts were \$6,-880.81. He was at the quarry only half a dozen times from the date of his first visit until the trial.

Beach, plaintiff's foreman, testified he went to work for plaintiff about August 1, 1951; that in the first two months thereafter he inspected all of the quarry; the stone was inferior; it had "a soft texture, hard to process," you could not "obtain large enough pieces to make it marketable"; he left in February 1952 because he had been there long enough to find out that he "could not operate for him [plaintiff] and make a profit." Beach further testified that plaintiff refused to permit him to operate the quarry in the way he felt it should be operated; that he told plaintiff it would cost \$10,000 to put the quarry on a paying basis.

The notice of rescission was served on July 3, 1952.

[1,2] A party rescinding must rescind promptly on discovering the facts which entitle him to rescind. Civ.Code, § 1691. The requirement of prompt rescission is mandatory, and a party may not wait to see whether the contract turns out to be good or bad; and this is particularly true in relation to contracts relating to mining property. *Hazzard v. Johnson*, 45 Cal.App. 19, 27-28, 187 P. 121. Diligence is a condition of the right to rescind, and the right is lost by delay. *Estrada v. Alvarez*, 38 Cal.2d 386, 391, 240 P.2d 278. The transaction is ratified by failure to rescind promptly after discovery of the facts which entitle the party to rescind. *Wilbur v. Griffins*, 56 Cal.App. 668, 677, 206 P. 112. In *Campbell v. Title Guarantee, etc., Co.*, 121 Cal.App. 374, at page 376, 9 P.2d 264, at page 265, the court observed:

"As was said in *Schneider v. Henley*, 61 Cal.App. 758, at page 763, 215 P. 1036, 1038: 'Subdivision 1 of section 1691 of the Civil Code requires prompt action in case of rescission. * * * In *Marten v. [Paul O.] Burns Wine Co.*, 99 Cal. 355, 33 P. 1107, it was held that a delay of 3 months was too long. In the case of *Bailey v. Fox*, 78 Cal. 389, 20 P. 868, a delay of

4 months was held to be fatal, and in *Gamble v. Tripp*, 99 Cal. 223, 227, 33 P. 851, the Supreme Court said that a delay of 4½ months, in the absence of some excuse shown therefor, was certainly not the prompt action required by the Code. From an examination of authorities, it would appear that 30 days is about the utmost length of time which the courts are disposed to allow to the purchaser for rescission, unless there are unusual circumstances in the case excusing longer delay."

In *Estrada v. Alvarez*, supra, 38 Cal.2d 386, at page 391, 240 P.2d 278, at page 281, it is said:

"'There have been many cases in which delays for much shorter periods than a year have been held to be fatal to the right to rescind.' (*Clanton v. Clanton* (1942), 52 Cal.App.2d 550, 556, 126 P.2d 639, and *King v. Los Angeles County Fair Ass'n* (1945), 70 Cal.App.2d 592, 596-597, 161 P.2d 468, which collect some of those cases; see also *Campbell v. Title Guarantee, etc., Co.* (1932), 121 Cal.App. 374, 377, 9 P.2d 264; *Schneider v. Henley* (1923), 61 Cal.App. 758, 763, 215 P. 1036; *Brown v. Domestic Utilities Mfg. Co.* (1916), 172 Cal. 733, 737, 159 P. 163; *Ferguson v. Edgar* (1918), 178 Cal. 17, 19, 171 P. 1061.)"

[3,4] Whether a party claiming to have been defrauded has rescinded promptly depends on the circumstances of the particular case and is a question primarily for the trial court. *French v. Freeman*, 191 Cal. 579, 589, 217 P. 515; *Noll v. Baida*, 202 Cal. 98, 105, 259 P. 433; *Esau v. Briggs*, 89 Cal.App.2d 427, 438, 201 P.2d 25. It is a question of fact. *Miller v. Eisenberg*, 90 Cal.App.2d 479, 482, 203 P.2d 11. The conclusion of the trial court will not be set aside by a reviewing court if it finds reasonable support in the evidence. *McCray v. Title Ins. & Trust Co.*, 12 Cal.App.2d 537, 538, 55 P.2d 1234.

[5] Viewing the evidence and the reasonable inferences that may be drawn therefrom in the light most favorable to defendants and disregarding conflicting evidence and inferences, it is manifest we cannot say, as a matter of law, that the

trial court's finding that the notice of rescission was not served promptly after plaintiffs discovered and had knowledge of all the true facts concerning the quarry and the profits thereof is without support in the evidence. A conclusion may be derived from the evidence that at least as early as February 1952 plaintiff had knowledge of all the facts with respect to the quarry and, if his testimony is to be believed, that he then knew the representations with respect to its productivity and profits were untrue. The trial court may even have fairly inferred that he learned all the facts as early as November 1951. Plaintiffs did not give notice of rescission until July 3, 1952. They did not act with reasonable diligence.

[6] As we have noted, the court found that plaintiffs did not sustain any damage. They contend the finding is without evidentiary support. The complaint alleged that the property plaintiffs exchanged for the quarry had a value of \$33,000; that the quarry was of no value to plaintiffs over and above the value of the movable personal property; that they sustained damages in the sum of \$33,000. Defendants answered these allegations thus: "defendants deny generally and specifically each and every allegation therein contained." Plaintiffs assert that the denial is a negative pregnant and constituted an admission of damage in the amount of \$32,999. The cause was tried on the theory that the denial was sufficient and that the question of damages was in issue. Assuming, without deciding, that the denial is a negative pregnant, the point was waived. (3 Cal.Jur.2d 618, § 149.)

[7] There was evidence that the property which was exchanged for the quarry had a value of about \$33,000 at the time of the exchange. On November 27, 1951 plaintiff listed the quarry and equipment with a real estate broker and granted him the right to sell it for \$60,000. At the time he gave the listing plaintiff stated to the broker "that he felt he did not have the proper management and that he was concerned about the way the operation was going on, the things that were happening at the quarry concerning his superintendent, Mr. Beach * * * that Mr. Beach,

he felt, was not doing a good job and that he was misusing the funds and taking advantage of his being absent, and that he did know that Mr. Beach was selling stone on the side, that he had received no money for, and just in general that he was pretty disgusted with the whole thing." In a letter to the broker dated November 29, 1951 plaintiff stated:

"My superintendent Mr. A. A. Beach informs me that he can easily quarry 150 tons per week of assorted flagstone and should by the first of the year, 1952, attain 200 tons weekly. From my observations with all the product being sold and desired by the Western States Stone Company, with proper supervision, which I am unable to do, owing to my other varied activities, the profit per average ton should be \$5.00."

A qualified expert testified that the value of the quarry alone was \$22,500. There was evidence that the value of cabins and equipment on the property was \$19,000. The finding that plaintiff sustained no damage is amply supported by the evidence.

Affirmed.

SHINN, P. J., and WOOD, J., concur.



Charles W. FOUST, Plaintiff and
Respondent,

v.

Ismay M. FOUST, Defendant and Appellant.*
Civ. 20848.

District Court of Appeal, Second District,
Division 2, California.

June 24, 1955.

Hearing Granted Aug. 17, 1955.

*Annulment proceeding, wherein plaintiff was awarded decree of annulment stating that property rights of parties were adjusted, settled and distributed as per terms and conditions of previously executed property settlement agreement, copy of which
* Opinion vacated 302 P.2d 11.

was attached to decree, and which was approved by court and embodied in and made part of judgment. Upon plaintiff's failure to make payments as provided by judgment, defendant procured issuance of writ of execution on the theory that property settlement had been merged in decree. The Superior Court, Los Angeles County, Philbrick McCoy, J., granted plaintiff's motion to quash writ, and defendant appealed. The District Court of Appeal, Moore, P. J., held that where terms of agreement, as well as all other available evidence, made it apparent that parties intended final adjudication, agreement so merged as to be competent authority for issuance of writ of execution on decree.

Reversed with instructions.

1. Judgment Ⓒ582

Merger is substitution of rights and duties under judgment for those under agreement of parties.

2. Marriage Ⓒ63

Where decree of annulment stated that property rights of parties were adjusted, settled and distributed as per terms and conditions of previously executed property settlement agreement, copy of which was attached to decree, and which was approved by court and embodied in and made part of judgment, and where terms of agreement, as well as all other available evidence, made it apparent that parties intended final adjudication, agreement so merged as to be competent authority for issuance of writ of execution on decree.

3. Courts Ⓒ89

A dissenting opinion or concurrence is not authority.

Richard A. Ibanez, Los Angeles, for appellant.

Herman Wildman, Los Angeles, for respondent.

MOORE, Presiding Justice.

The question here posed is whether a property settlement agreement, incorporated by reference into a decree, so merges as to be competent authority for the issuance of

a writ of execution on such decree. The inquiry arises from the order of the court below, here on appeal, which quashed an execution and restrained the sheriff from conducting a sale of plaintiff's property under and by virtue of such writ.

Plaintiff was awarded a decree of annulment on July 22, 1943. On the day preceding the decree, the parties executed a writing settling their property rights whereby it was provided that plaintiff should pay defendant \$50 a month for life or until her remarriage. The court by its decree referred to the agreement settling the property rights "and by this reference embodied in and made a part of this judgment" and attached a copy of the agreement. Subsequently, plaintiff failed to make the payments as provided by the judgment and became indebted to defendant in a sum in excess of \$2,400. Such delinquent sum was still unpaid on June 21, 1954, when defendant procured the issuance of the writ of execution on the theory that the property settlement had been merged in the decree.

After levy had been made by the sheriff on the property of plaintiff, the latter made a motion for the court to quash the writ, based upon his own affidavit. In that document, he averred that a copy of the property settlement "was attached and by reference embodied in and made part of the judgment." The court granted the motion, thereby holding that the property settlement did not merge in the judgment of annulment. Such order is contrary to the law of this state.

Plaintiff contends that the agreement for property settlement did not merge in the decree of July 22, 1943; that the decree merely referred to the property settlement and was not made a part of the decree and that the decree did not order performance of its provisions. In support of such thesis, plaintiff cites *Howarth v. Howarth*, 81 Cal.App. 2d 266, 183 P.2d 670; *Kent v. Superior Court*, 106 Cal.App.2d 593, 235 P.2d 420; *Plummer v. Superior Court*, 20 Cal.2d 158, 124 P.2d 5; *Price v. Price*, 85 Cal.App.2d 732, 194 P.2d 101; *Shogren v. Superior Court*, 93 Cal.App.2d 356, 209 P.2d 108; and 1 *Armstrong's California Family Law*, page 426. Each of such authorities has been

overruled in each respect as to which it is contrary to *Flynn v. Flynn*, 42 Cal.2d 55, 265 P.2d 865, 867.

[1] It is, by the *Flynn* decision, now the law that merger is the substitution of rights and duties under the judgment for those under the agreement of the parties; in any situation requiring a determination of the potency of the judgment to effect the provisions of the agreement, it is necessary to determine whether the parties intended a merger; in the absence from the judgment of an express order to perform the terms of the agreement, the intention of the parties and the court must be derived from such competent proofs as are available; "the necessity of referring to an extrinsic document presents no insuperable barrier to giving effect to the decree"; where it is difficult to determine from only the "permanent records of the court alone the intended character of the payments involved, courts do not hesitate to consider all of the admissible extrinsic evidence correctly to interpret their decrees."

The decree in the *Flynn* case reads in part as follows: "The property settlement agreement * * * is hereby specifically incorporated herein and made a part of this decree, and defendant is hereby ordered to make all of the payments provided * * *."

[2] The decree in the case at bar reads as follows: "It is *ordered* and adjudged—that the properties and property rights of plaintiff and defendant herein are adjusted, settled and distributed as per the terms and conditions of that certain agreement dated July 21, 1943, executed by plaintiff and defendant herein, a full and true copy of which agreement is on file herein attached—and which is hereby approved by the court and by this reference embodied in and made a part of this judgment." From a comparison of the two judgments, it is clear that there is no substantial difference in the language and intent of the two decrees. In both, the agreements were incorporated by reference; in each instance, the agreement was by reference made a part of the decree and it was adjudged that the property rights of the parties are adjusted and settled as per the terms of the agreement pre-

sented to the court. In view of such language, is it possible that either party or the court intended otherwise than to enter a final judgment of the rights of the parties under that document?

Also, from the terms of the agreement, it is apparent that a final adjudication was intended. While plaintiff took over \$18,000 and 80 shares of an Arizona corporation, the value of which was not determined, defendant received a six-year old automobile, two United States Bonds of the face value of \$1,025 and the household furniture. The only other asset to go to defendant in any degree to compensate her for the lion's share her husband had taken was the paltry sum of \$50 per month during her lifetime as a single woman. In view of such disparity in the amounts awarded by the agreement to the parties and of their stipulation that their contract should be made a part of the decree, it requires no *Mill* or *Spencer* to infer that the parties intended a final judgment to be entered settling for all time every conceivable claim of either party against the other. If they had had no such purpose, why should they agree to have their contract incorporated in the decree? Surely, by their stipulation, they did not mean that next year, or at any time, defendant should file suit to collect on her agreement. Such an interpretation would lead to absurd results. If a merger was not intended, then the language of the stipulation was meaningless and its presentation and filing were idle acts. If merger is a question of fact to be determined from the intention of the parties and the court, then the agreement of these parties merged; for from all the available evidence the parties intended to adjust all claims of either against the other and to perpetuate such adjustment by a judgment.

[3] Plaintiff attempts to support his position by the dissenting and concurring opinions in *Fox v. Fox*, 42 Cal.2d 49, 265 P.2d 881; *Dexter v. Dexter*, 42 Cal.2d 36, 265 P.2d 873; and *Flynn v. Flynn*, 42 Cal. 2d 55, 265 P.2d 865. Such argument fails of its purpose. However so eloquent or profound a dissenting opinion or a concurrence may be, it is not authority. *Grattan v. Wiggins*, 23 Cal. 16, 27; *Mix v. Ingersoll*

Candy Co., 6 Cal.2d 674, 679, 59 P.2d 144; Turney v. Collins, 48 Cal.App.2d 381, 388, 119 P.2d 954.

The judgment is reversed; the court below is instructed to enter an order dissolving the injunction issued to prevent a sale under the execution.

McCOMB and FOX, JJ., concur.



133 Cal.App.2d 769

Eugene DE FREITAS, Plaintiff and Respondent,

v.

Miriam DE FREITAS, Defendant and Appellant.
Civ. 20728.

District Court of Appeal, Second District,
Division 3, California.

June 22, 1955.

Husband's action for separation. Wife cross-complained for annulment. The Superior Court, Los Angeles County, Clyde C. Triplett, J., granted temporary custody of minor child of parties to husband. Wife appealed. The District Court of Appeal, Ashburn, J. pro tem., held that evidence sustained trial court's conclusion that welfare of child would be best served by permitting temporary custody to remain with its father, and trial court did not abuse its discretion.

Order affirmed.

1. Appeal and Error ⇨1078(5)

Where wife seeking annulment of marriage appealed from minute order and from whole of order setting temporary alimony and temporary custody of child, but brief on appeal attacked only portion of order awarding temporary custody of child to husband seeking separate maintenance, all other provisions of order were affirmed, under rule that claims of error not advanced in opening brief are waived.

2. Appeal and Error ⇨931(1), 946

Divorce ⇨296, 312.6(3, 5)

Husband and Wife ⇨299½

Statute setting up considerations for guide of courts in awarding custody of child in actions for divorce or separate maintenance confers a broad discretion on the court to do what is best for welfare of child, and court's determination will not be disturbed upon appeal in absence of manifest showing of abuse, and every presumption supports reasonableness of award. West's Ann.Civ.Code, § 138(1, 2).

3. Parent and Child ⇨2(3)

In a contest between parents concerning the custody of their minor child, neither is entitled to custody as a matter of right, and under statute setting up considerations for guidance of court, in awarding custody in divorce and separate maintenance actions, each is equally entitled to custody, and no showing or finding of unfitness is necessary to enable the court to award custody to one parent or the other in accordance with what, in its sound discretion, is deemed the best interest of the child. West's Ann.Civ.Code, § 138(1, 2).

4. Divorce ⇨296, 298(6)

Husband and Wife ⇨299½

Statute providing that, in actions for divorce or separate maintenance, as between parents adversely claiming custody of child, neither parent is entitled to it as of right, but, other things being equal, if child is of tender years it should be given to mother, does not give mother absolute right to custody of child of tender years, and qualifying clause, "but other things being equal" leaves large measure of discretion with trial court, and if court finds that other things are not equal and there is any evidence to support such finding, court does not abuse its discretion. West's Ann.Civ. Code, § 138(2).

5. Husband and Wife ⇨299½

Marriage ⇨64

In proceeding to determine temporary custody of child whose father was seeking separate maintenance and whose mother was seeking annulment, evidence justified court's ruling that welfare of child would be best subserved by permitting custody to

remain with father temporarily. West's Ann.Civ.Code, § 138(2).

6. Appeal and Error ⇐1010(1)

It is not province of reviewing court to present a detailed argument on sufficiency of evidence to support findings where it appears that question is one purely of determining which side shall be believed.

7. Courts ⇐104

Where an appellant has failed to show that the trial court was wrong, it is not incumbent upon a reviewing court to engage in a dissertation upon the law for the purpose of demonstrating that the court was right.

S. S. Schwartz, Huntington Park, for appellant.

Westrum & Harvey, Maywood, for respondent.

ASHBURN, Justice pro tem.

Plaintiff husband brought this action praying (1) for a decree that, because of defendant wife's cruelty, he "may live separate and apart from the defendant" and (2) for exclusive custody of the child of the marriage, alleged to be then in his custody. The wife, in addition to answering, filed a cross-complaint for annulment on grounds of her non-age and plaintiff's fraudulent inducement of the marriage. She alleged the child to be in the joint custody of the parties and prayed that custody be awarded to her. The child was in fact in the custody of the plaintiff. Each party obtained an order requiring the other to show cause why the custody of the child should not be awarded, "during the pendency of this action" to the moving party. The wife also sought attorney fees, court costs and support for herself and the child during the pendency of the action. The orders were heard together, and after a somewhat elaborate trial of the issue, temporary custody was awarded to plaintiff by minute order of May 21, 1954, reading as follows: "Heretofore submitted on May 14, 1954, the court now renders its decision and order as follows: Temporary custody of the minor child is given to plain-

tiff subject to right of reasonable visitation of defendant. Plaintiff and defendant are ordered restrained from removing the minor child from Los Angeles County, California, without the written permission and consent of both parties or order of court first obtained. Plaintiff is ordered to pay to the defendant for her support and maintenance and as alimony the sum of \$5.00 per week payable on Saturday of each week beginning May 22, 1954, such payment to discontinue if defendant removes from Los Angeles County. * * *" This was followed by written findings and conclusions of law on July 12, 1954, but there was no formal order signed by the judge.

The child is a girl, two years of age. And the court found that "both parties are fit persons to have the custody and control of the minor child," but that "the best interests of the minor child demand that the plaintiff have custody and control of the minor child subject to the right of reasonable visitation reserved to the defendant."

[1] Defendant appealed from the minute order "and from the whole of said order." But her brief on appeal attacks only that portion of the order which awards temporary custody of the child to plaintiff. As to all other provisions of the order it must be affirmed pursuant to the settled rule that claims of error not advanced in the opening brief are waived. *Title Guarantee & Trust Co. v. Fraternal Finance Co.*, 220 Cal. 362, 363, 30 P.2d 515; *David v. Goodman*, 89 Cal.App.2d 162, 170, 200 P.2d 568; 4 Cal.Jur.2d § 480, p. 310.

[2-4] Section 138, Civil Code, contains these pertinent provisions:

"In awarding the custody the court is to be guided by the following considerations:

"(1) By what appears to be for the best interests of the child; and if the child is of a sufficient age to form an intelligent preference, the court may consider that preference in determining the question;

"(2) As between parents adversely claiming the custody neither parent is entitled to it as of right; but other

things being equal, if the child is of tender years, custody should be given to the mother; if the child is of an age to require education and preparation for labor or business, then custody should be given to the father."

This section confers a broad discretion on the court to do what is best for the welfare of the child. And the appeal presents only the question whether that discretion was abused in the instant case. "In a divorce proceeding involving the custody of a minor, primary consideration must be given to the welfare of the child. The court is given a wide discretion in such matters, and its determination will not be disturbed upon appeal in the absence of a manifest showing of abuse. *Gantner v. Gantner*, 39 Cal.2d 272, 275, 246 P.2d 923; *Taber v. Taber*, 209 Cal. 755, 757, 290 P. 36. 'Every presumption supports the reasonableness of a decree.' *Runsvold v. Runsvold*, 61 Cal.App.2d 731, 733, 143 P.2d 746." *Gudelj v. Gudelj*, 41 Cal.2d 202, 208, 259 P.2d 656, 660. "In a contest between parents concerning the custody of their minor child neither is entitled to custody as a matter of right. Under the statute, Civ. Code, § 138(2), each is equally entitled to custody and no showing or finding of unfitness is necessary to enable the court to award custody to one or the other in accordance with what, in its sound discretion, is deemed the best interests of the child. *Munson v. Munson*, 27 Cal.2d 659, 666, 166 P.2d 268; *Stever v. Stever*, supra, 6 Cal.2d 166, 169, 56 P.2d 1229; *Beal v. Beal*, 218 Cal. 755, 758, 24 P.2d 768." *Davis v. Davis*, 41 Cal.2d 563, 565, 261 P.2d 729, 730. "An abuse of discretion must be clearly established before the reviewing court will interfere with an award of custody. *Wolfe v. Wolfe*, 30 Cal.2d 1, 5, 180 P.2d 345; *Munson v. Munson*, 27 Cal.2d 659, 666, 166 P.2d 268; *Prouty v. Prouty*, 16 Cal.2d 190, 191, 105 P.2d 295. The trial court is given a wide latitude of discretion in determining whether other things are equal within the meaning of the Code section. *Taber v. Taber*, 209 Cal. 755, 756, 290 P. 36. It is the welfare of the child and not the shortcomings of the respective parties which is de-

terminative." *Clarke v. Clarke*, 35 Cal.2d 259, 261, 262, 217 P.2d 401, 402. "This section (Civ.Code, sec. 138, subd. 2) does not give the mother the *absolute right* to the custody of a child of tender years. The qualifying clause, "But other things being equal", still leaves a large measure of discretion with the trial court. If the court finds that other things are *not* equal, as it evidently did here, and there is any substantial evidence to support such a finding, our inquiry is at an end." *Scott v. Barnes*, 118 Cal.App.2d 271, 275, 257 P.2d 700, 703.

[5] We deem it unnecessary to detail or review the evidence justifying the court's ruling at bar; it fully sustains the conclusion that the welfare of the child will be best subserved by permitting the custody to remain with the father, at least temporarily. The trial judge expressed real concern over the proper order to be made by him, accorded both sides a full hearing and exercised a discretion which cannot upon this record be termed an unsound one,—certainly he did not abuse his discretion.

Cases arising upon application for modification of an existing custody order are not controlling here; we deal with one awarding temporary custody prior to trial. The cited cases of *Juri v. Juri*, 69 Cal.App. 2d 773, 160 P.2d 73; *Washburn v. Washburn*, 49 Cal.App.2d 581, 122 P.2d 96, have to do with motions for modification.

[6, 7] We reiterate what this court said in *Sonkin v. Hershon*, 130 Cal.App.2d 491, 279 P.2d 156, 157: "It is not the province of a reviewing court to present a detailed argument on the sufficiency of the evidence to support the findings where it appears that the question is one purely of determining which side shall be believed. The trial court having determined this with the witnesses before it, the controversy is settled. *Gillespie v. Gillespie*, 121 Cal.App. 2d 95, 97, 262 P.2d 607." And in *Re Estate of Phelps*, 132 Cal.App.2d 850, 283 P.2d 293, 295: "Where an appellant has failed to show that the trial court was wrong it is not incumbent upon a reviewing court to engage in a dissertation upon the law

for the purpose of demonstrating that the court was right."

The order is affirmed.

PARKER WOOD, Acting P. J., and
VALLÉE, J., concur.

Court of Appeal on application for bail after denial by trial court, petitioner's application would be denied and petitioner granted leave to renew application in trial court based on subsequent affidavits. West's Ann. Rule on Appeal, rule 32(b).



134 Cal.App.2d 58

In the Matter of the Application of Leslie
C. GILLEN, On Behalf of Mabel MA-
LOTTE, For Bail On Appeal.

Cr. 3146.

District Court of Appeal, First District,
Division 1, California.

June 24, 1955.

Proceeding on application to District Court of Appeal for bail pending appeal after denial of application by trial court. The District Court of Appeal, Peters, P. J., held that where trial court was justified in its denial of bail on showing before it, and where the only affidavits that would support granting of bill were those filed in District Court of Appeal on application for bail, application would be denied and petitioner granted leave to renew application in trial court based on subsequent affidavits.

Application denied with permission granted to renew application for bail in trial court.

1. Bail ⇨46

Under rule permitting convicted person to seek bail from appellate court after denial of bail by trial court, appellate court can grant bail only if appellate court finds denial by trial court was unjustified. West's Ann. Rules on Appeal, rule 32(b).

2. Bail ⇨49

Where trial court was justified in its denial of bail on showing before it, and where the only affidavits that would support granting of bail were those filed in District

Leslie C. Gillen, John R. Golden, San Francisco, for petitioner.

Edmund G. Brown, Atty. Gen., of the State of California, Clarence A. Linn, Chief Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty., City and County of San Francisco, Norman Elkington, Asst. Dist. Atty., San Francisco, for respondent.

PETERS, Presiding Justice.

This is an application for bail pending appeal under Rule 32(b) after the trial court denied the application. After the filing of the application in this court the applicant was permitted to file additional affidavits relative to her present health and physical condition. The District Attorney and Attorney General were also permitted to file counter-affidavits.

[1, 2] When a convicted person seeks bail from an appellate court under Rule 32 (b) the appellate court can grant bail after a denial by the lower court only if the appellate court finds that the denial by the lower court was unjustified. Since on the showing made in the lower court the denial of bail was not "unjustified," and since the only affidavits that would support the granting of bail are those filed in this court, it would seem that in such circumstances the present application should be denied and the petitioner granted leave to renew the application in the trial court based on the subsequent affidavits. *People v. Perdue*, 48 Cal. 552; *Ex parte Curtis*, 92 Cal. 188, 28 P. 223.

The application is denied with permission granted to petitioner to renew the application for bail in the trial court based upon the affidavits filed in this court and any other relevant evidence available.

BRAY and FRED B. WOOD, JJ., concur.

134 Cal.App.2d Supp. 877

A. C. RYLEE and M. W. Cogburn, etc.,
Plaintiffs and Respondents,

v.

Nickolas DE FINI, et ux., Defendants and
Appellants.

C. A. 8581.

Appellate Department, Superior Court,
 Los Angeles County, California.

June 15, 1955.

Action by real estate brokers against owner of realty for commission alleged due from owner for finding purchaser of realty. The Municipal Court of Los Cerritos Judicial District, entered judgment for brokers, and realty owner appealed. The Appellate Department of the Superior Court, County of Los Angeles, Bishop, Acting P. J., held that where brokers were given exclusive agency to sell owner's property at \$14,500 on terms of \$4,500 cash and \$10,000 at \$100 per month including interest at 6%, but agreement buyer had signed reserved to him right to pay off mortgage all at once or make payments of more than \$100 a month, brokers failed to procure purchaser on terms specified in listing contract and were not entitled to commission.

Judgment reversed.

Swain, J., dissented.

1. Appeal and Error ⇨840(1)

In action by brokers against landowner for commission alleged due for finding purchaser for land wherein facts were set forth in second cause of action of amended complaint, the reviewing court was required to disregard first cause of action in which same facts were pleaded as common count.

2. Trial ⇨404(1)

Where finding of trial court referred specifically to one particular contract marked in evidence, finding could not be interpreted as referring to different contract.

3. Brokers ⇨86(5)

In action by brokers against landowner for commission alleged due for finding purchaser for land, finding that buyer brokers had produced had been ready, willing and

able to purchase said property on terms and under conditions of their listing contract was not supported by evidence.

4. Brokers ⇨49(3)

Where brokers were given exclusive agency to sell property at \$14,500 on terms of \$4,500 cash and \$10,000 at \$100 per month including interest at 6 per cent, but agreement prospective purchaser had signed reserved to purchaser right to pay off mortgage all at once or make payment of more than \$100 per month, brokers failed to procure purchaser on terms specified in listing contract and were not entitled to commission.

5. Brokers ⇨49(3)

Where real estate broker procured purchaser for realty who agreed to pay \$4,500 down and \$10,000 trust deed all at once or more than at \$100 per month, and listing contract provided for \$4,500 down payment and \$10,000 trust deed to be paid at \$100 per month, the variance must be objected to by owner when terms of purchase are brought to him if, when sued for commission, owner desires to defend on variance.

6. Brokers ⇨88(14)

In action by brokers against landowner for commission, trial court's finding that brokers had procured purchaser ready, willing and able to sign upon landowner's terms was not equivalent of finding to effect that landowner waived or was estopped to assert that there was material variance between terms purchaser agreed to and those broker was authorized to obtain.

Max Z. Wisot & Ted Sullivan, Long Beach, for appellants.

Vincent S. Dalsimer, Bellflower, for respondents.

BISHOP, Acting Presiding Judge.

The plaintiffs are faced with a dilemma, as they defend their judgment of \$725: if the issues are restricted to the two framed as a result of a pretrial conference, the vital one of those issues must be resolved against them; and if the issues are as broad as the findings, then the evidence fails to support an essential finding.

[1] The action is one for a broker's commission. As the facts are set forth in the second cause of action of the amended complaint, we must disregard the first cause of action, in which they are pleaded as a common count. *Orloff v. Metropolitan Trust Co.*, 1941, 17 Cal.2d 484, 489, 110 P.2d 396; *Neal v. Bank of America*, 1949, 93 Cal.App.2d 678, 681, 209 P.2d 825; *Maselli v. E. H. Appleby & Co., Inc.*, 1953, 117 Cal.App.2d 634, 637, 256 P.2d 618. We have, then, an action based upon the theory that the plaintiffs, armed with an exclusive listing, had secured a buyer ready, willing and able to buy according to the terms of the listing. As indicated by the documents attached to the amended complaint, the terms authorized by the defendants were: price \$14,500, to be paid as follows: \$4,500 cash, seller to carry \$10,000 at \$100 a month, including interest at 6%. The prospective buyers signed a written offer, whose terms we shall examine in a moment.

We have no report of the discussion that took place in the pretrial conference, but as the actual trial commenced "the two main issues to be reached in the present trial" were stipulated to be: first, did the plaintiffs on or about November 11 produce to the defendants "a binding contract of sale" in accordance with the terms of the exclusive listing, signed by a buyer ready, willing and able to buy defendants' property; and, second, something indefinite, about a down payment of \$500 which proves to be of no concern to us. The trial court found, in one of its Findings of Fact, that the plaintiffs did procure from the buyer "a binding and enforceable written purchase contract (Exhibit 'B' of Complaint) * * and that the terms of said contract of purchase complied with the terms and conditions" of the listing agreement. Unfortunately, for the judgment, the facts are not in accord with this finding; the issue should have been resolved against the plaintiffs.

The written offer, signed by the prospective purchasers, was never accepted by the defendants, and at no time merited being characterized as a binding contract. However, there is precedent for this unhappy

terminology; (for two examples see *Barnes v. Osgood*, 1930, 103 Cal.App. 730, 734; 284 P. 975; *Twogood v. Monnette*, 1923, 191 Cal. 103, 107; 215 P. 542, and our conclusion that the finding is contrary to the fact is not a matter of semantics. The price in the listing agreement and the offer were the same: \$14,500. In its early passages the offer recited that \$500 had been paid as a deposit (the evidence was to the contrary), and that the balance of the \$14,500 was to be placed in escrow within 30 days, as follows: \$4,500 cash (inclusive of the \$500) "balance and terms as follows: Buyer agrees to pay \$145.00 & \$45.00 down. (sic) Seller to carry 1st trust deed of \$10,000. Payable @ \$100.00 or more per mo. including interest at 6%. Rylee & Cogburn to get loan on 15123 Cabell for Down payment." We can only interpret the reference to "Rylee & Cogburn to get loan on 15123 Cabell for Down payment" as a condition, which if not met, would release the prospective purchasers from the deal. If so, this was no "binding contract," but a conditional offer.

[2] Escrow instructions, signed by the prospective purchasers, were received in evidence. These, however, may not be made use of to support the finding that we have been considering. A copy of the "written contract" on which plaintiff relies was attached to the amended complaint as "Exhibit B", and the finding that plaintiff procured "a binding and enforceable written purchase contract" specifically refers to that Exhibit B. The finding may not be interpreted as referring to a different contract.

[3] It may be that there was no intention of limiting the issues to the two referred to, and as finding III is broader in scope we assume there was no such intention. Finding III—that plaintiff did "produce a buyer ready, willing and able to purchase said property on the terms and under the conditions of said [listing] contract"—however, is not supported by the evidence, whether the offer made by the buyers is found in this deposit receipt or in the escrow instructions. The matter we are about to discuss is a further reason for the conclusion already reached, that on the first

issue framed at the pretrial hearing, the evidence fails to support the finding that was made.

The listing agreement, down in its "contract" provisions, set the price at which the plaintiff was authorized to procure a buyer, at \$14,500, upon these terms already noted: "Forty Five Hundred Dollars (\$4500) cash, balance as follows: Seller to Car \$10,000 at \$100. mo. including interest at 6%. Seller Will Consider Sec. T.D.—Buyer to get Top Loan." Up above the "Contract", on this listing agreement under the heading "Remarks: Exchange, Encumbrance, Financing", we find: "Seller will Carry—Submit all Cash offers." We interpret the "Seller to Car" \$10,000 at \$100 mo., down in the "contract", as meaning that in addition to the \$4500 to be paid as cash, the seller is to receive \$100 a month until \$10,000 and interest at 6% have been paid. (Unless it means this—it is too uncertain to be valid.) By such an arrangement the seller would have a secured investment, paying 6% interest on a sum varying from \$10,000 down to less than \$100 over a long period. Looked at another way, the seller would have a secured income of \$100 per month spread over a period in excess of twelve years.

[4-6] The offer brought to the defendants by the broker, whether we take the deposit receipt or the escrow instructions, was not "on the terms and under the conditions of said contract" to quote from finding III, for in both those writings the prospective buyer retained the right to pay off the whole \$10,000 at any time, or to pay greater sums than \$100 in any month. The variance between the terms upon which the broker was authorized to "sell" defendants' property and the terms of either "binding agreement" to buy it is not unsubstantial. See *Andrews v. Waldo*, 1928, 205 Cal. 764, 769, 272 P. 1052. It is the sort of a variance, no doubt, that must be objected to by the owner, when the terms of the purchase are brought to him, so that the broker may have the variance eliminated, if the purchaser can be persuaded to accept the owners' terms. *Lathrop v. Gauger*, 1954, 127 Cal.App.2d 754, 767, 274 P.2d 730, 738, and cases cited. The *Lathrop* case notes

an exception to the rule to which it refers: "a failure to timely specify a particular ground of objection does not preclude the assertion of such ground as a defense if the seller, through no fault of his own, was not aware of the facts giving rise to the grounds of objection." The case of *Gulart v. Azevedo*, 1923, 62 Cal.App. 108, 216 P. 405, 408, is given as an authority recognizing the exception just referred to, and there we find this passage: "Respondent contends that, by refusing to convey the property on the sole ground that his wife would not sign the quitclaim deed sent to him for execution, the defendant waived all other objections that he had an opportunity to make at that time. The simple answer is that defendant did not then have the opportunity to make the objections here relied on, because of plaintiff's incorrect statement that the land had been sold in accordance with the terms of the listing contract. Had that statement been true, the defendant could have made no objection which would have been a defense to this action." The evidence in this case would have warranted a finding that plaintiffs represented that they had a purchaser signed up on defendants' terms, and, that neither the deposit receipt nor the escrow instructions were shown to the defendants. There was no finding on this phase of the case. A finding that a purchaser was secured on defendants' terms is not the equivalent of a finding, the effect of which is that defendants waived, or are estopped to assert, that there was a material variance between the terms agreed to by the purchasers and those the broker was authorized to obtain. An excuse for non-performance is not the same as performance. *Krotzer v. Clark*, 1918, 178 Cal. 736, 739, 174 P. 657; *Downs v. Atkinson*, 1929, 207 Cal. 259, 261, 277 P. 723.

The judgment is reversed.

PATROSSO, J., concurs.

SWAIN, Judge.

I dissent. The purchasers signed not only the offer which contained the provision "Rylee and Cogburn to get loan on 15123 Cabell for down payment" but also signed

escrow instructions (No. 11279), dated November 4, 1953 in which they agreed to purchase the property on the terms set out in the listing agreement no mention being made as to Rylee and Cogburn getting a loan. In addition to that, a loan escrow was opened (see plaintiff's Ex. F) into which the lender deposited \$4,500 with instructions "When escrow closed transfer net proceeds to escrow No. 11279". The defendants and Mrs. De Fini's attorney were informed of this prior to November 11, 1953. It is true that the loan escrow was not opened until November 17, 1953, but the escrows support the finding that on or about the 3rd day of November, 1953, "plaintiffs had produced * * * a buyer ready, willing, and able to purchase said property on the terms and under the conditions required in said contract."

The reason which Mr. De Fini gave for not signing the escrow instructions was that he would not sign until his wife signed. Mrs. De Fini refused to sign until the full down payment was deposited in escrow. Neither reason is a defense. Plaintiffs were required to obtain a qualified purchaser before the listing expired but this does not mean the sale had to be completed by that date. The purchaser had a reasonable time thereafter to complete the sale; this included putting the balance of the down payment into the escrow. *Laack v. Dimmick*, 1928, 95 Cal.App. 456, 470-471, 273 P. 50, 55, holds, "It is the contention of defendants that 'under the circumstances of the instant case it is apparent that the purchaser must not only be ready at the time of his announced desire to purchase, but continue to be able to respond as and when the seller presents his deed and certi-

ficate of title.' * * * The purchaser must be able to buy; and the word 'able' means financially able. This does not mean, however, that such purchaser must have all the money in his immediate possession or to his credit at a bank, but only that he must be able to command the necessary funds to close the deal within the time required. Even where the purchaser was not personally able to buy, it was said that 'it is sufficient if (he) has arranged so that these funds will be available for payment when the time comes to close the transaction, although part of it be obtained on the purchase property itself.' *Pellaton v. Brunski*, 69 Cal.App. 301, 231 P. 583. It is much more clearly sufficient if the purchaser has assets of greater value than the purchase price and a financial rating which will enable him to command the funds when needed. For in such event the purchaser is not only able to purchase, but is able to respond in damages if he refuse to go ahead with the contract. Furthermore, the contract of sale provided that the balance of the purchase price was payable 'within * * * days' from date upon the execution and delivery of a deed and a guaranty certificate of title showing title in the owner. Where a contract for the sale of realty does not fix the time for final payment, a reasonable time is allowed. *McGibbon v. Schmidt*, 172 Cal. 70, 75, 155 P. 460. Or, to state it in other words, the rule that a purchaser must be ready willing, and able means, where no time is fixed in the contract, that he must be ready, willing, and able to carry out the purchase within a reasonable time. *Bunyard v. Farman*, 176 Mo.App. 89, 161 S.W. 640."

I would affirm the judgment.

44 Cal.2d 706

**Norman O. HOUGE, Plaintiff and
Respondent,**

v.

**Patrick H. FORD, Helen Smith, Individual-
ly and as Trustee of the Estate of Carl
Hugo Johanson, deceased, Defendants.**

**Patrick H. Ford, Appellant.
L. A. 23250.**

**Supreme Court of California.
In Bank.**

June 24, 1955.

Rehearing Denied July 20, 1955.

Action by former client against attorney for declaratory judgment as to former client's rights under contingent fee contract.—The Superior Court, Los Angeles County, Philbrick McCoy, J., gave judgment for client. Attorney appealed. The Supreme Court, Spence, J., held that where contract provided that attorney was to take necessary legal steps to protect or collect legacy of client, parties intended that if legacy could not be protected, attorney would attempt to collect a cash settlement for client's claim, and when final decree of distribution in estate established all of client's claims, attorney had fully performed all that was required of him under contract.

Judgment reversed with directions.
Opinion, 277 P.2d 27, vacated.

1. Attorney and Client ⇨148(1)

Contingent fee contract between attorney and client, when explained by reference to circumstances under which it was made and matter to which it relates, left no doubt as to its meaning, and statute providing that any possible doubts as to meaning of contract should be resolved against person preparing it was not applicable. West's Ann. Civ.Code, §§ 1647, 1654.

2. Attorney and Client ⇨149

In contingent fee contract between legatee and attorney providing that attorney would take necessary legal steps to protect or collect legacy of client, words "protect or collect" were used with reference to two alternative possibilities, that attorney would

seek to protect the legacy, or collect a settlement in cash for client's claim, and upon final decree of distribution in estate granting client's claim, attorney had fully performed under contract, and was not required to bring accounting action against trustee under will.

See publication Words and Phrases, for other judicial constructions and definitions of "Protect or Collect".

**3. Contracts ⇨159
Statutes ⇨197**

The word "or" should be construed as meaning "and" only when such construction is found necessary to carry out the obvious intent of the legislature in a statute or the obvious intent of parties in a contract, when such intent may be gleaned from the context in which the word is used. West's Ann.Civ.Code, § 1644.

See publication Words and Phrases, for other judicial constructions and definitions of "Or".

4. Contracts ⇨159

In its ordinary sense, the function of the word "or" in a contract is to mark an alternative such as "either this or that".

5. Contracts ⇨147(1), 169

The object and meaning of a parties' contract must be determined by their intent at the time of its execution and cannot be extended beyond its plain import by circumstances which occurred after its execution and which were not within parties' contemplation at time of execution.

Patrick H. Ford, Los Angeles, in pro-
per., Macbeth & Ford and Moira D. Ford,
Los Angeles, for appellant.

Harry A. Daugherty and Lyman A. Gar-
ber, Beverly Hills, for respondent.

SPENCE, Justice.

Defendant Ford, an attorney, appeals from an adverse judgment in a declaratory relief action brought by plaintiff, his former client, for the purpose of settling controverted claims relative to a contingent fee contract, which was followed by an assignment. The trial court construed the original contract in line with plaintiff's conten-

tion that defendant had failed to complete the agreed legal services; and upon that basis, it concluded that the contract and the assignment were of no further force and effect. Defendant maintains that the court erred in its construction of the parties' contract, and in its adjudication that the above-mentioned instruments were of no further force and effect. The record supports defendant's position.

Carl Hugo Johanson died in 1939. The residue of his estate—consisting primarily of stock in the Panama Glove Company, a corporation, and certain patents and contracts relating thereto—was bequeathed in trust to his widow, his attorney Oscar Houge, and his "faithful employee" Helen Smith. The will directed the trustees to keep the income from the securities and the income "from patents and [related] contracts" in separate accounts. The income from the securities was to be paid 50% to the testator's widow, 35% to Miss Smith, and 15% to one Weber, another employee, "as long as he continued to work for the Glove Company." The patent income was to be paid 50% to the testator's widow, 20% to Miss Smith, 5% to Weber, and 25% to the attorney Oscar Houge. Upon the death of the testator's widow, two-thirds of such portion of the income which she was entitled to receive under the trust was to be paid to the remaining beneficiaries in certain proportions.

The trust was to terminate on the death of both the testator's widow and Miss Smith. At that time the corpus was to be distributed, with one-third going to the testator's church. As to the remaining two-thirds of the corpus, the will provided for distribution as follows: To Oscar Houge during his lifetime an undivided 25% in all the patents and contracts relating thereto in the trust estate; but if at the time of distribution of the trust estate, he should not be living, then said 25% should go to "his son, Norman O. Houge (plaintiff herein), provided he is still engaged in devoting his time to the successful operation of the promotion of the sale and operation of the machinery and equipment and methods described in said patents"; and as to "all the

tate not specifically heretofore distributed," 21% was to go to a named beneficiary and "the rest * * * to Norman O. Houge provided he is still engaged in working for the businesses of the trust estate and promoting its best interests."

Plaintiff anticipated that he would be called into military service, and he voluntarily quit his employment in the trust's business. Then fearing that he might not secure re-employment there, plaintiff discussed with defendant the effect of such absence from the business on his interests under the will and the possibility of a forfeiture because of his failure to meet the employment condition. Defendant advised plaintiff that it would probably be necessary to take legal action to protect plaintiff's interest in the trust estate. Accordingly, the parties on February 6, 1941, entered into the following "attorney and client" contract: "The undersigned client (plaintiff) hereby employs the undersigned attorney (defendant) to render legal service in connection with the following matter, to wit: Drawing contracts and taking other necessary legal steps to protect or collect legacy of client under estate of Carl Hugo Johanson now pending in L.A. Superior Court. As consideration the client agrees to pay said attorney a fee as follows: * * * Contingent: Forty (40) percent of the amount recovered, preserved or protected by the legal services rendered. * * * Attorney is vested with authority to compromise and settle this matter, in his discretion, except that no settlement shall be made for less than \$10,000.00."

On February 18, 1941, nine days after the above contract was signed, the testator's widow, Mrs. Johanson, died. In March, 1941, plaintiff was drafted into the Army. Upon his discharge, he was refused further employment in the trust's business. In October, 1944, plaintiff's father, Oscar Houge, died. Oscar Houge had been the executor of the Johanson will, as well as a trustee and a life-income beneficiary of the trust estate. In 1946, the subsequently appointed administrator with the will annexed submitted a final account and petition for distribution in the Johanson estate, wherein attempt was made to eliminate plaintiff

from taking any distributive share therein because of his failure to meet the condition of continuous employment in the trust's business. On plaintiff's behalf, defendant filed objections, and the issue of plaintiff's alleged forfeiture of his legacy went to a contested trial in 1947. While the trial court indicated from the bench an unfavorable ruling on plaintiff's claim, defendant was able ultimately to obtain a decision in plaintiff's favor upon the signing of the findings and conclusions.

The decree of distribution in the Johanson estate was entered in 1948, vesting plaintiff's interest in the trust free of the employment condition and giving plaintiff a twofold status: (1) as an income beneficiary of the trust; and (2) as a remainderman of the corpus of the trust, upon its termination. The Johanson will had not given plaintiff a share in the trust income, but apparently his claim thereto was successfully advanced by defendant following the death of Mrs. Johanson and Oscar Houge, two of the life-income beneficiaries, with plaintiff succeeding to the share of his deceased father as such income beneficiary. An appeal was taken from the 1948 decree by Helen Smith, the surviving trustee, and then dismissed. Thus in early 1950 the decree, establishing plaintiff's distributive rights in both the income and corpus of the trust estate, became final—nine years after the execution of the 1941 contract by plaintiff and defendant. The trust was then to continue, but to terminate upon the death of Helen Smith, the sole surviving trustee. On March 6, 1950, a stipulation leading to the closing of the Johanson estate was signed.

On this same last-mentioned date—March 6, 1950—plaintiff, at defendant's request, executed the following assignment: "For Value Received, pursuant to written contract dated February 6, 1941, the undersigned, Norman O. Houge, hereby assigns, sets over, and transfers to Patrick H. Ford, forty (40) percent of his right, title, and interest in and to the corpus and beneficial right in the trust created by the Will of Carl Johanson (L.A. Superior Court, Probate No. 191032) of which Helen Smith is now the trustee." By virtue of this assignment, de-

fendant has received to date approximately \$1,000.

Sometime in 1951 plaintiff became dissatisfied with the sums distributed to him out of the patent income, and he attempted to persuade defendant to take some legal action to compel the trustee to increase the amount of income distributed to the beneficiaries of the trust. In particular, plaintiff assailed the trustee's failure to cause the Glove Company, which was controlled by the trust, to declare dividends, which, if issued, would have come into the trust estate. Accordingly, plaintiff urged defendant to seek an accounting from the trustee and, if necessary, to petition for her removal. Defendant advised against such action, contending that it would be unwise in that it would seriously diminish the small income then being produced by the trust if the trustee used trust income to defend herself. Ultimately, in November, 1952, in discussing the matter with defendant, plaintiff cited their contractual arrangement and insisted that defendant was thereby obligated to initiate such further legal proceedings as plaintiff desired. Defendant, on the other hand, maintained that plaintiff's legacy was fully vested by the final decree of distribution, that their 1941 contract was thereby completely performed, and that he was under no further obligation to plaintiff. Plaintiff then brought this action for declaratory relief.

The principal point in controversy is the proper construction to be placed on the parties' contract for the purpose of determining their rights and obligations. Defendant contends that his services under the contract ended when the decree for distribution had become final and the Johanson estate had been distributed to the trustee; that the contingent fee arrangement entitled him to forty per cent of everything plaintiff received by virtue of that final decree; and that the assignment merely confirmed the proportionate division of plaintiff's share in the trust estate, whether income or corpus. On the other hand, plaintiff contends that the contract imposed upon defendant a continuing duty, obligating him not only to exert every effort to secure a favorable decree of distribution,

but also to take such further action during the entire existence of the trust as might appear necessary to plaintiff to obtain both income and corpus; and that the latter obligation would require defendant to institute legal proceedings based upon alleged illegal acts of the trustee, and for the purpose of obtaining further distribution of income.

[1] Plaintiff relies upon section 1654 of the Civil Code, and contends that as defendant prepared the contract, any possible doubt as to its meaning should be resolved against defendant. That section, however, applies by its terms only "In cases of uncertainty not removed by the preceding rules * * *" (see 12 Cal.Jur.2d § 149, p. 363, and cases cited); and in our opinion, the plain wording of the contract, when "explained by reference to the circumstances under which it was made, and the matter to which it relates", Civ.Code, § 1647, leaves no doubt as to its meaning.

[2-4] It will be recalled that defendant was employed by plaintiff to "protect or collect" plaintiff's legacy "under estate of Carl Hugo Johanson." Plaintiff's right to any legacy was doubtful because the terms of the Johanson will made such legacy contingent on plaintiff's continuous employment in the trust business, and plaintiff had already discontinued such employment with a view to entering the military service. Plaintiff obviously had in mind a possible settlement in cash, as he authorized defendant to settle for not less than \$10,000. Under these circumstances, it is entirely clear that the parties had in mind that defendant's services might result either in (1) the possible protection of plaintiff's legacy by establishing his right thereto, free from the condition of continuous employment, in the final decree of distribution in the Johanson estate; or (2) the possible settlement in cash of his disputed claim; and that defendant's obligation to render legal services under the contract would be terminated at such time as he might accomplish either objective as set forth in the contract. Thus, the words "protect *or* collect" were obviously used advisedly and with reference to the two alternative possibilities; and there is no reason here for construing the word "or"

in any way other than in its "ordinary and popular sense." Civ.Code, § 1644. The cases cited by plaintiff to sustain his claim that the word "or" should be construed here as meaning "and" do not sustain his position. Resort to such unnatural construction of the word "or" is sanctioned only when such construction is found necessary to carry out the obvious intent of the legislature in a statute or the obvious intent of the parties in a contract, when such intent may be gleaned from the context in which the word is used. *Arnold v. Hopkins*, 203 Cal. 553, 563, 265 P. 223; *Heidlebaugh v. Miller*, 126 Cal.App.2d 35, 38, 271 P.2d 557. In its ordinary sense, the function of the word "or" is to mark an alternative such as "'either this or that'", *Barker Bros., Inc., v. City of Los Angeles*, 10 Cal.2d 603, 606, 76 P.2d 97, 99; *People v. Smith*, 44 Cal.2d 77, 279 P.2d 33; and such was the plain meaning of the word "or" as used by the parties here in the phrase "protect *or* collect."

It should be further recalled that at the time the 1941 contract was made, neither plaintiff nor defendant contemplated the possibility of the receipt by plaintiff of any income from the trust during the life of the trust. The Johanson will did not make plaintiff an income beneficiary, and plaintiff's whole concern was directed at the establishment of his right to a share of the corpus at the termination of the trust, which right was made contingent by the will upon plaintiff's continuous employment in the trust business. It was only after the deaths of Mrs. Johanson and of plaintiff's father, who were two of the trustees and life income beneficiaries, that defendant succeeded in establishing not only plaintiff's claim to a share of the corpus at the termination of the trust, but, in addition, plaintiff's right to participate in the income of the trust during the life thereof by reason of the intervening death of plaintiff's father. And as plaintiff testified, it was only after the 1947 trial and following defendant's explanation, that plaintiff became aware that he might have a right to participate in the income during the life of the trust.

[5] The object and meaning of the parties' contract must be determined by their

intent at the time of its execution, and it cannot be extended beyond its plain import by circumstances which occurred after its execution, and which were not within their contemplation at the time of execution. Plaintiff testified that at the time of making the contract in 1941, he had no idea of instituting any action to force an accounting by the trustees or the removal of the trustees. Yet it is plaintiff's present claim that long after defendant had established plaintiff's rights by the final decree of distribution in 1950, defendant was still obligated to perform legal services by bringing an action, on plaintiff's demand, to force an accounting by, or the removal of, the trustee.

We are of the opinion that defendant's obligation under the contract to "protect" plaintiff's legacy was fully performed when he had taken the necessary steps to obtain a final decree of distribution establishing plaintiff's rights in the trust estate. Moreover, such was the view of the parties, for when the Johanson estate was closed in 1950, plaintiff executed an assignment transferring to defendant forty per cent of all plaintiff's "right, title and interest" in plaintiff's legacy. This assignment declares on its face that it was executed pursuant to the 1941 contract. Defendant successfully performed legal services on plaintiff's behalf over a period of nine years, and the assignment recognized the validity of their contract for a forty per cent contingent fee. No claim of fraud or undue influence is asserted in the making of the contract or the assignment. The only claim made by plaintiff is that there was a partial failure of consideration because of defendant's failure to perform further legal services, which we have held he was under no obligation to perform.

Plaintiff cites and relies upon *Dalzell v. State Bar*, 6 Cal.2d 433, 57 P.2d 1300, but that case is clearly distinguishable. It involved a twenty-five per cent contingent fee contract to "collect" and "'undivided interest in the property of Florence Ferguson Shoemaker, according to the decree of distribution in her estate'". 6 Cal.2d at page 434, 57 P.2d at page 1301. The attorney successfully brought an action and ob-

tained judgment for approximately \$18,000. In payment of the judgment, he received various sums totalling in excess of \$12,000, of which he wrongfully retained in excess of \$7,000, and remitted only \$4,950 to his clients. He was disciplined because of his "unwarranted overcharge of his clients and because of his failure to account to them over a period of several years". 6 Cal.2d at page 438, 57 P.2d at page 1302. No comparable contract or circumstances are before us here.

From what has been said, it follows that the trial court erred in concluding that defendant had not completely performed his obligation under the 1941 contract when he had secured the favorable final decree of distribution establishing plaintiff's right to his legacy. The trial court further erred in declaring that the 1941 contract and the assignment made pursuant thereto were of no further force and effect.

The judgment is reversed, with directions to the trial court to enter judgment in favor of defendant Ford in accordance with the views herein expressed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and SCHAUER, JJ., concur.



44 Cal.2d 805

Kenneth A. McCONNELL and Louise A. McConnell, Plaintiffs and Appellants,

v.

Harry L. COWAN, Petitioner, Defendant and Respondent.

L. A. 23183.

Supreme Court of California, in Bank.

July 5, 1955.

Action for judgment declaring that plaintiff was not under obligation to pay defendant an amount agreed upon as compensation for services rendered by defendant in procuring lease for certain real property for the plaintiff. Defendant by cross-complaint sought to recover the compensa-

tion. The Superior Court, Los Angeles County, Joseph M. Maltby, J., rendered judgment for defendant, and plaintiff appealed. The Supreme Court, Carter, J., held that, under the evidence, the defendant broker had had some discretion and, as matter of law, was not a mere "middleman" and was not entitled to commission without having disclosed to both the prospective lessor and the prospective lessee that he had a commission agreement with each.

Judgment reversed.

Opinion, 278 P.2d 482, vacated.

1. Brokers ⇨67(2)

So-called middleman exception to dual representation rule of agency is that if scope of broker's employment is limited to bringing parties together so that they may negotiate their own contract, he is mere "middleman" and upon performance, he is entitled to compensation from each of them who has agreed to pay him, though the others are unaware of such employment. West's Ann.Bus. & Prof.Code, § 10176(d).

See publication Words and Phrases, for other judicial constructions and definitions of "Middleman".

2. Brokers ⇨67(2)

If broker engaged by both parties is clothed with some discretion in matter of advising or negotiating the transaction, he cannot recover compensation from either, unless both of them knew of the double agency at the time of the transaction. West's Ann.Bus. & Prof.Code, § 10176(d).

3. Brokers ⇨67(1)

The word "middleman", within so-called middleman exception to dual representation rule of agency, is short term for describing situation in which agent has limited authority, i. e., he has no power to negotiate and does not negotiate terms on which principals will deal, so that there is no opportunity for him to sacrifice interests of one principal to detriment of other. West's Ann.Bus. & Prof.Code, § 10176(d).

4. Brokers ⇨67(2)

Where broker who engaged in negotiation of leases as a specialty was authorized by prospective lessee to see if he "could get

one of the deals", i. e., with improvements or without improvements at lesser rent, and testified, in prospective lessee's action against him for judgment declaring nonliability for commission, that prospective lessee could not have obtained lease on his own initiative, broker had some discretion and, as matter of law in the action, was broker and not mere "middleman" and was not entitled to commission without having disclosed to both prospective lessor and prospective lessee that he had commission agreement with each. West's Ann.Bus. & Prof.Code, §§ 10000 et seq., 10131, 10134, 10176(d).

Lyle M. Stevens, Long Beach, for appellants.

Leo Friedman, Long Beach, and Orlan S. Friedman, Beverly Hills, for respondent.

CARTER, Justice.

By his complaint in this action plaintiff sought to have it declared that he was not under obligation to pay defendant an amount agreed upon as compensation for services rendered by defendant in procuring a lease of certain real property for plaintiff. Defendant by cross-complaint sought to recover said compensation from plaintiff. Judgment was rendered in favor of defendant, and plaintiff has appealed.

From the trial court's findings it appears that E. D. Mitchell owned certain real property in the city of Long Beach. Plaintiff was desirous of leasing the property from Mitchell and, on October 24, 1952, he authorized defendant to submit to Mitchell an offer to lease the property. It was thereupon orally agreed between plaintiff and defendant that if plaintiff were able to secure a lease of the property he would pay defendant 5% of the net profits from the business to be conducted on the property by plaintiff. The oral agreement was followed by a written agreement on October 27, 1952. The offer from plaintiff to Mitchell for such lease was transmitted by defendant to and refused by Mitchell. But on October 28, 1952, Mitchell authorized defendant to submit a written offer for a lease of the property to plaintiff, varying

from plaintiff's offer, which provided that Mitchell would pay defendant a 3% commission. The latter offer was submitted by defendant to plaintiff and was accepted by him. Thereafter, on November 4, 1952, plaintiff and Mitchell, without defendant's participation, executed a lease of the property. Mitchell had no knowledge of the 5% agreement between plaintiff and defendant, but plaintiff knew defendant was to receive a 3% commission from Mitchell. The court then found that defendant was acting as a middleman to bring plaintiff and Mitchell together and was not an agent of either, hence the 5% agreement was valid and enforceable because in such a situation the rule was not applicable that an agent may not recover compensation from both principals unless full disclosure was made to each. The court also found that defendant had no authority to vary the terms of or exercise any discretion in connection with plaintiff's offer to Mitchell and the same was true of the offer from Mitchell to plaintiff. It was admitted that defendant was, at the time of the transaction here involved, a licensed real estate broker.

The evidence is as follows: Defendant testified that, before contacting plaintiff, he knew Mitchell wanted to lease the property, but had no listing from him. About October 24, 1952, he approached plaintiff, who was engaged in the hamburger sandwich business, and talked to him about leasing the Mitchell property. Thereafter three writings on plaintiff's stationery, addressed to defendant, setting forth the agreement as to defendant's commission between the parties, were signed by plaintiff.¹ The first document was dated October 24, 1952, the second October 27, 1952, and the third November 5, 1952. The first two were signed on October 27, 1952. The first document stated that defendant was therewith authorized "to offer for me" (plaintiff) a proposition to lease a portion of Mitchell's property in the city of Long Beach at a rental of \$750 per month provided Mitchell expended \$25,000 for improvements on the property; it closed by stating that plaintiff

would lease, as offered, only if Mitchell "pays you [defendant] your desired leasing fee." Defendant submitted the offer to Mitchell on October 27, 1952, but does not know whether he showed him the first document. Mitchell rejected the offer as he did not want to make any improvements but said he wanted to lease the property on a ground lease basis. Defendant returned to plaintiff thereafter on the same day and told him he wanted "it put in writing," meaning the oral agreement made on October 24th that he was to get 5% of the net profits from plaintiff's business to be conducted on the property proposed to be leased as commission for "getting the lease." The second writing followed, which stated that "for and in consideration of ten dollars * * * and other considerations given by you [defendant] to me" (plaintiff), plaintiff agreed to pay the 5% commission on the basis above mentioned. The third writing merely amplified the second. In explanation of the "other considerations" in the second writing, defendant testified he intended to take Mitchell's property for himself and that the substance of his discussion with plaintiff was that the latter had been unable to get the property. Defendant said he was going to see Mitchell and get it for himself, and plaintiff asked defendant what kind of a deal he would make with him if he got it for plaintiff instead of himself, to which defendant queried, what deal would be fair. They then agreed upon "the five per cent." In further amplification of the nature of the arrangement between plaintiff and defendant, the latter testified: "After I had talked with Mr. Mitchell * * * in my original conversation with him [plaintiff] on the 24th, he had already told me that he would take the place whether he got the building built or he didn't get the building built. He would take a ground lease or take it with the building on it. He agreed to my five per cent and I was to see Mr. Mitchell to find out *if I could get one of the deals*. When Mr. Mitchell agreed to the \$500 a month ground lease I told * * * [plain-

1. Apparently the papers were signed in blank by plaintiff and filled in by defendant but no question is here presented

that these documents were agreed to by plaintiff.

tiff] I wanted to put our verbal agreement as to the five per cent in writing, it looked like we were going to make this deal." (Emphasis added.) Defendant further testified that plaintiff could not have obtained the property on his own initiative and the 5% commission was for getting a lease from Mitchell for plaintiff. After Mitchell rejected plaintiff's offer and on October 28th, defendant obtained from Mitchell a writing (hereinafter called fourth writing) addressed to defendant in which Mitchell agreed to lease the property to plaintiff for a term of 10 years at \$500 per month; no provision was made for improvements by Mitchell and it embodied substantially the same basic terms as later appeared in the lease executed by plaintiff and Mitchell; Mitchell also agreed therein to pay defendant 3% of the total rental as a "leasing commission." Defendant advised plaintiff of Mitchell's offer and plaintiff signed on the fourth writing his acceptance thereof. Defendant was paid the 3% by Mitchell at the time the fourth writing was signed and before plaintiff and Mitchell executed the lease. Defendant testified he did not remember whether he told Mitchell he was receiving a commission from plaintiff. The lease was signed on November 4, 1952. Mitchell testified that defendant took no part in any negotiations after getting the fourth writing signed by both parties.

Plaintiff's case is based on the rule that: "[W]here an agent has assumed to act in a double capacity, a principal who has no knowledge of such dual representation * * * may avoid the transaction. Actual injury is not the principle upon which the law holds such transaction voidable; rather, the law holds it voidable in order to prevent the agent from putting himself in a position where he will be tempted to betray his principal. * * * To this point Mechem in his work on Agency, Second Edition, Volume 2, section 2138, p. 1715, says: '* * * an agent who is relied upon to exercise, in behalf of his principal, his skill, judgment, knowledge or influence, will not be permitted without such principal's full knowledge and consent, to undertake to represent the other party also in the same transaction. Such conduct is a

fraud upon his principal, and not only will the agent not be entitled to compensation for services so rendered, but the contract or dealings made or had by the agent, while so acting also for the other party without the knowledge or consent of the principal, are not binding upon the latter, and if they still remain executory, he may repudiate them on that ground, or, if they have been executed in whole or in part, he may by acting promptly and before the rights of innocent parties have intervened, restore the consideration received, rescind the contract and recover back the property or rights with which he has parted under it. It makes no difference that the principal was not in fact injured, or that the agent intended no wrong, or that the other party acted in good faith; the double agency is a fraud upon the principal and he is not bound.'" *Vice v. Thacker*, 30 Cal.2d 84, 90, 180 P.2d 4, 8; see, also, *Glenn v. Rice*, 174 Cal. 269, 162 P. 1020; *Butler v. Solano Land Co.*, 203 Cal. 231, 263 P. 530; *Gordon v. Beck*, 196 Cal. 768, 239 P. 309; 2 Cal. Jur.2d, Agency, § 107; 9 Cal. Jur.2d, Brokers, § 77; Rest., Agency, § 390 et seq.; Business & Professions Code, § 10176(d). It is also held that neither principal is liable for the commission unless both knew of the dual representation, even if one does know of it he is not liable if the other does not which is the situation we have here, because, as above noted, plaintiff knew defendant was to receive a commission from Mitchell. The rule is thus stated: "His [the agent's] contract for compensation being thus tainted, the law will not permit him to enforce it against either party. * * * And the fact that the party whom he sues was aware of the double agency and of the payment, or agreement to pay, compensation by the other party, and consented thereto, does not entitle him to recover. He must show knowledge by both parties. One party might willingly consent, believing that the advantage would accrue to him, to the detriment of the other. The law will not tolerate such an arrangement, except with the knowledge and consent of both, and will enter into no inquiry to determine whether or not the particular negotiation was fairly conducted by the agent.

It leaves him as it finds him, affording him no relief." Glenn v. Rice, *supra*, 174 Cal. 269, 272, 162 P. 1020, 1021; see, also, Gordon v. Beck, *supra*, 196 Cal. 768, 239 P. 309; Riggins v. Patterson, 37 Cal.App. 319, 174 P. 119; cases collected Chandler v. Lack, 73 Okl. 285, 170 P. 516, 14 A.L.R. 464; 80 A.L.R. 1075.

[1-3] The question presented therefore is whether the evidence shows as a matter of law that the arrangement did not fall within the so-called middleman exception to the dual representation rule later discussed herein. Defendant contends that plaintiff does not question the sufficiency of the evidence to support the findings favorable to the exception and that they show that defendant had no discretion in exercising his agency and hence he was what is sometimes euphemistically called a middleman; that under such circumstances the agent may receive compensation from both principals without disclosing to either that he had an arrangement with both for a commission. The exception is stated: "If the scope of a broker's employment is limited to bringing parties together so that they may negotiate their own contract, he is a mere middleman. Upon performance, he is entitled to compensation from each of them who has agreed to pay him, even though the others are unaware of such employment. But if a broker engaged by both parties is clothed with some discretion in the matter of advising or negotiating the transaction, he cannot recover compensation from either, unless both of them knew of the double agency at the time of the transaction." 9 Cal.Jur.2d, Brokers, § 77; see, also, Clark v. Allen, 125 Cal. 276, 57 P. 985; Green v. Robertson, 64 Cal. 75, 28 P. 446; King v. Reed, 24 Cal.App. 229, 141 P. 41; Carothers v. Caine, 38 Cal.App. 71, 175 P. 478; Kennedy v. Johnson, 109 Cal.App. 662, 293 P. 698; Anderson v. Thacher, 76 Cal.App.2d 50, 172 P.2d 533; Hooper v. Mayfield, 114 Cal.App.2d 802, 251 P.2d 330; Butler v. Solano Land Co., *supra*, 203 Cal. 231, 263 P. 530; Rest., Agency, §§ 390-394.

2. Commonly a middleman is a trader who buys commodities from the producer and

285 P.2d—174

The word "middleman" is a short term for describing a situation in which the agent has limited authority, that is, he has no power to and does not negotiate the terms on which the principals will deal, yet he is an agent or he may possibly be an independent contractor, or falls in one of the recognized legal categories.² Being so limited there is no opportunity for him to sacrifice the interests of one principal to the detriment of the other and the reason for the dual representation rule fails.

While plaintiff could have been more specific in his attack on the findings (he claims the findings that defendant was a middleman and not an agent for either party are conclusions of law), it is clear that his basic premise is that the evidence shows as a matter of law that this was not a situation where an agent had limited authority—no right or duty to exercise discretion or negotiate in regard to the terms upon which the principals would deal.

[4] The writings shed no light on the scope of defendant's authority but defendant's own testimony of the arrangement between him and plaintiff shows as a matter of law that this is not a case of an agent with limited authority and hence the findings are not supported by the evidence. It is true, as pointed out by defendant, that plaintiff testified in regard to the first writing that he was to pay the 5% commission if defendant got the lease from Mitchell on the terms there stated, which would indicate that defendant's sole power was to transmit the offer, and the same is true as to Mitchell and his offer, the fourth writing, but plaintiff's offer was rejected by Mitchell, and according to defendant's own version (heretofore quoted), he was to see if he "could get one of the deals," from Mitchell, that is, with Mitchell building the improvements as offered by plaintiff, or at a lesser rent without improvements as offered by Mitchell. There was, therefore, vested in defendant, authority to negotiate with Mitchell and get one deal or the other—exercise some discretion. The fact that

sells them to the retailer or sometimes directly to the consumer.

the lease was drawn and executed without any participation by defendant is not significant, because the basic terms thereof had already been stated in Mitchell's offer and plaintiff's acceptance of it (the fourth writing). It is undisputed that defendant was engaged in the real estate brokerage business and one of his specialties was the negotiation of leases. He said that plaintiff could not obtain a lease from Mitchell on his own initiative and that he was to receive the 5% commission for getting a lease from Mitchell. It appears from defendant's testimony and the undisputed evidence that the transaction was one in which defendant was more than a mere errand boy-servant for plaintiff and Mitchell, to carry offers from one to the other. Although it has been held that whether a person is a "middleman" is generally one of fact, *Clark v. Allen*, supra, 125 Cal. 276, 57 P. 985, it is one of law here on defendant's own testimony as to the arrangement.

The cases in which it has been held that the agent had no discretion and could receive commissions from both parties are distinguishable. In *Clark v. Allen*, supra, 125 Cal. 276, 57 P. 985, and *Green v. Robertson*, supra, 64 Cal. 75, 28 P. 446, the facts do not appear. In *King v. Reed*, supra, 24 Cal.App. 229, 141 P. 41, the broker had only one fixed price which he could transmit to the proposed buyer. In *Carothers v. Caine*, supra, 38 Cal.App. 71, 175 P. 478, only an offer was to be transmitted. Moreover, the last cited case is contrary to *Butler v. Solano Land Co.*, supra, 203 Cal. 231, 263 P. 530, and is impliedly overruled by that case. In *Kennedy v. Johnson*, supra, 109 Cal.App. 662, 293 P. 698, the negotiations and deal were made by the principals and the broker only brought them in contact. In *Anderson v. Thacher*, supra, 76 Cal.App.2d 50, 172 P.2d 533, *Hooper v. Mayfield*, supra, 114 Cal. App.2d 802, 251 P.2d 330, and *Butler v. Solano Land Co.*, supra, 203 Cal. 231, 263 P. 530, the rule was stated but found not applicable in those cases.

Consideration should also be given to the Real Estate Law regulating the business of real estate brokers and salesmen. Bus. &

Prof.Code, § 10000 et seq. That statute states the policy against dual representation. A broker's license may be revoked or suspended if, while he is "performing or attempting to perform" any of the acts within the scope of the regulatory act, he is guilty of "acting for more than one party in a transaction without the knowledge or consent of all parties thereto." Bus. & Prof.Code, § 10176(d). The act defines a broker as one who "offers to buy [or sell], lists, or solicits for prospective purchasers" of real estate and also one who for compensation "negotiates * * * leases [of], or offers to lease" real estate. Bus. & Prof.Code, § 10131. "One act, for a compensation" of "offering for another to buy or sell * * * real estate" or "leasing * * * real estate" shall constitute acting as a broker. Bus. & Prof.Code, § 10134. If defendant was acting as a broker then under the act the policy against dual representation is applicable to him. The cases holding that various activities and scopes of authority were not within the act—that the agent was only a "middleman"—involved the exercise of less authority than defendant exercised in this case. In *Freeman v. Jergins*, 125 Cal.App.2d 536, 271 P.2d 210; *Shaffer v. Beinhorn*, 190 Cal. 569, 213 P. 960; *McKenna v. Edwards*, 19 Cal.App.2d 327, 65 P.2d 810, and *Crofoot v. Spivak*, 113 Cal. App.2d 146, 248 P.2d 45, the one claiming compensation was only to find and introduce to the seller a person who might be interested as a buyer; he neither had nor exercised any other authority. In other cases the authority was broader and a different result was reached, see *Hooper v. Mayfield*, supra, 114 Cal.App.2d 802, 251 P.2d 330; *Abrams v. Guston*, 110 Cal.App. 2d 556, 243 P.2d 109; *Rhode v. Bartholomew*, 94 Cal.App.2d 272, 210 P.2d 768; *Davis v. Chipman*, 210 Cal. 609, 293 P. 40; *Ryan v. Walker*, 35 Cal.App. 116, 169 P. 417; *Cram v. McNeil*, 32 Cal.App. 101, 162 P. 140.

Applying the rule announced in the above cited cases to the facts of this case leads us to the inevitable conclusion that defendant acted as agent for both plaintiff and Mitchell, and he, therefore, cannot recover

compensation from either unless he disclosed to both his agreement to receive compensation from both. This he admittedly failed to do.

The judgment is reversed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



44 Cal.2d 814

Alice Araxle SAYEGH, Petitioner,

v.

The SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;

Marle Sayegh, as Guardian, etc., et al.,
Real Parties In Interest.

L. A. 23726.

Supreme Court of California.
In Bank.

July 5, 1955

Proceeding upon a petition for a writ of prohibition to restrain Superior Court from retrying issue of fact relative to validity of antenuptial agreement between petitioner and decedent. The Supreme Court, Gibson, C. J., held that the application for the writ was premature since the lower court had not yet ruled on the res judicata plea.

Alternative writ discharged and peremptory writ denied.

Opinion, 280 P.2d 20, vacated.

1. Prohibition $\Rightarrow$ 17

Ordinarily, a reviewing court will not grant prohibition until an objection to jurisdiction has been made and overruled in lower court, since it is assumed that any valid objection properly brought to atten-

tion of that court will prevail and that writ will be unnecessary.

2. Prohibition $\Rightarrow$ 17

In proceeding, brought by testamentary trust beneficiaries to determine heirship, wherein testator's widow answered (1) that will had been revoked as to her by reason of her subsequent marriage to decedent and (2) that her rights as an heir had been determined in proceeding upon her application for family allowances (wherein antenuptial agreement had been held invalid), and requested judge sitting in probate to terminate heirship proceeding and to hold that order for family allowances was a final judgment binding upon all parties interested in estate, probate judge's refusal to rule upon question of effect of prior order and his action in transferring heirship proceeding to master calendar department for setting and trial did not constitute a decision on the plea of res judicata within rule requiring reviewing court to refuse prohibition until objection to jurisdiction has been made and overruled in lower court.

3. Judgment $\Rightarrow$ 958(1)

While res adjudicata may be a complete defense and a bar to an action, court in which case is pending has jurisdiction to pass upon question of whether or not plea is well taken.

A. G. Ritter, Los Angeles, for petitioner.

No appearance for respondent.

Louis P. Pink and J. Perry Langford,
Los Angeles, for real parties in interest.

GIBSON, Chief Justice.

Petitioner, the widow of Gabriel N. Sayegh, seeks a writ of prohibition to restrain respondent court from trying a petition to determine heirship in the estate of her deceased husband.

On February 18, 1952, petitioner entered into an antenuptial agreement with Mr. Sayegh which provided, among other things, that the survivor of them should

have no interest in the property of the estate of the other by way of inheritance, succession, family allowance or homestead. They were married a few hours after the agreement was executed, and Mr. Sayegh died six days later, leaving a will dated February 16, 1948. The will, which was admitted to probate, named decedent's two brothers as executors and, after making some specific bequests, provided that the residue of the estate be held in trust for decedent's nieces and nephews, the children of his two brothers, who are the real parties in interest in the present proceeding.

Petitioner applied for a family allowance, which was opposed by the executors on the ground that she had waived such an allowance in the antenuptial agreement. After trial, it was found that her consent to the agreement had been obtained by duress, fraud and undue influence and she was granted a family allowance. This order was affirmed on appeal. In re Estate of Sayegh, 118 Cal.App.2d 327, 257 P.2d 995. The beneficiaries of the trust subsequently commenced a proceeding to determine heirship, claiming that they are entitled to distribution of all the estate except for certain specific bequests. Petitioner answered asserting that the will was revoked as to her by reason of her subsequent marriage to decedent and that her rights as heir had been determined by the order for family allowance. She requested the judge sitting in probate to terminate the heirship proceeding and to hold that the order for family allowance was a final judgment binding upon all parties interested in the estate. The judge refused to rule upon the question of the effect of the prior order and transferred the case to the master calendar department for setting and trial. Petitioner now seeks a writ of prohibition to restrain

trial of the heirship proceeding, asserting that the issues are *res judicata*.

[1-3] Ordinarily, a reviewing court will not grant prohibition until an objection to jurisdiction has been made *and overruled* in the lower court, since it is assumed that any valid objection properly brought to the attention of that court will prevail, and the writ will be unnecessary. *Baird v. Superior Court*, 204 Cal. 408, 415, 268 P. 640; *Have-meyer v. Superior Court*, 84 Cal. 327, 406, 24 P. 121, 10 L.R.A. 627; *Hanrahan v. Superior Court*, 81 Cal.App.2d 432, 434-435, 184 P.2d 157; see *Rescue Army v. Municipal Court*, 28 Cal.2d 460, 464, 171 P.2d 8. It seems obvious that the refusal of the judge to rule on the effect of the order for family allowance and his action in transferring the heirship proceeding to the master calendar department for setting and trial did not constitute a decision on the plea of *res judicata*. While *res judicata* may be a complete defense and a bar to an action, the court in which the case is pending has jurisdiction to pass upon the question of whether or not the plea is well taken. *Reidy v. Superior Court*, 220 Cal. 111, 112, 29 P.2d 780; *Baird v. Superior Court*, 204 Cal. 408, 412-414, 268 P. 640; *Liberty Mut. Ins. Co. v. Superior Court*, 62 Cal.App.2d 601, 610-611, 145 P.2d 344; *Goodman Bros. v. Superior Court*, 51 Cal. App.2d 297, 304-306, 124 P.2d 644; see *Vitimin Milling Corp. v. Superior Court*, 1 Cal.2d 116, 121, 33 P.2d 1016; cf. *Donovan v. Superior Court*, 39 Cal.2d 848, 851, 250 P.2d 246. Accordingly, application for the writ is premature.

The alternative writ of prohibition is discharged and the peremptory writ is denied.

SHENK, CARTER, TRAYNOR and SCHAUER, JJ., concur.

44 Cal.2d 772

James RICHARDSON and Latha Richardson, Plaintiffs and Respondents,
v.

Herbert HAM, Willard Ham and George Ham, Individually, and doing business as Ham Brothers Construction Company, Defendants and Appellants.

Ben W. BARNETT and Barbara Barnett, husband and wife, Plaintiffs and Respondents,
v.

Herbert HAM, Willard Ham and George Ham, Individually, and doing business as Ham Brothers Construction Company, Defendants and Appellants.

Marco J. MEDIN, Jr., Roy W. Crosswhite, and Odessa Barnes, Plaintiffs and Respondents,
v.

Herbert HAM, Willard Ham and George Ham, Individually, and doing business as Ham Brothers Construction Company, Defendants and Appellants.
L. A. 23537.

Supreme Court of California, in Bank.
June 29, 1955.

Consolidated actions against owners of bulldozer for personal injuries and property damage resulting when vandals started bulldozer and bulldozer ran wild. The Superior Court, San Diego County, John A. Hewicker, J., entered orders granting plaintiffs new trial after judgments in favor of defendants on verdicts of the jury, and the defendants appealed. The Supreme Court, Traynor, J., held that trial court was authorized under the evidence to grant plaintiffs new trial on ground of insufficiency of evidence.

Orders affirmed.

Opinion, 275 P.2d 532, vacated.

1. Appeal and Error ⇐1015(3)

In passing a motion for new trial based on alleged insufficiency of evidence, it is exclusive province of trial court to judge credibility of witnesses, determine probative force of testimony, and weigh the evidence.

2. New Trial ⇐70, 71

The trial court, in considering sufficiency of evidence on motion for new trial based on alleged insufficiency of evidence to sustain verdict, may draw inferences opposed to those drawn at trial, and where only conflicts consist of inferences deduced from uncontradicted probative facts, court may resolve such conflicts in determining whether the case should be retried.

3. Appeal and Error ⇐1015(1)

An appellate court will reverse trial court's order granting a new trial for insufficiency of evidence to sustain verdict only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment.

4. Automobiles ⇐173(8)

The extreme danger created by a bulldozer in uncontrolled motion and the foreseeable risk of intermeddling fully justify imposing a duty on owner to exercise reasonable care to protect third parties from injuries arising from its operation by intermeddlers.

5. Negligence ⇐10

If the realizable likelihood that third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent actor from being liable for harm caused thereby.

6. Automobiles ⇐173(8), 201(9)

Duty of owners of bulldozer to protect plaintiffs from injury caused by the uncontrolled and unauthorized operation of bulldozer included duty to protect plaintiffs from intentional misconduct of young men, and such misconduct did not therefore constitute a superseding cause of plaintiffs' harm.

7. New Trial ⇐70

In actions against owners of bulldozer to recover for injuries and property sustained when vandals started up bulldozer and bulldozer ran wild, trial court was authorized under evidence to grant plaintiffs new trials on ground of insufficiency of evidence.

Gray, Cary, Ames & Frye, James W. Archer, Ward W. Waddell, Jr., and Thomas C. Ackerman, Jr., San Diego, for appellants.

McInnis, Hamilton & Fitzgerald, William T. Fitzgerald, Franklin B. Orfield, Thomas P. Golden and Hubert L. Rose, San Diego, for respondents.

TRAYNOR, Justice.

Defendants, members of a construction contracting partnership, were engaged in earth moving operations in the development of a new subdivision located on top of a mesa in San Diego county. In their work they used two 26-ton Allis-Chalmers bulldozers, which were operated by two of their employees. The bulldozers did not have electrical ignition systems, and they could be started by pushing the compression lever in and stepping on the starter. The engine was stopped by pulling the compression lever out. They were equipped with fluid drives and could be started in gear, in which case they would commence to move as soon as the engine started. No locks were supplied with the bulldozers by the manufacturer, but the local dealer had improvised a lock that would prevent starting. It consisted of a metal sleeve welded to a padlock that locked around the starter rod thereby preventing the starter from operating. The lock provided by the dealer for one of the bulldozers was lost, and defendants improvised a substitute. At the close of the working day on Saturday, July 5, 1952, the operators of the bulldozers parked them near one another on top of the mesa. One of them was locked by the dealer's lock, and there is evidence that as to the other, only the padlock, but not the sleeve of the improvised lock, was put around the starter rod. The padlock alone would not prevent the starter from operating. The following evening three young men, aged 17, 18, and 20, after drinking intoxicants, decided to go for a drive with the wife of one of them. While driving, one of them mentioned having seen the bulldozers, and they decided to go to the mesa for the purpose of racing them. On their arrival, two of the young men left the car and at-

tempted to start the bulldozers. They were unable to start the bulldozer equipped with the dealer's lock but succeeded in starting the other bulldozer. They drove it around the mesa for 15 to 30 minutes causing considerable damage, and then, being unable to stop it, headed it toward a canyon to the east of the mesa and abandoned it. It went off the edge of the mesa, down the hill, across a freeway, and traveled for about a mile before it was halted by a retaining wall and a utility pole. During the course of its journey it traveled through a house and seriously injured the occupants. It also collided with a house-trailer and an automobile causing further property damage and personal injuries. Plaintiffs, whose persons or property were in the path of the bulldozer, brought these actions for damages against defendants alleging that they were negligent in leaving the bulldozer unattended and unlocked. The actions were consolidated for trial, and the jury returned verdicts for defendants. The trial court granted motions for a new trial on the grounds of insufficiency of the evidence and misconduct of the jury. Defendants appeal.

[1-3] "In passing upon a motion for a new trial based upon the insufficiency of the evidence, it is the exclusive province of the trial court to judge the credibility of the witnesses, determine the probative force of testimony, and weigh the evidence. [Citations.] In considering the sufficiency of the evidence upon such motion the court may draw inferences opposed to those drawn at the trial [citation], and where the only conflicts consist of inferences deduced from uncontradicted probative facts, the court may resolve such conflicts in determining whether the case should be retried. [Citation.] It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court." *Brooks v. Metropolitan Life Ins. Co.*, 27 Cal.2d 305, 307, 163 P.2d 689, 690; see also, *Ballard v. Pacific Greyhound Lines*, 28 Cal.2d 357, 359, 170 P.2d 465; *Mazzotta v. Los Angeles Ry. Corp.*, 25 Cal.2d 165, 168, 153 P.2d 338; *Martin v. Smith*, 103 Cal.App.2d 894, 897-

898, 230 P.2d 679, and cases cited; 3 Witkin, California Procedure 2061.

Defendants contend that there is no substantial evidence that would support a judgment against them. They rely on the recent decision of this court in *Richards v. Stanley*, 43 Cal.2d 60, 271 P.2d 23, holding that, in the absence of special circumstances, the duty of an owner of an automobile to exercise reasonable care in the management thereof does not include a duty to remove the ignition key to protect persons on the highway from the negligent driving of a thief. Since, however, the kinds of foreseeable intervening conduct by third parties as well as the risks created by such conduct in this case are materially different from those considered in the *Richards* case, that case is not controlling here.

Automobiles do not arouse curiosity, and ordinarily the only appreciable risk that they will be set in motion if they are left unattended arises from the possibility of their being stolen. The record in the present case, on the other hand, shows that defendants' bulldozers aroused curiosity and attracted spectators, while they were in operation as well as while they were parked for the night. Moreover, curious persons had been known to climb on them, and it could reasonably be inferred that they were attractive to children when left unattended at the end of the working day. The evidence is therefore sufficient to justify the conclusion that there was a reasonably foreseeable risk that defendants' bulldozers might be tampered with when left unattended.

[4] Given this foreseeable risk of intermeddling, the question is presented whether defendants were under a duty to exercise reasonable care to prevent intermeddlers from putting their bulldozers in operation. In the *Richards* case it was concluded that even if theft was reasonably to be foreseen, the owner was under no duty to persons on the highway to exercise reasonable care to keep his car out of the hands of a thief. It was pointed out that the owner will ordinarily have no reason to foresee that a thief will be an incompetent driver, that the risk of negligent driving arising from

possible theft is less than the risk that the owner might intentionally create without negligence by lending his car to another, and that it would be anomalous to impose greater liability when the car is being driven by a thief than that provided by statute when the owner voluntarily entrusts his car to another. The risks arising from intermeddling with bulldozers, however, are entirely different from those arising from the driving of an automobile by a thief. Bulldozers are relatively uncommon, and curious children or others attracted by them ordinarily will not know how to operate them. An intermeddler who starts a bulldozer accidentally or otherwise may not be able to stop it, and the potentialities of harm from a 26 ton bulldozer in uncontrolled motion are enormous, particularly when it is left on top of a mesa from which it can escape and injure persons and property located below. The extreme danger created by a bulldozer in uncontrolled motion and the foreseeable risk of intermeddling fully justify imposing a duty on the owner to exercise reasonable care to protect third parties from injuries arising from its operation by intermeddlers. See *Jensen v. Minard*, 44 Cal.2d 325, 282 P.2d 7; *Warner v. Santa Catalina Island Co.*, 44 Cal.2d 310, 282 P.2d 12, and cases cited.

In the absence of an effective lock the bulldozer engine could be started by pushing in a lever and stepping on the starter. Moreover, the engine could be started with the bulldozer in gear, and if so started, the bulldozer would commence to move immediately. Although this risk could be avoided by the use of a simple but effective lock, there is evidence that no such lock was used. Accordingly, there is substantial evidence that defendants did not exercise reasonable care to prevent intermeddlers from setting their bulldozer in motion.

[5,6] It is contended, however, that even if defendants were under a duty to protect plaintiffs from injuries from operation of the bulldozer caused by ordinary intermeddlers, they were not under a duty to protect plaintiffs from intermeddlers who deliberately undertook to operate the bulldozer, or, in other words, that the intention-

al misconduct of the young men constituted a superseding cause of plaintiffs' injuries. See Restatement, Torts, § 448. It is settled, however, that "If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby." Restatement, Torts, § 449; *McEvoy v. American Pool Corp.*, 32 Cal.2d 295, 298-299, 195 P.2d 783; *Benton v. Sloss*, 38 Cal.2d 399, 405, 240 P.2d 575. The possibility of the intentional, wrongful misconduct that occurred in this case was not so remote as not to constitute "one of the hazards" that would justify the conclusion that defendants' failure to lock the bulldozer was negligent. Accordingly, defendants' duty to protect plaintiffs from injuries caused by the uncontrolled and unauthorized operation of their bulldozer included a duty to protect plaintiffs from the intentional misconduct of the young men, and such misconduct did not therefore constitute a superseding cause of plaintiffs' harm.

[7] Since the evidence was sufficient to support the trial court's granting of plaintiffs' motions for a new trial, it is unnecessary to decide whether the orders might also be sustained on the ground of the alleged misconduct of the jury.

The orders are affirmed.

GIBSON, C. J., and SHENK and SCHAUER, JJ., concur.

SPENCE, Justice.

I concur in the affirmance of the orders granting a new trial, as there was ample evidence to sustain a finding that defendants were negligent, and that such negligence was a proximate cause of plaintiffs' damage. I also agree that this case is distinguishable from *Richards v. Stanley*, 43 Cal.2d 60, 271 P.2d 23, but I still adhere to the views expressed in my dissenting opinion in the *Richards* case.

CARTER, Justice.

I concur in the judgment of affirmance, but as I read the majority opinion it seeks

to establish a standard of conduct based upon the view of those members of the court joining in said opinion without regard to considerations of public policy and the experience of people generally in the ordinary walks of life. It does not appear that the Legislature has established a standard of conduct for those owning, possessing and operating heavy equipment of the character here involved, and such standard must, therefore, be determined under the rules of the common law which accepts as its criterion the conduct of a reasonably prudent person. The determination of this standard, is, of course, in the first instance, for the trier of fact; that is, it is for the trier of fact to determine from the evidence presented whether or not the conduct of the defendant in the instant case was that of a reasonably prudent person. If the trier of fact determines that such conduct was not that of a reasonably prudent person under all the circumstances, the deduction to be drawn from such determination is that the defendant was negligent. There can be no question but that the defendant owed a duty to the plaintiffs here to exercise ordinary care in the control and management of its equipment so that it would not inflict injury upon plaintiffs without fault on their part. Here, the trial court by granting plaintiffs' motion for a new trial on the ground of the insufficiency of the evidence has determined in the first instance that defendant's conduct was not that of a reasonably prudent person and that it violated its duty when it so managed and controlled its equipment as to inflict injury upon plaintiffs. The District Court of Appeal by unanimous decision agreed with this determination of the trial court. *Richardson v. Ham Bros. Construction Co.*, Cal.App., 275 P.2d 532. This determination was based upon the evidence presented to the trial court, and that court in the exercise of its fact finding power determined that defendant had deviated from the standard of conduct of a reasonably prudent person. This is the process by which the common law has been developed and it has never been the function of an appellate court in cases of this character to arbitrarily establish standards

of conduct upon which liability may or may not be predicated.

In discussing the development of the common law with respect to negligence Mr. Justice Holmes in his work entitled *The Common Law* makes the following illuminating observation:

"The cases which have raised difficulties needing explanation are those in which the court has ruled that there was *prima facie* evidence of negligence, or some evidence of negligence to go to the jury.

"Many have noticed the confusion of thought implied in speaking of such cases as presenting mixed questions of law and fact. No doubt, as has been said above, the averment that the defendant has been guilty of negligence is a complex one: first, that he has done or omitted certain things; second, that his alleged conduct does not come up to the legal standard. And so long as the controversy is simply on the first half, the whole complex averment is plain matter for the jury without special instructions, just as a question of ownership would be where the only dispute was as to the fact upon which the legal conclusion was founded. But when a controversy arises on the second half, the question whether the court or the jury ought to judge of the defendant's conduct is wholly unaffected by the accident, whether there is or is not also a dispute as to what that conduct was. If there is such a dispute, it is entirely possible to give a series of hypothetical instructions adapted to every state of facts which it is open to the jury to find. If there is no such dispute, the court may still take their opinion as to the standard. The problem is to explain the relative functions of court and jury with regard to the latter.

"When a case arises in which the standard of conduct, pure and simple, is submitted to the jury, the explanation is plain. It is that the court, not entertaining any clear views of public policy applicable to the matter, derives the rule to be applied from daily experience, as it has been agreed that the great body of the law of tort has been derived. But the court further feels that it is not itself possessed of sufficient

practical experience to lay down the rule intelligently. It conceives that twelve men taken from the practical part of the community can aid its judgment. Therefore it aids its conscience by taking the opinion of the jury." *The Common Law*, by Oliver Wendell Holmes, Jr., pp. 122-123.

As stated above, the standard of conduct applicable to a particular factual situation—whether it was that of a reasonably prudent person—must be derived from daily experience, and a jury or trial judge is in a better position than an appellate court to make such determination. It seems clear that the only test the courts can apply in determining whether the conduct complained of was that of a reasonably prudent person is the reasonable minds test. *Johnson v. Southern Pacific R. Co.*, 154 Cal. 285, 97 P. 520; *Seller v. Market St. Ry. Co.*, 139 Cal. 268, 72 P. 1006; *Herbert v. Southern Pacific Co.*, 121 Cal. 227, 53 P. 651; *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 P. 513; see dissenting opinion, *Gray v. Brinkerhoff*, 41 Cal.2d 180, 186, 192, 258 P.2d 834. That reasonable minds differ as to whether defendants' conduct was that of a reasonably prudent person is demonstrated by the record before us which discloses that the trial judge, the three members of the District Court of Appeal and a majority of this court agree that their conduct was such that negligence may be inferred therefrom. A question of fact is therefore presented, and the ruling of the trial court in granting a new trial on insufficiency of the evidence must be upheld unless settled rules of law are disregarded.

Just to show that a conflict existed in the evidence, and in the inferences to be drawn therefrom, let us look at the facts and the inferences which may have motivated the trial court in its action in granting plaintiffs a new trial on the ground of insufficiency of the evidence:

The bulldozer in question was parked at the top of a mesa. After the intoxicated youths found they were unable to stop it, they abandoned it and it went off the edge of the mesa, down the hill, across a freeway causing personal injuries and property damage on its way. The inference to be drawn

from the evidence relating to its position was that it was at the top of a hill and that the only place for it to go was *down*. The plaintiffs' injuries themselves carry the inference that it was left unattended in a place where it could cause injury if molested by untrained persons. Herbert Ham, one of the defendant owners, testified (by deposition) that he remembered seeing people drive up to look at the bulldozers; that he may have seen strangers get on the machines; that he had chased people away from the bulldozers mostly when they were not running; that all employees had verbal instructions to chase onlookers away from the machines; that he was afraid someone might be hurt if strangers got on the bulldozers; that the bulldozers were supposed to be locked with a sleeve and padlock which had been improvised to keep the machines immobilized. The inferences to be drawn, or which may have been drawn by the trial court, from this evidence were that defendants were aware that the bulldozers attracted the curious, "mostly" when they were not running; that defendants were aware that injury might result if strangers got on the machines; that the locks therefor were necessary to prevent just such an occurrence as the one here involved, and that if any untrained person started the machine it would be a danger both to themselves and others. Finney, an oiler, whose duty it was to lubricate the machines, testified that he had seen people in and about the general area where the bulldozers were parked; that these people were watching the bulldozers operate; that he had seen people there when he left at night; that he did the oiling after the drivers (or cat skimmers) left for the night; that he was supposed to lock the machines when he was through work. A logical inference from this is that the defendants knew people were around in the vicinity of the parked bulldozers after all employees had left and that he was to lock the machines so that they would not be meddled with by curious strangers. Schlickelman, a cat skinner for defendant, testified that there was no guard on duty to watch the equipment; that when he had been there at closing time he had seen people from 50 to 100 feet away

watching the bulldozers; that he had seen people of all ages watching the machines; that he didn't remember whether any had gotten in the tractor while he had been around. It could be reasonably inferred from this that defendants knew that numbers of people of all ages were around the area where the bulldozers were parked at closing time.

Finney, the oiler, testified that to start the machines, a lever was pushed and a starter stepped on; that the machine could be started in gear and would move right off without pressing an accelerator; that it was similar to fluid drive except that it would start in gear. It could be inferred from this that it would be a simple matter for a curious person to start the machine without knowing how to stop it.

Summing up this evidence together with the inferences therefrom, we see an unlocked piece of heavy equipment which had a fascination for people of all ages parked unattended at the top of a hill with the possibility of causing untold damage to human life and property. We also see that the defendants knew curious onlookers were around the parking area at closing time; that orders were given to drive these onlookers away; that the machines were supposed to be kept locked because of the fear that some of the curious might get on the machines and "hurt" somebody. It is reasonable to infer that the machine itself, weighing twenty-six or seven tons, would have a fascination which an ordinary automobile would not have for the average person. It is also reasonable to note that a bulldozer is a machine capable of doing great bodily injury as well as property damage if in the hands of one not skilled in its operation. From its very size and complexity, it is reasonable to infer that once started in a downward direction it could not be stopped until it came to rest against an object sturdy enough to withstand its momentum. It should also be noted that in its downward course it would gain momentum and speed and that the force with which it would strike anything in its path would be greatly increased because of the added momentum and speed. This evidence is most certainly sufficient

to sustain a verdict for the plaintiffs had one been had; hence it was not an abuse of discretion for the trial court to grant plaintiffs a new trial on the ground of insufficiency of the evidence.

All persons are required to use ordinary care to prevent others being injured as the result of their acts. Ordinary care has been defined as that degree of care which people of ordinarily prudent behavior could be reasonably expected to exercise under the circumstances of a given case. In other words, the care required must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated. *Crowe v. McBride*, 25 Cal.2d 318, 321, 153 P.2d 727; *Hatzakorzian v. Rucker-Fuller Desk Co.*, 197 Cal. 82, 98, 239 P. 709, 41 A.L.R. 1027; 19 Cal.Jur. 579; *Warner v. Santa Catalina Island Co.*, 44 Cal.2d 310, 282 P.2d 12. Section 447 of the Restatement of Torts sets forth the rule with respect to the intervening act of a third person as follows: "The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if (a) the actor at the time of his negligent conduct should have realized that a third person might so act. * * *" This rule is applicable in California. *Stasulat v. Pacific Gas and Elec. Co.*, 8 Cal.2d 631, 67 P.2d 678; *Mosley v. Arden Farms Co.*, 26 Cal.2d 213, 219, 157 P.2d 372, 158 A.L.R. 872; *Sawyer v. Southern California Gas Co.*, 206 Cal. 366, 274 P. 544. The evidence here shows without conflict that defendants feared intermeddling by unauthorized persons; that they feared the tractors would be started by unauthorized persons; that they feared harm would come to others because of such intermeddling. It seems too clear to even warrant comment that the action taken by the intoxicated youths was reasonably foreseeable by defendants and hence not a supervening, independent cause of plaintiffs' injuries and property damage. *Gall v. Union Ice Co.*, 108 Cal.App.2d 303, 313, 239 P.2d 48; *Northwestern, etc., Ins.*

Co. v. Rogers, etc., Foundry, 73 Cal.App.2d 442, 166 P.2d 401.

Zuber v. Clarkson Const. Co., 363 Mo. 352, 251 S.W.2d 52, is a case very similar to the one presently under consideration. Defendant construction company owned large motor-driven, earth-moving tractors which it left parked, at the end of the day, on a levee with the machinery in gear and the switches and ignitions unlocked with fuel in the tanks and the brakes off ready to be easily put in operation. The plaintiffs alleged that each evening curious spectators were gathered around watching the machines; that some of these persons had, to the defendant's knowledge, or the knowledge defendant should have had, theretofore started the tractors; that the tractors were left unattended at the close of the working day. It was alleged further that plaintiffs' decedent was killed because of injuries sustained by the unauthorized operation of one of defendant's unattended tractors. The court there said:

"It has been said a person who is responsible for an instrumentality which is dangerous and likely to cause injury to persons rightfully in its proximity is charged with taking appropriate precautions to avoid injury to such persons, and his failure to take such precautions constitutes negligence. * * * It has also been stated that a negligent act may be one which creates a situation which involves an unreasonable risk to another because of the expectable action of a third person. Restatement, Torts, § 302.

"Relating to those dangers to be reasonably anticipated—if there is some probability or likelihood, not a mere possibility, of harm sufficiently serious that ordinary men would take precautions to avoid it, then the failure to do so is negligence. While the likelihood of a future happening is the test of a duty to anticipate, this does not mean the chances in favor of the happening must exceed those against it. The test is not the balance of probabilities, but of the existence of some probability of sufficient moment

to induce the reasonable mind to take the precautions which would avoid it." 251 S.W.2d 52, 55.

The court held that the machines, left as they were, ready for operation were "potentially dangerous, and, if one were started by some reckless person or by some intermeddler probably unskilled in the technique of its operation, it would (and did) become a monstrous instrumentality of destruction. It seems to us it could be reasonably said the person, defendant, the owner and responsible for these machines, with knowledge that curious intermeddlers were making the practice of operating the machines, had reason to anticipate or foresee that other intermeddlers would start the machines and that, among those who operated the machines, some person, though an adult, starting a machine would be reckless or unskilled. It is not too much to say that, in the circumstances averred, a reasonably prudent person should take into account these probabilities, and would foresee that some injury was likely to ensue." 251 S.W.2d 52, 56. There are two distinguishing features to the Zuber case: it was alleged that defendant knew or in the exercise of reasonable care should have known that strangers had intermeddled with the machines and that the machines were parked in a public place. Plaintiffs here may, on a new trial, be able to produce additional evidence and show that defendants knew, or in the exercise of reasonable care should have known, that strangers had theretofore tampered with the machines or might tamper with them. As I have previously pointed out, a logical inference from the instructions given to the employees by defendants to lock the machines and chase the curious away is that defendants had reason to fear the unauthorized actions of third persons. Plaintiffs did allege that "said defendant well knew that said tractor in its unlocked condition was a dangerous instrumentality." The trial judge in his wisdom, in the exercise of his discretion, in the performance of his duty granted plaintiffs a new trial believing, as he must have believed, that the evidence was against the verdict and that

plaintiffs should have the further opportunity to produce additional evidence in support of their allegations.

In *Richards v. Stanley*, 43 Cal.2d 60, 271 P.2d 23, 25, it was said in the majority opinion that "In the absence of such a statute, however, it has generally been held that the owner of an automobile is under no duty to persons who may be injured by its use to keep it out of the hands of a third person *in the absence of facts putting the owner on notice that the third person is incompetent to handle it.*" (Emphasis added.) While I do not agree with the last quoted statement or with the majority opinion in the *Stanley* case, it needs no citation of authority here to say that defendants had knowledge that their machines were destructive forces if driven, or meddled with, by persons not specially trained. The record shows, without contradiction, that defendants knew, and feared, that harm would come to others if the machines were meddled with by untrained strangers. Section 449 of the Restatement of Torts states the rule as follows: "If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby." *McEvoy v. American Pool Corp.*, 32 Cal.2d 295, 298-299, 195 P.2d 783, 786.

In order that an appellate court may reverse an order of a trial court granting a new trial, it must be found that the trial judge in so doing was guilty of a *gross, manifest and unmistakable abuse of discretion*; it must also be found that the trial judge violated his duty because it is his duty to grant a new trial whenever in *his opinion* (not that of the reviewing court) the evidence on which a decision rests is insufficient to justify the decision. Under the facts as presented by this case, and the law as it stands in this state, how can it possibly be said that the trial court abused its discretion?

Woody GIBSON, Plaintiff and Appellant,
v.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant and Respondent.
No. 16295.

District Court of Appeal, First District,
Division 1, California.

June 24, 1955.

Rehearing Granted July 21, 1955.*

Action for injuries sustained by plaintiff when struck by defendant's train while walking along pathway adjacent to tracks. The Superior Court, City and County of San Francisco, Daniel R. Shoemaker, J., granted defendant's motion for judgment notwithstanding verdict for plaintiff and plaintiff appealed. The District Court of Appeal, Bray, J., held that plaintiff as user of pathway constructed by railroad close to its tracks was not relieved from necessity of watching for approaching trains, and where he walked close enough to tracks to be struck by overhang of train, he was contributorily negligent.

Judgment affirmed.

Peters, P. J., dissented.

1. Carriers ⇐327

Where prospective passenger places himself so near edge of railroad platform as to be within line of ordinary overhang of train, he contributes to injury, and other things being equal, cannot recover.

2. Negligence ⇐136(9, 26)

Question of contributory negligence is normally one for jury and it is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn by jury from evidence, that court can say, as matter of law, that contributory negligence is established.

3. Railroads ⇐383(1)

Pedestrian using pathway constructed by railroad close to its tracks was not relieved from necessity of watching for approaching trains, and where he walked close enough to tracks to be struck by overhang of train, he was contributorily negligent.

4. Railroads ⇐397(1)

In action for injuries sustained by plaintiff when struck by defendant's train while walking along pathway adjacent to tracks, evidence of suction power of train when passing plaintiff was properly excluded, where such evidence was offered not to prove that plaintiff was pulled into train, but was proposed to relate only to what occurred after plaintiff was first struck.

5. New Trial ⇐164

In action for injuries sustained by plaintiff when struck by defendant's train while walking along pathway adjacent to tracks, action of court in denying defendant's motion for new trial but granting its motion for judgment notwithstanding verdict was not inconsistent, where effect of such action was finding that if court was wrong in determining that plaintiff was guilty of contributory negligence as matter of law, it saw no reason for disturbing jury's verdict and judgment on that verdict would stand as judgment in case. West's Ann.Code Civ.Proc. § 629.

Fitz-Gerald Ames, Sr., San Francisco, for appellant.

R. Mitchell S. Boyd, Dunne & Phelps, San Francisco, for respondent.

BRAY, Justice.

Action for damages for personal injuries sustained by plaintiff when struck by defendant's train. Motions for nonsuit and directed verdict were denied. The jury awarded plaintiff \$75,000. Defendant moved for judgment notwithstanding the verdict and for new trial. The court granted the former and denied the latter. Plaintiff appeals from the judgment notwithstanding the verdict.

Questions presented.

1. Was plaintiff contributorily negligent in assuming that all portions of the railroad pathway were safe from overhang of passing trains?

2. Should evidence of suction power of the train have been admitted?

3. Was the court inconsistent in denying defendant's motion for new trial but grant-

* Opinion vacated 290 P.2d 347.

ing its motion for judgment notwithstanding the verdict?

Facts.

Except as to just when the train's whistle was blown there appears little, if any, conflict in the evidence. Westerly, opposite Bay Meadows race track, defendant's railway tracks run north and south. On the West side of the West rail and distant 1 foot 9 inches therefrom, defendant maintains an asphalt walk or pathway 8 feet wide, about at the level of the ties except at the Hillsdale station and Bay Meadows crossing platforms, where the asphalt is level with the tracks. This pathway connected the much wider platform at the Hillsdale station with that at the Bay Meadows crossing. It was used both for walking between those platforms, and for boarding trains which stopped there on occasion to pick up race track patrons. The engine which struck plaintiff had an overhang which extended 1 foot 2½ inches over the walk.¹ The edge of the pathway was 1 foot 9 inches from the nearest rail. The walk extends southerly from the Bay Meadows crossing (an infrequently used commuter stop) some 1200 feet to the Hillsdale station. The tracks here and for a considerable distance southerly are straight. The pathway is used by passengers and other pedestrians. This fact was well known to defendant. (Defendant concedes it owed a duty of due care to persons using the pathway.) Near the station for a distance of 380 feet and near the crossing for a distance of 230 feet a white line extends along the pathway sufficiently far from the rails to clear the engine's overhang. In the intervening distance of approximately 600 feet there is no white line. Near sundown, with the weather clear and light, a slight breeze blowing about 5:50 p.m., plaintiff had walked across the crossing intending to go to Bay Meadows track. As he got to the gate of the track, the crowd started coming out. He noticed a train standing

to the north. He assumed it was headed north. Assuming that the races were over, he retraced his steps to the west side of the tracks. While on the crossing he seemed to hear a couple of train whistles. He made no assumption as to their source. He walked south on the pathway. He heard a train whistle, probably a little deeper in tone than the whistle or whistles he heard at the crossing. (This was 10 to 15 seconds before he was struck.) He continued walking forward and "took probably a half step to the right" (away from the track). He heard no sound of grinding such as would be caused by the application of locomotive brakes. The half step to the right placed his left foot about 22 inches away from the track edge of the asphalt. He has a faint recollection of being "spun," feeling heat in his face and seeing a wheel of the engine. The next thing he remembered he was talking to a San Mateo policeman after the accident. He was then lying to the west of the pathway at a point about half way between the crossing and the station. This was plaintiff's first time on the pathway. He did not know that a locomotive would overhang the pathway. Plaintiff suffered serious injuries to his shoulder, arm, elbow and his leg was "mashed."

The engineer died prior to trial so his story is unknown. The fireman, whose view was obstructed by the engine for the last 300 feet before the impact, at that point observed a group of people walking southerly along the pathway, their backs towards the train. He could not tell how close they were to the edge. People "too often" walk alongside the track there, fairly close. The usual speed at this point is 50 miles per hour. No stop at either Hillsdale station or Bay Meadows crossing was intended. Immediately north of the crossing there is a whistle post. Admittedly the whistle was blown there. There was evidence that the whistle was not sounded after the engine reached the crossing. One Harland,

1. It is interesting to note that although the witnesses referred to the area in question as a walk or pathway, counsel for both parties in their briefs and on oral argument refer to it as a "platform." We are accepting the witnesses'

designation rather than that of counsel. As hereafter shown the duty of a railroad company at a station platform seems well determined. We have been unable to find any case involving a pathway between platforms.

walking north on the pathway, passed plaintiff walking south. He heard a whistle, turned around and started walking south. At that time the train was about 600 yards away. When he was about 10 to 20 feet behind plaintiff he heard the whistle again. The train was then possibly 300 yards away. He did not have too much of an idea on that. Harland turned over to the right and stopped. When the train passed him he saw some part of the front part of the engine strike plaintiff. Plaintiff was then about 2½ feet from the edge of the pathway nearest the rail. Harland had the impression that plaintiff was sucked into the train. Harland then stated that the whistle was going continuously until the time of the accident.

A railway "red cap" walking on the pathway saw plaintiff about 350 feet ahead of him. Plaintiff was walking close to the track edge of the asphalt. The whistle was blowing continuously. The train hit plaintiff and spun him to the right.

Defendant's maintenance official testified that prior to May, 1946, there had been a gravel path which was 3 feet 6 inches in from the point where the track edge of the asphalt now is. The old path was completely clear of the engine overhang.

1. Contributory negligence.

The judgment notwithstanding the verdict was granted on the theory that plaintiff was guilty of contributory negligence as a matter of law. The evidence shows without conflict that plaintiff walked some 600 feet down the pathway close to the railside edge of the pathway. Although he admittedly heard a train whistle when he was at the crossing before starting down the pathway he made no effort to locate it or to learn if there was any train approaching from his rear. At no time during his movement down the pathway did he glance behind to observe if there were any trains approaching. About 10 to 15 seconds prior to the accident he heard another whistle which "probably sounded a little deeper

in tone" than the previous one. He then continued walking forward and took a half step away from the rails "to be safe." This placed his foot nearest the track approximately 22 inches from the edge of the asphalt and approximately 3 feet 7 inches from the nearest rail. He continued on in this location until hit. Although he heard a whistle and felt it necessary to do something "to be safe," he did not look around to determine where the whistle came from or to see if he were in a safe position.

If defendant owed plaintiff the duty of maintaining the pathway free from danger from overhang of trains and suction, then plaintiff could not have been guilty of contributory negligence* for if plaintiff had the right to assume that all portions of the pathway were safe, then under the facts of this case he was under no duty to look for approaching trains.

The question here is, by the constructing of a pathway close to its tracks does a railroad impliedly represent to users thereof that all portions of the pathway are safe, thereby relieving the user from the necessity of watching for approaching trains, when walking close enough to the tracks to be struck by the overhang of the train, or to be drawn into the train by suction? In *McKeown v. Northwestern Pac. R. Co.*, 20 Cal.App.2d 324, at pages 326-327, 66 P.2d 1250, at page 1251, the court said: " * * * it is the uniform rule that where a passenger places himself so near the edge of a railroad platform as to be within the line of the ordinary overhang of a train, he contributes to the injury, and other things being equal, cannot recover. [Citations.]"

[1] While the facts in our case are distinguishable from those in the *McKeown* case, that difference would not change the apparent universalness of the rule, see cases cited in the *McKeown* case, 20 Cal.App.2d at page 327, 66 P.2d at page 1251, and the cases hereafter discussed, nor the application of the principle to the facts of our case. In the *McKeown* case, the plaintiff was familiar with the station platform and with the

2. Defendant, although not conceding its correctness, is not attacking (except as it relates to the maintenance of the path-

way) the jury's implied finding of negligence.

normal overhang of engines, while here plaintiff was using the pathway for the first time and knew nothing of engine overhang. In the McKeown case, although denied by the plaintiff, there was testimony that as the train approached she deviated from her course to approach nearer the edge of the platform. In our case, after hearing a whistle, plaintiff took a half step away from the track. In the McKeown case the engine overhang was either flush with the edge of the concrete platform, or overhung it an inch; thus the plaintiff's arm must have extended either beyond the platform or within an inch of its edge. In our case the engine overhung the pathway $14\frac{1}{2}$ inches. Plaintiff's feet were probably $2\frac{1}{2}$ feet from the pathway's edge. Only his elbow extended into the space occupied by the engine's overhang. The other differences between the two cases bear on defendant's negligence rather than on plaintiff's duty.

In *Holmes v. South Pac. C. Ry. Co.*, 97 Cal. 161, 31 P. 834, the railroad tracks were in the street. There was a space of 3 feet between the sidewalk at the station and the nearest rail. The plaintiff was walking in this space. When the whistle sounded the plaintiff stepped partly upon the track and was hit. Again, here, the facts are not similar to ours but the court pointed out that there are many cases supporting the principle, 97 Cal. at page 167, 31 P. at page 835: "A railroad track upon which trains are constantly run is itself a warning to any person who has reached years of discretion, and who is possessed of ordinary intelligence, that it is not safe to walk upon it, or near enough to be struck by a passing train, without the exercise of constant vigilance in order to be made aware of the approach of a locomotive, and thus be enabled to avoid receiving injury; and the failure of such a person, so situated with reference to the railroad track, to exercise such care and watchfulness, and to make use of all his senses in order to avoid the danger incident to such situation, is negligence *per se*."

In *Norfolk & W. Ry. Co. v. Hawkes*, 102 Va. 452, 46 S.E. 471, because of a curve in the track, the projection from the train

overhung the platform varying from $1\frac{1}{4}$ to 10 inches and at the point where the plaintiff was struck it was $6\frac{1}{2}$ inches. The plaintiff knew that the train was approaching. Of a person's duty at a railroad platform the court said, 46 S.E. at page 472: "It is manifest that this duty requires the railroad company to construct its platform sufficiently near to the rails that it will afford to passengers, including the aged and infirm, a safe exit to and from the trains. And it is a matter of common knowledge that in performing this duty the platforms along the best-regulated railroads are built so near the rails that the projections from the engines and cars will overlap, to some extent, the edge of the platform. While the extreme edge of the platform is perfectly safe for passengers when occupying it for the purpose to which it is manifestly adapted, it is a matter of common knowledge that it is a place of danger when occupied while trains are passing or are likely to pass."

In *Higgins v. Erie R. Co.*, 89 N.J.L. 629, 99 A. 98, the plaintiff was familiar with the platform and the coming and going of trains there. He was drawing a hand truck on the platform and either drew it so near the platform's edge that it was struck by the engine tender's overhang or in turning he brought the truck against the tender. "The law is well settled in this state that where a person places himself so near the edge of a railroad platform as to be within the line of the ordinary overhang of a properly constructed platform and engine he contributes to the injury, and the company is not liable for the injuries he may suffer from such negligent exposure to danger." 99 A. at page 99.

In *Long v. Delaware L. & W. R. Co.*, 1941, N.J.L. 207, 21 A.2d 824, the court quoted the above statement in holding negligent a plaintiff who was struck by a hand-rail of a passing car, while standing on a platform 19 feet 2 inches wide between two sets of tracks.

In *Ratliff v. Chesapeake & O. Ry. Co.*, 6 Cir., 1940, 116 F.2d 155, the plaintiff standing on the station platform was trying to flag the approaching train so that she

could board it. She was struck by a cross-beam on the front of the engine which overhung the platform $1\frac{1}{2}$ or 2 feet. It was claimed, as here, that the platform as constructed was an implied assurance that any portion of it was safe from passing trains. The court said 116 F.2d at pages 156-157: "None of the cases cited by appellant holds that such a facility as is here involved,—entirely adequate and safe when used as ordinary persons would use it,—is unsafe merely because it does not prevent careless persons from putting themselves in positions of danger."

In *Ferran v. Southern Pac. Co.*, 3 Cal.2d 350, 44 P.2d 533, the court referred to the general rule quoted above in *Holmes v. South Pac. C. Ry. Co.*, 97 Cal. 161, 31 P. 834, but held it did not apply to persons required to cross intervening tracks to board cars who are injured while doing so.

As contra to the principle enunciated in the foregoing cases, plaintiff cites the following: *Chunn v. City & Suburban Railway*, 207 U.S. 302, 303, 28 S.Ct. 63, 52 L.Ed. 219. There the platform which was customarily used by passengers intending to use the Washington car was one between two sets of tracks and was 7 feet 10 inches wide. The steps of defendant's cars projected 2 feet 2 inches over the platform, so that when two cars passed each other at this point (which was the situation when the plaintiff was hurt) the clear space left for the passenger to stand in was only 3 feet 6 inches. The court held that "the margin of safety was narrow and left little allowance for the infirmities of mankind. In the confusion of two cars approaching from opposite directions it is too much to expect nice calculations of distances. It is not to be wondered at that in the attempt to escape the one the plaintiff fell foul of the other." 207 U.S. at page 308, 28 S. Ct. at page 65. "Nor was the plaintiff necessarily wanting in due care by taking her place between the tracks. It was the usual place from which entrance to the Washington car was made. It was safe enough under ordinary circumstances. It was made unsafe only by reason of the defendant's negligent act in running an-

other car rapidly by. The plaintiff had the right to assume * * * that when it [the defendant] stopped one car and thereby invited her to enter it, it would not run another rapidly by the place of her entrance and put her in peril." 207 U.S. at pages 308, 309, 28 S.Ct. at page 65. The court did not discuss the general rule of passengers on station platforms, nor even the exception stated in *Ferran v. Southern Pac. Co.*, supra, 3 Cal.2d 350, 44 P.2d 533 (passengers crossing tracks) but rested its decision primarily on the narrowness of the platform provided for its patrons. In many details the facts in *Lagomarsino v. Market Street Ry. Co.*, 69 Cal.App.2d 388, 158 P.2d 982, were similar to those in the *Chunn* case, and the ruling was the same. A somewhat similar case to the *Chunn* case is *Edwards v. Union Pac. R. Co.*, 1913, 90 Kan. 183, 133 P. 728. There the court's decision was based principally upon the fact that the station platform where the plaintiff was required to go because of the crowded condition of the rest of the platform, and where she was struck by a locomotive overhang of about 27 inches, was less than 5 feet wide between the rails and a depot bow window. The trial court had given an instruction on contributory negligence embodying the general rule. In holding that the instruction was improper under the circumstances of the case, the court said 133 P. at page 729: "Had the evidence shown that the platform space about the window had been comparatively free and unobstructed, and that plaintiff, with ample opportunity to choose a safe place to walk, had put herself or remained in a position of obvious danger from incoming trains, the instruction would have stated the law correctly. Her testimony, however, is that she was endeavoring to get past the narrow space in front of the window, and because of the crowd of persons about her she was prevented from realizing her danger * * *." Thus, the decision cannot be construed as applying to the facts of our case.

Nor is *Jaques v. Southern Pac. Co.*, 8 Cal.App.2d 738, 48 P.2d 63, in point here. There two sets of railroad tracks were maintained in the street, each set operated

by a different company. Between the tracks there was a safety zone 3 feet 10 inches wide. However, the defendant's cars overhung this zone so that there was less than 22 inches left for a person to stand in. While the plaintiff was standing in the safety zone awaiting an approaching car of the other company, defendant's train passed by. Its great speed drew the coat which she was wearing into contact with the train so that she lost her balance and was thrown or fell under the wheels. The court in upholding a judgment in the plaintiff's favor did not discuss the law of contributory negligence involved other than to say, 8 Cal. App.2d at page 740, 48 P.2d at page 64: "It is then argued that the respondent should have anticipated the danger from suction to a person standing near a railway track and that she was therefore guilty of contributory negligence. Manifestly, if the engineer, who had operated trains for more than thirty years, was not chargeable with knowledge of this particular danger, it cannot be said as a matter of law that an eighteen year old school girl should be deemed to have anticipated the same danger." It then stated that the question of contributory negligence was one of fact properly left to the jury—an entirely different situation from the one in our case, where on a sufficiently wide pathway plaintiff by walking dangerously near to the track, and without any effort to determine whether he was safe from train overhang or suction, chose to violate the rule which the cases hold is well settled, namely, that a person on a station platform must look out for a train's overhang.

In *Becker v. City & County of San Francisco*, 121 Cal.App.2d 723, 264 P.2d 133, while standing on a street curb at a regular bus stop the plaintiff leaned forward and his head came in contact with the side of a moving bus. Judgment for the defendant was affirmed. Apparently the case is cited by plaintiff here because the court approved an instruction to the effect that it would be negligence for the bus to be operated in such manner that any portion of it extended over the curb. Such a ruling, however, in no way minimizes the railroad platform rule heretofore mentioned.

In *Campbell v. Yazoo & M. V. R. Co.*, 1909, 95 Miss. 309, 48 So. 618, the plaintiff stood on the concrete platform between the waiting room and tracks, his back to the tracks. He was struck by the engine bumper which overhung the platform 2 inches. It was held that " * * * being in a place where he is invited to be by the company, he has a right to suppose that he will be safe from collision with a train running on the track so long as he occupies a place on the platform, and the mere fact that plaintiff, while on the platform, did not look behind him for an approaching train, cannot be held evidence of contributory negligence * * *. Negligence is not imputable to a person for failing to look out for danger, when, under the surrounding circumstances, the person sought to be charged with it had no reason to suspect that danger was to be apprehended." 48 So. at page 619. This case does not refer to the before-mentioned "uniform rule." *McKeown v. Northwestern Pac. R. Co.*, supra, 20 Cal.App.2d 324, 66 P.2d 1250.

In *Archer v. New York, N. H. & H. R. Co.*, 1887, 106 N.Y. 589, 13 N.E. 318, the plaintiff while on the station platform was struck by a car which overhung the platform 2 or 3 inches. It was held that the plaintiff could not be chargeable with negligence as a matter of law in "assuming there was nothing to make his position dangerous." 13 N.E. at page 321. No reference is made to the uniform rule. Moreover, it appears that the platform in the *Archer* case was one between railroad tracks and there was evidence that the plaintiff did not know and because of the peculiar situation was justified in not knowing that there existed the track upon which the train which injured him came.

Except as to situations of platforms between tracks where the rule is different than the one applicable here, plaintiff has cited and we have found no case holding that a person has the right to assume that a platform or pathway is safe from overhang of passing trains, except *Edwards v. Union Pac. R. Co.*, supra, 90 Kan. 183, 133 P. 728, where it was held that the plaintiff forced by the crowd upon the platform to place herself in a position of danger would have

been negligent had she not been forced to do so; and *Campbell v. Yazoo & M. V. R. Co.*, supra, 95 Miss. 309, 48 So. 618, which does not refer to the platform rule. Moreover, these cases were decided many years before the court in the *McKeown* case, supra, stated that the rule was "uniform."

Defendant's Engineer of Maintenance of Way and Structures testified that it is a general policy of defendant to paint lines on a pathway to mark danger points. This fact, however, does not change the rule regarding the fact that parties using such pathway may not assume that all portions are safe. While in this case there were white lines on the Hillsdale station and Bay Meadows crossing platforms, plaintiff at no time testified that he was misled by the absence of white lines between. Prior to the construction of the present pathway there had been a gravel pathway, all portions of which were clear of the engine overhang. There is no evidence that plaintiff knew of the white lines where they existed nor of the previous pathway. We can see no practical difference between a station platform and a pathway between platforms, so far as the duty of a railroad company to its users is concerned. Actually, it would appear that its duty at a station platform would be at least as high, if not higher, than on a pathway. Station platforms are places where many people gather, where there can be confusion and milling around. A pathway ordinarily has no such congestion.

[2,3] Usually, of course, the question of contributory negligence is one for the jury and it is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn by the jury from the evidence, that the court can say, as a matter of law, that contributory negligence is established. *Zibbell v. Southern Pac. Co.*, 160 Cal. 237, 240, 116 P. 513. In view of the well settled rule as to station platforms, plaintiff's conduct under the circumstances leaves no possible inference other than that he was guilty of contributory negligence.

3. If there were error in excluding it for this purpose, it was error without prejudice as there was ample evidence of de-

Cal.Rep. 285-286 P.2d-10

2. Train suction.

[4] Plaintiff offered a qualified expert who would have testified to the "suction pounds pressure" developed by a train traveling at 50 miles per hour (the speed maintained by the train which struck plaintiff) and which would have been exerted upon plaintiff, "taking into consideration the fact that * * * [plaintiff] was first hit and then spun facing back with his back to the train and then the amount of pressure that was exerted upon him to throw him into the train, together with his off-balance condition and together with his spinning motion would have been sufficient to pull him into the train." The court refused to admit the testimony. It is not clear to what issue this testimony would have related. Were it to the effect that suction initially might have pulled him into the train, it would be relevant on the question of defendant's negligence in driving a train at great speed alongside a platform on which there were a number of people.³ But the evidence was offered not to prove this, for it was proposed to relate only to what occurred *after* plaintiff was first struck. There could be no error in excluding it for this purpose, as there was no contention that plaintiff's injuries were not caused by the accident, so that just what occurred after he was first struck is not too important on the question of the negligence of either party.

3. Inconsistency of rulings.

[5] Plaintiff contends that in denying defendant's motion for new trial but granting its motion for judgment notwithstanding the verdict, the court acted inconsistently, in effect, holding on the motion for new trial that the evidence was sufficient to support the jury's verdict, and on the motion for judgment notwithstanding the verdict that it was not, because as a matter of law the jury's finding that plaintiff was not contributorily negligent was not supported.

Section 629, Code of Civil Procedure, dealing with both of these motions, does not

defendant's negligence and the jury found defendant negligent.

appear to meet the situation here. It provides what happens if the court (a) grants a new trial and denies judgment notwithstanding the verdict, (b) where both motions are denied. It appears to us that the effect of the trial court's action is a finding that if it was wrong in determining that plaintiff was guilty of contributory negligence as a matter of law, then it sees no reason for disturbing the jury's verdict and the judgment on that verdict would stand as the judgment in the case. We see no inconsistency in the court's action.

The judgment is affirmed.

FRED B. WOOD, J., concurs.

PETERS, Presiding Justice.

I dissent.

The majority hold that, under the law as stated in *McKeown v. Northwestern Pac. R. Co.*, 20 Cal.App.2d 324, 66 P.2d 1250, it must be held that plaintiff, as a matter of law, was contributively negligent. I cannot agree with this conclusion.

The jury decided that defendant was negligent and that plaintiff was not guilty of contributory negligence. Those are, of course, normally, fact questions. But the trial judge granted a judgment notwithstanding the verdict, holding that plaintiff was guilty of contributory negligence as a matter of law. Such a judgment is proper when and only when it can be said that there is no evidence or no reasonable inference from the evidence that would support a verdict for the plaintiff. The majority purport to follow these rules, but, in my opinion, violate them.

There can be no doubt that the implied finding of the jury that defendant was negligent is amply supported by the evidence. The majority assume that this is so, and defendant, in its briefs, does not argue to the contrary. The nature of that negligence is most important. In determining whether plaintiff acted as a reasonable man, it is important to know what defendant's duty was towards plaintiff and how, and under what circumstances, defendant violated that duty. The jury could have found that de-

fendant was negligent not only in operating its train at 50 miles an hour under the facts, in failing to apply the brakes after defendant's engineer should have known of plaintiff's danger, and in possibly failing to sound the warning whistle properly, but the jury could also have found that defendant was negligent in building the pathway between the crossing and the station platforms in the manner it did.

What are the pertinent facts? Here was an area customarily used by large numbers of persons. At the Bay Meadows crossing, for the convenience of its patrons and others, a large area, flush with the rails, was constructed, with a white line painted on it that indicated the danger zone near the rails. This area could properly be designated a platform. A similar but larger platform, with a similar white line, was installed at the Hillsdale station. Between these two platforms, for a distance of approximately 600 feet, the defendant constructed what properly was called by many witnesses an asphalt "pathway" or "walkway." This was constructed below the level of the rails at the level of the ties. It was 8' wide and its closest edge was 1 9" from the rails. The engine here involved overlapped the rails 2' 11½", and overlapped the path 1' 2½". The real issue in this case is whether, by so constructing the path, did the defendant impliedly represent to persons rightfully using it, that it was a safe place on which to walk? The plaintiff, as a reasonable man, saw the pathway and used it as it was intended to be used, as a pathway between the two platforms. It should also be mentioned that the railroad right-of-way was quite wide in the area in question so that the path could have been constructed so as to be perfectly safe. The pathway, constructed as it was, to a reasonable man, amounted to an implied invitation to use it to walk between the two platforms. Included within that invitation was the implied representation that the entire pathway was a safe place to walk. Because of the nature of the construction, defendant invited plaintiff to use the pathway, and owed a duty to persons rightfully using it to maintain it in a safe condition. It violated

that duty by allowing trains to travel over the area that substantially infringed on the paved portion of the pathway.

Now what does all this have to do with the issue of contributory negligence? Plaintiff, according to the majority, was guilty of contributory negligence as a matter of law because he walked too close to the edge of the path, in an area that he should have known was dangerous. The other facts in reference to contributory negligence were so clearly factual matters for the jury that they need not be further discussed. Now just where was plaintiff walking? Plaintiff's feet were nearly 3 feet from the tracks when he was hit. He was at least a foot and a half inside the path. How many people know that an engine overhangs the track for a distance of 3 feet? Until I read this record I had no idea that the overhang of an engine was 3 feet. Until I read this record I would have assumed that in walking 3 feet from the rails I was in a safe position. But, in addition to that reasonable assumption, here the railroad built the pathway 1' 9" from the tracks. As a reasonable man, the plaintiff could assume that this was a representation that trains did not overhang the rails more than 1' 9". Thus, in walking about 3 feet from the rails he could reasonably assume that he was safe. That is the end of the case so far as contributory negligence as a matter of law is concerned.

The majority, however, hold that the decision in *McKeown v. Northwestern Pac. R. Co.*, 20 Cal.App.2d 324, 66 P.2d 1250, compels a finding of contributory negligence. That case dealt with an accident on a platform in the literal sense. Here we are dealing with a pathway. It may be that people know or should know that a platform, for the convenience of passengers in getting on and off trains and in loading and unloading baggage, must be constructed close to the rails and within the danger zone of overhanging equipment. In that sense a platform, of itself, may be a warning of danger. On that issue I express no opinion because it is not involved. A pathway is not a platform—in fact, it is an implied

invitation to use it for the purposes it apparently was intended—to walk on. There are other factual distinctions with the *McKeown* case. These distinctions are fairly and fully set forth in the majority opinion, and need not be repeated here. When added to the basic distinction that the *McKeown* case was dealing with a loading platform while here we are dealing with a pathway, the conclusion seems inevitable that the issue of contributory negligence was a factual one. For this reason I would reverse the judgment notwithstanding the verdict.



134 Cal.App.2d 196

W. F. DREHER, Plaintiff and Respondent,

v.

Geo. J. ROHRMOSER, also known as George J. Rohrmoser, and Marjorie B. Rohrmoser, husband and wife, Defendants and Appellants.

Civ. 20900.

**District Court of Appeal, Second District,
Division 1, California.**

June 28, 1955.

Action to quiet title to two lots purchased by plaintiff, who had title taken in name of defendant husband, who also signed notes and deeds of trust securing two building loans at plaintiff's request. From adverse judgment of the Superior Court, Los Angeles County, Edwin L. Jefferson, J., the defendants appealed. The District Court of Appeal, Drapeau, J., held that the evidence sustained finding that naked title only was placed in name of defendant husband for convenience of plaintiff, that husband never had any beneficial interest in property and that neither husband nor wife had at any time any community or other interest therein.

Judgment affirmed.

1. Husband and Wife ⇨249

Statute providing that all property acquired after marriage by either husband or wife, or both, including real property is community property does not include property held in trust by a spouse for a third person. West's Ann.Civ.Code, § 164.

2. Quieting Title ⇨43

In action to quiet title to two lots which plaintiff had purchased but title to which had been taken in name of defendant husband, who also signed notes and deeds of trust for building loans for convenience of plaintiff, plaintiff had right to interpose any equitable claim which he possessed directed to the issues raised by the pleadings.

3. Trusts ⇨87

In action to quiet title to land which had been purchased by plaintiff but title to which had been taken in name of defendant husband for convenience of plaintiff, evidence showing circumstances under which property was deeded to defendant husband was properly admitted. West's Ann.Civ. Code §§ 162-164.

4. Husband and Wife ⇨264**Trusts** ⇨89(3)

In action to quiet title to two lots purchased by plaintiff but title to which was taken in name of defendant, who also signed notes and deeds of trust securing two building loans, evidence sustained findings that naked title only was placed in defendant husband for convenience of plaintiff, that husband never had any beneficial interest in property and that neither defendant husband nor wife had at any time any community or other interest in the property.

Albert A. Dorn, Los Angeles, for appellants.

Everett H. Mills, North Hollywood, for respondent.

DRAPEAU, Justice.

Defendant, George J. Rohrmoser, was employed by plaintiff, who was a general contractor and builder of homes.

Through a real estate broker, plaintiff bought two lots in Wilmington for \$2,000,

which amount he paid into escrow. At that time he told defendant George that he wanted to put the lots in his (defendant's) name "for convenience sake, so that he could get the permits and the titles and the loan" and thus expedite the construction of two houses on the lots. Defendant agreed to this arrangement.

Accordingly, a grant deed to "Geo. J. Rohrmoser, a married man" was executed by Charles V. Huck, et al., owners of the lots. Defendants had no dealings with either the real estate broker or the owners. Thereafter, plaintiff arranged for two building loans of \$6,000 each and, at his request, defendants signed the notes and deeds of trust securing the same.

On October 21, 1953, when the houses were completed and sales thereof to third parties were pending, defendant George J. Rohrmoser executed a grant deed conveying the property to the plaintiff. When plaintiff presented the deed to Mrs. Rohrmoser, she refused to sign it. This action to quiet title followed.

The answer alleged ownership in defendants under the deed from Huck, et al. It also alleged execution of the trust deeds and an oral agreement pursuant to which plaintiff constructed the two houses and was paid \$12,000 therefor.

Defendant George J. Rohrmoser admitted he had made no payments on the notes; that he never paid any portion of the purchase price and did not know what it was until he heard plaintiff's testimony at the trial. He also testified that on several prior occasions he had taken title to lots for plaintiff and had thereafter executed deeds to the new purchasers; also that he took title to the instant property to protect plaintiff from his creditors.

From the judgment quieting title to the property in plaintiff, defendants appeal.

Appellants take the position that:

1. They acquired the lots in question as community property by the deed from Huck, et al.

2. The deed from appellant husband conveyed nothing to respondent.

3. Respondent did not have legal title to the property when he initiated the instant action of quiet title.

4. Under the pleadings, it was error to admit evidence tending to prove an equitable title in respondent.

"The relief awarded in an action to quiet title may vary according to the circumstances of the case. * * * And * * * while an action to quiet title cannot be maintained by the owner of an equitable estate against the holder of the legal title upon a complaint containing only the averments commonly made therein, yet appropriate remedies, such as cancellation, reconveyance, or decrees establishing or enforcing trusts, or determining the priorities of opposing equities, may be had, as between the proper parties, whenever they are required upon equitable considerations and are justified by the pleadings and proof." 22 Cal. Jur. 129, 130, section 18, citing *De Leonis v. Hammel*, 1 Cal.App. 390, 394, 82 P. 349.

In *Jeffords v. Young*, 98 Cal.App. 400, 406, 277 P. 163, 166, in which it was contended that a suit to quiet title by one holding an equitable title to realty would not lie against the holder of the legal title, the court stated:

"While it is true that the complaint of the appellants stated facts constituting only a suit to quiet title, the answer of the grantee Lorenz set up new matter and asked for affirmative relief, praying that the title be quieted in him. The new matter in the answer is deemed to have been denied, and, in spite of the nature of plaintiffs' original action, they have a right to interpose, against the defendants' claim of legal title, any equitable claim which they may possess, and upon a proper showing the grantee's title should be quieted subject to the valid equitable claim of the appellants."

Again in *Bacon v. Bacon*, 21 Cal.App.2d 540, 545, 69 P.2d 884, 886, it is stated, quoting from *Wilson v. Anderson*, 109 Cal.App. 467, 293 P. 627, 630:

"The authorities cited abundantly show that under the provisions of section 738, Code of Civil Procedure, the court, in an action involving adverse claims to real property prosecuted upon a complaint seeking to quiet title of the plaintiff, may enter such judgment as the equities of the case require, and provide for the establishing and enforcing of such trusts in relation to the property involved as the equities of the case justify or demand."

[1] Following sections 162 and 163 of the Civil Code which define separate property of the spouses, section 164 of the same code reads: "All other property acquired after marriage by either husband or wife, or both, including real property situated in this State * * * is community property".

This does not, however, include property held in trust by a spouse for a third person. 10 Cal.Jur.2d 670, section 7, citing *Anderson v. Broadwell*, 119 Cal.App. 130, 6 P.2d 260. See, also, 41 C.J.S., Husband and Wife, § 471, subd. i, p. 1006; and 54 Am.Jur. 152.

[2, 3] Accordingly, respondent had the right to interpose any equitable claim which he possessed directed to the issues raised by the instant pleadings. And there was no error in admitting evidence showing the circumstances under which the property here was deeded to appellant husband.

[4] The admissions of appellant husband, standing alone, were amply sufficient to support the trial court's findings: that the naked title only was placed in the name of said husband for the convenience of respondent; that said husband never had any beneficial interest in the property; and that neither appellant husband nor wife had at any time any community or other interest therein.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

134 Cal.App.2d 288

Frank KELLOGG, Plaintiff and Respondent,
v.

Edris GAYNOR, as Administratrix of the Estate of Joseph Gaynor, also known as J. Gaynor, also known as Josif Ginsburg, deceased, Defendant and Appellant.

Civ. 20674.

District Court of Appeal, Second District,
Division 3, California.

July 7, 1955.

Rehearing Denied July 29, 1955.

Hearing Denied Sept. 1, 1955.

Action against a physician's administratrix for alleged malpractice of physician in performing surgery upon plaintiff's nose and chin. The Superior Court of Los Angeles County, H. Burton Noble, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Shinn, P. J., held, inter alia, that physician's administratrix was entitled to presumption that physician had not been negligent.

Judgment reversed.

1. Physicians and Surgeons ⇨18(6, 8)

In action against physician's administratrix for alleged malpractice of physician in performing plastic surgery upon plaintiff's chin, it was not necessary for plaintiff to produce direct evidence as to technique used by doctor or as to particular manner in which surgery was performed, and if in the opinion of experts, undesired result which they observed would have been avoided if proper degree of skill, judgment and care had been used, this alone would have been a sufficient reason for opinion that such had not been used.

2. Physicians and Surgeons ⇨18(9)

In action against physician's administratrix for alleged malpractice of physician in performing plastic surgery upon plaintiff's chin, evidence consisting of expert testimony, on issue, on whether surgery had been performed in negligent manner, was sufficient for jury.

3. Evidence ⇨53

A "presumption" is a form of evidence which jury is required to consider

along with all other evidence in case, and is to be weighed with other evidence, and unless it is overcome by contrary evidence, it requires a verdict in favor of presumption.

See publication Words and Phrases, for other judicial constructions and definitions of "Presumption".

4. Negligence ⇨121(1)

Where party to negligence action has died or for some other reason is unable to testify as to his acts which it is claimed were negligently performed, there is presumption that his acts were performed with degree of skill and care which was commensurate with his duty, provided that party claiming benefit of presumption has not introduced evidence of conduct wholly irreconcilable with exercise of due care.

5. Physicians and Surgeons ⇨18(6)

A physician's administratrix defending malpractice action was entitled to benefit of presumption that physician's acts were performed with degree of care and skill commensurate with duty.

DeForrest Home, Los Angeles, for appellant.

Louis C. Blau, Beverly Hills, and David L. Mohr, Los Angeles, for respondent.

SHINN, Presiding Justice.

Defendant Edris Gaynor, as Administratrix of the estate of Joseph Gaynor, deceased, appeals from a judgment entered on a verdict rendered in favor of Frank Kellogg, plaintiff, in an action for alleged malpractice of her intestate.

Kellogg sustained injury to his nose in an accident some 23 years before this action was instituted. He underwent slight corrective surgery for a deviation of the right septum, after which he experienced no difficulty in breathing. In 1949, Joseph Gaynor, a medical doctor specializing in plastic surgery, performed corrective surgery on respondent's nose and chin. The purpose of the operation was to narrow the nose, to remove a hump from it, and to accentuate the chin. Because of unsatis-

factory results, Dr. Gaynor performed a second operation on respondent's nose in 1951, followed by postoperative aftercare as in the first surgery. Plaintiff remained unsatisfied as to the results on his nose and chin. Dr. Gaynor did not perform a second operation on the chin, having advised plaintiff that it would resume its normal shape after a period of time. The chin was characterized by mobile pieces of cartilage, and the nose, even after the second operation, was concave with a bulbous tip, and the passage of air was impaired. Plaintiff instituted this action shortly after the death of Dr. Gaynor in 1951, his claim having been rejected by defendant.

In the first cause of action plaintiff alleged damage to his nose and in the second cause of action, damage to his chin. Defendant's motion for nonsuit as to the first and second causes of action was denied and her motion for a new trial also was denied.

Appellant contends (1) that the court erred in denying her motion for nonsuit as to the second cause of action and (2) that it was error to refuse her requested instruction that it was to be presumed that Dr. Gaynor exercised due care in rendering his services.

Dr. McDowell, plaintiff's expert, testified that in his opinion the services were not rendered in a manner consistent with the care and skill usually employed by qualified plastic surgeons in this community. He gave as his reasons for his opinion that too much tissue was removed from the nose, uneven implants had been placed in the chin, and scars placed in improper directions and locations and he stated: "The results I feel are certainly below the results that you ordinarily expect from a capable plastic surgeon." He further testified that further surgery would be recommended, but that good results could not be assured because the condition of plaintiff's nostrils was such that normal passage of air through them could not be guaranteed.

[1,2] In presenting her first point defendant urges insufficiency of the evidence of negligence in the operation upon the chin. She says: "It will be noted that Dr.

McDowell did not testify to a single act which he considered unskillful or negligent." No support for this contention is to be found in defendant's quoted excerpts from *Costa v. Regents of Univ. of California*, 116 Cal.App.2d 445, 461, 254 P.2d 85, to the effect that the fact that the result of treatment is less favorable than in a great majority of cases may result from individual differences or less favorable circumstances of the case and need not indicate that the treatment was negligently performed, nor in the statement quoted from *Nicholas v. Jacobson*, 205 Cal. 577, 271 P. 1057, to the effect that there was in that case no evidence whatever of the commission of any negligent or unskillful act. It was not necessary for plaintiff to produce direct evidence as to the technique used by the doctor nor as to the particular manner in which the surgery was performed. The circumstances of the case were such that in the opinion of experts the results would speak for themselves. They could see what had been done and it was competent for them to base their opinions upon their belief that the work should not have been done as it was done and that a better result would have been reached if the surgeon had employed a standard degree of skill and judgment. If in the opinion of experts the undesired result which they observed would have been avoided if the proper degree of skill, judgment and care had been used, this alone would have been a sufficient reason for an opinion that they were not used. There was sufficient expert testimony on behalf of plaintiff to justify a conclusion that the surgery on the chin was performed in a negligent manner. It was not error for the court to deny defendant's motion for a nonsuit as to the second cause of action.

[3,4] Defendant requested and the court refused an instruction reading as follows: "Where a party to an action has died, and therefore is not available to testify in his own behalf, there is a presumption of law that the deceased exercised reasonable care and was not guilty of negligence. A presumption is a form of evidence which the jury is required to consider

along with all other evidence in the case, and is to be weighed with the other evidence, and unless it is overcome by contrary evidence would require a verdict in favor of the presumption; that is to say, the presumption that the deceased was not guilty of malpractice." The court was clearly in error in refusing this instruction. Where a party has died or for some other reason is unable to testify as to his acts which it is claimed were negligently performed, there is a presumption that his acts were performed with a degree of skill and care which was commensurate with his duty, provided that the party claiming the benefit of the presumption has not introduced evidence of conduct wholly irreconcilable with the exercise of due care. In *Westberg v. Wilde*, 14 Cal.2d 360, 94 P.2d 590, and *Scott v. Burke*, 39 Cal.2d 388, 247 P.2d 313, these principles were thoroughly examined and expounded with full citation of authorities. Anything further said on the general subject would be useless repetition.

[5] Plaintiff answers this assignment of error by claiming that the rule has no application in an action against a physician or surgeon for malpractice. No case has been cited and we have found none which tends to support this contention. A physician is entitled to the benefit of the presumption since negligence is a fact to be proved. *Engelking v. Carlson*, 13 Cal.2d 216, 88 P.2d 695; *Simone v. Sabo*, 37 Cal.2d 253, 257, 258, 231 P.2d 19. It is argued that the question of negligence was one that could have been resolved only through the opinions of experts and it appears to be contended that a mere presumption of the exercise of care should not be accorded the dignity or quality of an expert opinion. But there is a general presumption of the use of the proper degree of care and it applies to all men. It means only that the trier of fact must accept as a fact absence of negligence unless and until evidence of negligence is produced which outweighs the presumption of the exercise of due care. We think there were compelling reasons

for application of the presumption to the facts of the present case. The jury were properly instructed that the results obtained by Dr. Gaynor, considered alone, did not create an inference that he was guilty of malpractice but that the results might be considered by expert witnesses in determining whether he had exercised knowledge and skill in accordance with his duty. Where it was impossible for the defendant to produce evidence with respect to the methods and technique employed in the problem which confronted Dr. Gaynor, to withhold from the defendant the benefit of the presumption would not only have been unreasonable but unjust as well. Application of the presumption was consistent with the testimony of defendant's expert that due care and skill had been employed. There is no merit in the contention that the presumption was inapplicable because it was opposed to the testimony of the plaintiff's expert. Expert testimony was required in order to establish negligence. If plaintiff's expert testimony had not been deemed by the jury to be satisfactory and sufficient, a finding against the claim of negligence would have been required, even though the defendant produced no expert testimony that due care and skill had been employed. This would result from the presumption against negligence. Plaintiff's argument that the problem of weighing a presumption against other types of evidence "inevitably results in creating a morass of confusion and uncertainty in the minds of the jurors" is not a new one. It has been settled in a long line of cases that triers of fact have that problem and must make the best of it. The logical effect of refusal of the instruction was to permit the jury to weigh the evidence as if no presumption of the exercise of due care existed. Refusal of the instruction was clearly erroneous and could not have failed to be prejudicial to the defense.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ.,
concur.

134 Cal.App.2d 23

Robert B. BROCKE and Dorothy O. Brocke,
Plaintiffs and Respondents,
v.

George C. NASEATH, Defendant and
Appellant.
Civ. 8461.

District Court of Appeal, Third District,
California.

June 23, 1955.

Rehearing Denied July 19, 1955.

Hearing Denied Aug. 17, 1955.

Action by borrowers to recover treble the amount of interest paid to lender. The Superior Court, Plumas County, William M. MacMillian, J., entered judgment for borrowers and lender appealed. The District Court of Appeal, Peek, J., held that under statute allowing borrower who paid over 12% interest per annum right of action to recover treble the amount of interest paid, borrower who borrowed \$4,000 but signed note due in six months for \$6,000 at 6% interest was allowed treble the amount that sum collected exceeded loan actually made and lender was not entitled to credit for interest from maturity of obligation to date of payment.

Judgment affirmed.

1. Usury ☞138

Under statute which allows borrower who paid over 12% interest per annum right of action to recover treble the amount of interest paid, borrower who borrowed \$4,000 but signed note due in six months for \$6,000 at 6% interest was allowed treble the amount that sum collected exceeded loan actually made. West's Ann.Civ.Code, § 1916-1 et seq.

2. Usury ☞138

Under statute which gives borrower who pays over 12% interest right of action to recover treble the amount of interest paid, lender who had borrower of \$4,000 sign note due in six months for \$6,000 at 6% interest was not entitled to credit of 6% interest on \$4,000 from maturity date until date of payment in borrower's action for treble the amount of interest paid. West's Ann.Civ.Code, § 1916-1 et seq.

3. Usury ☞142(4)

In action to recover treble the amount of usurious interest paid to lender, borrower had burden of proving usury by mere preponderance of the evidence. West's Ann.Civ.Code, § 1916-3.

4. Appeal and Error ☞931(1)

On appeal, that part of the evidence which supports judgment must be accepted, not that part which would defeat, or tend to defeat, judgment.

5. Appeal and Error ☞1010(1)

If, upon any hypothesis whatever, there is substantial evidence to support finding of facts, finding cannot be set aside on appeal.

6. Witnesses ☞275(6)

In action to recover treble the amount of interest paid to lender, trial court did not err in limiting cross-examination of borrower concerning his alleged contemplation of selling his premises for sum in excess of amount borrowed, since such testimony could in no way affect judgment.

7. Appeal and Error ☞1056(1)

In action to recover treble the amount of usurious interest paid to lender, even if trial court did err in striking out portion of transcript on borrower's motion, where lender's witness testified to substantially the same effect and lender failed to show any prejudice resulting therefrom, exclusion of that evidence did not result in miscarriage of justice.

8. Appeal and Error ☞1057(1)

In action to recover treble the amount of interest paid to lender wherein lender, at time of motion for continuance, made request to show by his wife's testimony that borrowers had negotiated with him weeks before loan was actually made, trial court did not prejudice lender's cause in rejecting his request where like evidence was already in the record.

9. Appeal and Error ☞970(1, 4)

Limiting introduction of evidence and allowing party to reopen his case in chief are matters peculiarly within discretion of trial court and do not constitute grounds for

reversal unless manifest abuse of discretion is shown.

Clewe & Blade, Oroville, for appellant.

Pardee & Cady, by Donald P. Cady, Susanville, for respondents.

PEEK, Justice.

This is an appeal by defendant from a judgment in the sum of \$9,793.23 in favor of plaintiffs in an action brought to recover treble the amount of interest collected on an alleged usurious transaction.

By this action plaintiffs sought to recover treble the amount of interest paid by them to defendant for a loan of \$4,000 dated June 30, 1947. Their complaint alleged that they borrowed \$4,000 from defendant for which he demanded and received a promissory note in the sum of \$6,000 to bear interest at 6% per annum due six months from the date thereof and secured by a mortgage upon certain real property situated in Plumas County; that defendant had actually collected from plaintiffs the sum of \$7,264.41, or interest in the sum of \$3,264.41 on the alleged \$4,000 principal. Defendant's answer admitted the execution of the mortgage and affirmatively alleged that plaintiffs borrowed \$4,500 on June 30, 1947; that plaintiffs were indebted to him in the further sum of \$1,000 on a prior note and the accrued interest thereon. During the hearing defendant testified to having advanced additional sums to plaintiffs.

It is defendant's first argument that in any event the amount of the judgment is excessive as a matter of law, and in this regard reliance is placed solely upon the case in *Penziner v. West American Finance Co.*, 10 Cal.2d 160, 74 P.2d 252. His argument in this regard is that the cited case requires a defendant in a usury action to be given credit for interest upon the true amount of the debt at the stipulated rate from the maturity date of the usurious obligation to the date of its payment, plus the principal amount of the loan; and that therefore plaintiffs in this case can recover only treble the difference between that amount and the amount actually paid by

them, which, assuming plaintiffs' allegations are true, would amount to \$8,029.77, or \$1,763.46 less than the judgment as entered.

The court in the *Penziner* case apparently rested its opinion upon the conclusion that as originally conceived, the transaction was not necessarily usurious; that the agreement of the parties contemplated advances from time to time up to an amount equal to the principal of the loan as it appeared on the face of the note plus interest thereon at a rate clearly within the statute; that the note did not provide for further charges; that it was only when the proceeds of the foreclosure sale were applied toward the payment of certain brokerage fees and interest that the element of usury was injected into the transaction. Here the evidence introduced by plaintiffs established an entirely different transaction. The contract between the parties at its inception was tainted with usury, providing as it did that the plaintiffs should pay for the use of \$4,000 the sum of \$2,000 plus interest on the stated principal of the note which was \$6,000 at the rate of 6% per annum.

[1,2] By the provisions of the Usury Law, Deering's Gen. Laws, Act 3757, Stats. 1919, West's Ann. Civ. Code, § 1916-1 et seq., it is established that the contract rate shall not exceed "twelve dollars on the one hundred dollars for one year", section 1, but if the lender contracts for more than the maximum allowed, then he is subject to the penalty that the particular portion of his contract calling for the payment of interest is null and void and that "no action at law to recover interest in any sum shall be maintained." Section 2. And, finally, if the lender goes one step further by demanding and receiving interest at the rate provided for in his contract in violation of the preceding sections of the Act, the borrower from whom the usurious interest was taken has a right of action to recover treble the amount of the money so paid. Section 3. It would seem to follow then that the recovery to which a borrower-plaintiff is entitled is an amount equal to three times the amount by which

the sum actually collected exceeds a loan actually made. In other words sections 1 and 2 disallow the lender any amount over and above the loan made and fees properly charged, and hence when he collects a further sum, he is liable in treble the amount thereof notwithstanding his forbearance beyond the maturity date of the note. Thus it was held in *Haines v. Commercial Mortgage Co.*, 200 Cal. 609, at page 625, 254 P. 956, 255 P. 805, 807, 53 A.L.R. 725, that parties may freely contract within the 12% per annum limit, but, said the court, "This means, also, that commissions and bonuses may be charged by the lender, but all such charges must, when added to the interest specified and spread over the whole period of forbearance, be kept within the limit set by law." Furthermore, interest at the stipulated rate during the period of forbearance beyond the maturity date of the note would seem to be but "a part of the enterprise evidenced by the first note and bears all the markings of an illicit deal." *Martin v. Ajax Construction Co.*, 124 Cal. App.2d 425, 431, 269 P.2d 132, 135. Therefore to allow a lender who has violated the Usury Law to be credited with the same when computing the amount of recovery to which a borrower suing under section 3 is entitled, would be violative of the legislative purpose and intent in the enactment of such a statute.

[3] Defendant next contends that to sustain a charge of usury the evidence not alone must be clear and convincing, but since usury laws are quasi penal by nature, plaintiffs must establish defendant's guilt with the same degree of certainty as if the action were criminal and not civil. The case relied upon in support of such argument, *Merk v. Gelzhaeuser*, 50 Cal. 631, has only been cited once and then only to be impliedly if not expressly overruled. See opinion by Garoutte, J., on denial of petition for hearing en banc in *Hearne v. De Young*, 119 Cal. 670, 682, 52 P. 150, 499. There can be no question that here as in any other civil case the plaintiff who charges the exaction of usurious interest has the burden of proving the charge by a mere preponderance of the evidence. *Knoll*

v. Schleussner, 112 Cal.App.2d 876, 247 P.2d 370.

[4, 5] Additionally defendant would have this court reweigh the evidence and pass upon the credibility of the witnesses from the standpoint of their numerical weight and the inherent improbability of their testimony. As the court stated in *Murphy v. Ablow*, 123 Cal.App.2d 853, at page 858, 268 P.2d 80, 83:

"On appeal that part which supports the judgment must be accepted, not that part which would defeat, or tend to defeat, the judgment. Unless it clearly appears that upon no hypothesis whatever is there substantial evidence to support a finding of the trier of fact, it cannot be set aside on appeal."

[6] Appellant next contends that the court erred in limiting cross-examination of the plaintiff Robert Brocke concerning plaintiffs' alleged contemplation of selling their premises for a sum substantially in excess of the amount borrowed. This contention is made without benefit of authority and it is difficult for us to determine the basis thereof since in any event the evidence was wholly immaterial and could in no way have affected the judgment of the court.

[7] Appellant further contends that the court erred in striking out without motion therefor an unspecified portion of the transcript. The record, however, shows that plaintiffs' counsel objected to the evidence in question and moved to strike. If there was any error in the court's granting of plaintiffs' motion, appellant has wholly failed to sustain his burden of showing any prejudice resulting therefrom. Furthermore a subsequent witness called by defendant testified to substantially the same effect, and hence it is difficult to perceive how the exclusion of that particular evidence resulted in a miscarriage of justice.

[8, 9] Defendant's final contention attacks the action of the trial court in denying his motion to reopen his case and rejecting certain offers of proof made at that time. At the time of the hearing on the first motion for a continuance, defendant sought

to prove by the testimony of his wife that plaintiffs had negotiated with him some two weeks prior to the actual loan. Again we fail to see how the court's denial of such request in any way prejudiced his cause since the evidence sought to be elicited related to like evidence concerning which the court had already received multitudinous testimony. Limiting the introduction of evidence and allowing a party to reopen his case in chief are matters peculiarly within the discretion of the trial court and do not constitute grounds for reversal unless a manifest abuse of discretion is shown. *People v. Berryman*, 6 Cal.2d 331, 57 P.2d 136.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



134 Cal.App.2d 84

Joseph CALDWELL, Plaintiff and
Respondent,
v.

Eugene FARLEY, Hod Carriers & Laborers
Local 802, Doe One Through One
Thousand, Defendants,

Hod Carriers & Laborers Local 802,
Appellant.
Civ. 20704.

District Court of Appeal, Second District,
Division 2, California.

June 24, 1955.

Rehearing Denied July 11, 1955.

Hearing Denied Aug. 17, 1955.

Action against labor union and union steward for injuries sustained by plaintiff, who was struck on head with board by steward following exchange of words over statements by plaintiff to union members as to inadvisability of a strike. From adverse judgment of the Superior Court, Los Angeles County, Frank G. Swain, J., the union appealed. The District Court of Ap-

peal, Moore, P. J., held that the evidence sustained finding that assault was committed within scope of union steward's employment.

Judgment affirmed.

1. Master and Servant ☞306

An employer is liable for the malicious tort of his employee done in the scope of his employment.

2. Master and Servant ☞306

Employer's liability for malicious tort of his employee done in scope of his employment extends beyond his actual control over conduct of employee, and he is liable for wrongful acts of his agent where such acts are a part of business which agent was employed to do.

3. Master and Servant ☞330(3)

In action for injuries sustained by plaintiff who was struck on head with board by union steward following exchange of words over statements made by plaintiff to union members concerning inadvisability of a strike, evidence sustained finding that assault was committed within scope of steward's employment, even though it occurred at time when men were congregating for work but before time for beginning day's work had arrived. *West's Ann.Civ. Code*, § 2338.

4. Appeal and Error ☞994(3)

Master and Servant ☞330(2)

In action against labor union and union steward for injuries sustained by plaintiff, who was struck on head with board by union steward following exchange of words over statements by plaintiff to union members as to inadvisability of a strike, steward's testimony to effect that he was not acting within scope of his agency was merely a legal conclusion and was not conclusive on reviewing court, but even if it had been a pure statement of fact, court was free to reject it.

5. Trial ☞382

In trial to the court, it is exclusive function of trial court to adjudge credibility of witnesses and weight of their testimony.

6. Appeal and Error ⇨1010(1)

Reviewing court cannot make contrary findings where findings of trial court are supported by substantial proof.

7. Master and Servant ⇨330(3)

In action against labor union and union steward for injuries sustained by plaintiff, who was struck on head with board by steward following exchange of words over statements by plaintiff to union members as to inadvisability of a strike, finding that lapse of time between exchange of words and assault did not destroy the connection of the two events was warranted by the evidence.

8. Master and Servant ⇨330(3)

In action against labor union and union steward for injuries sustained by plaintiff, who was struck over head with board following exchange of words with steward over statements by plaintiff to union members as to inadvisability of a strike, evidence warranted finding that union ratified acts of steward, who was not removed from his position.

Alexander H. Schullman and Boris Raynes, Los Angeles, for appellant.

Plotkin & Cossman, Los Angeles, for respondent.

MOORE, Presiding Justice.

The sole question for decision is whether there is sufficient substantial proof to support the finding that the tortious act of a labor union's agent was committed within the scope of his employment. Respondent sued appellant and its job steward Farley for damages on account of Farley's striking respondent with a club on the head without justifiable cause. Judgment was entered on the court's findings. The Union appeals.

On May 14, 1952, one Eugene Farley was the steward of appellant, an unincorporated association. Respondent was, at the same time and place, a member of the plasterer's union and was present for the purpose of plying his trade on the same structure on which the members of appellant were at work. At lunch time of the day preceding,

respondent expressed his opinion upon the inadvisability of a strike by appellant. The substance of such expressions was communicated by McDaniel of appellant union to defendant Farley about 7:15 a. m. of May 14. On receipt of such intelligence, Farley located respondent and engaged him in a discussion concerning the reaction of respondent's reported remarks upon the members of appellant. Bitter words were exchanged. Farley said he wished respondent would be quiet and peaceful; "you are causing friction and agitating and needling union members and they have reported it to me * * * You keep your damned mouth shut or you will get your head busted in." As respondent turned and started to walk away, Farley struck his head with a 1" x 4" board, causing serious bodily injuries.

Appellant contends that (1) Farley, as steward, was restricted to such duties as were prescribed in "Wage Scales and Working Rules of the Southern California District Council of Laborers"; (2) the assault upon respondent occurred "before work began"; (3) the discussion preceding the battery in no way concerned labor disputes or grievances, but concerned respondent's personal dislike for hod-carriers; (4) the discussion terminated amicably; (5) Farley was angered by remarks directed against him by respondent, and reacted impulsively in committing the battery; (6) appellant at no time authorized Farley to conduct any of his expressly defined duties by the exercise of force and violence; (7) no evidence warranted a conclusion of liability under the rule of *respondere superior*. Such contentions may be briefly summarized with one sentence: Farley's assault was outside the scope of his authority.

[1,2] That the battery upon respondent was within the scope of the steward's agency will readily appear. Scope is defined as range or extent of view; intent, or sweep. (Webster's International Dictionary.) An employer is liable for the malicious tort of his employee done in the scope of his employment. His responsibility extends beyond his actual control over the conduct of his employee. He is liable for

the wrongful acts of his agent where such acts are a part of the business which the agent was employed to do. *Carr v. Wm. C. Crowell Co.*, 28 Cal.2d 652, 654, 171 P.2d 5, 7. In that case the employee of the company threw a hammer at another workman and injured him. Defendant's enterprise required the association of employees with third parties, attended by the risk that someone might be injured. "The risks of such associations and conditions were risks of the employment." In *Stansell v. Safeway Stores, Inc.*, 44 Cal.App.2d 822, 824, 113 P.2d 264, the manager of the grocery was acting within the scope of his employment when he struck a customer after they had quarreled over an order and exchanged vile epithets.

Where the driver of an oil company's truck disputed with a motorist after the latter's car had been run off the highway by the truck and concluded his argument by striking the motorist with a "large instrument," the trial court properly instructed the jury that the assault by the truck driver was the conduct of the oil company. The court held that "the fact that the questioned act was unauthorized or, if wrongful, that it was not committed in order to further the interests of the principal, will not show such a departure from the service of the principal as will absolve the latter if the act was committed while the agent was still occupying himself with the principal's business within the scope of his employment. * * * Sanders' entire association with plaintiff arose out of his use of the public highway on his employer's business." *Fields v. Sanders*, 29 Cal.2d 834, 839, 840, 180 P.2d 684, 688, 172 A.L.R. 525.

[3] The finding herein was that the battery was not only committed within the scope of the employment, but also, that the moment of its occurrence was within its course even though the time for beginning the day's work had not arrived. The hearing of disputes and grievances was opportune whenever the Union's members were assembled at the situs of construction and the steward was present. It is unreasonable to conceive that a steward whose duties required him to report grievances should re-

main silent and refuse to inquire in order to ascertain the origin or quality of grievances or disputes until the men have commenced the daily task for which they are employed. If Farley was the person to whom complaints should be made, Mr. McDaniel was in order in narrating grievances at seven a. m. instead of waiting until eight o'clock. Also, if it was Farley's duty to quiet agitators, 7:30 a. m. was a wholesome hour to proceed with such duty. Farley's discussion with McDaniel and his reproval of respondent were both concerned with appellant's business. The propriety of his admonition to respondent was as correct as if he had waited until the noon hour or the close of the day. Farley's first words to respondent were that the Union had reacted unfavorably to the report of respondent's agitating its members. His last words were his threat which was followed by "busting" respondent's head.

If Farley's words and act were not within the scope of his employment, it is not conceivable in what scope they were. The men were holding neither a formal party nor a picnic. The workers were congregating to enter upon their duties. Farley's words concerned only the affairs of his Union and the grievances of its members toward respondent. While the evidence was such that an inference might have been drawn that the blow was dealt at a time after the reprimand to respondent and was the result of respondent's work, yet the court found that "Farley, with the desire to hurt and injure the plaintiff, did assault and strike the plaintiff on and about the head and shoulder with a board * * * it is not true that the aforesaid acts of Eugene Farley were committed in his own defense * * * at the time said blow was struck, defendant Eugene Farley was the agent of * * * Local 802 and was acting within the scope of said agency."

The contention is made that the battery was motivated by personal anger and did not advance the interests of the Union and was therefore outside the scope of his employment and fixed no liability on appellant. Liability followed if the injury resulted from a dispute arising out of Farley's pursuit of his duty. It is not indispensable to

a liability that the assault should have been made for the purpose of performing the work the employee was employed to do. Civ.Code, sec. 2338; *Hiroshima v. Pacific Gas & Elec. Co.*, 18 Cal.App.2d 24, 28, 63 P.2d 340. From the words used and threat made by Farley in his reprimand of respondent, it was a fair deduction that the clubbing administered by the steward was to terrorize all workers of other unions and to dissuade them from criticizing the internal workings of his Union. Such inference was reasonable notwithstanding the lapse of a moment from the termination of the reprimand until the assault.

[4-6] Contention is made that Farley's testimony to the effect that he was not acting within the scope of his agency should be conclusive on a reviewing court. Such contention has no basis in law. His testimony was a legal conclusion. But if it had been a pure statement of fact, the court was free to reject it and to be guided by the testimony of other witnesses and the inferences from all the evidence. It is the exclusive function of the trial court to adjudge the credibility of witnesses and the weight of their testimony. *Travis Glass Co. v. Ibbetson*, 186 Cal. 724, 727, 200 P. 595. Even though contrary inferences could reasonably have been drawn, the appellate court cannot make contrary findings where the trial court is supported by substantial proof. *Fischer v. Keen*, 43 Cal.App.2d 244, 250, 110 P.2d 693. Sufficient evidence was admitted to justify the findings above quoted.

[7] The contention that the intermission between the reprimand and the assault destroyed the connection of the two events is not meritorious. In making findings, the court was familiar with all the circumstances. Its exclusive function was to determine whether the lapse separated the reprimand from the clubbing. Where a series of events began with a discussion and concluded with an act of violence fifteen minutes later, the passing of time did not defeat plaintiff's right of recovery. *Carr v. Wm. C. Crowell Co.*, 28 Cal.2d 652, 653, 171 P.2d 5. The finding that the battery was a part of Farley's interview with respondent was warranted by the evidence.

[8] But respondent is not without other support for his judgment. The act of Farley was ratified by appellant. Two days after the assault, respondent was invited to Union headquarters where he was interviewed by appellant's financial secretary McClain. The contents of that conversation establish the Union's ratification of Farley's acts. McClain said, "Well, you guys from No. 2 have given us a lot of trouble. I don't mean you; I mean your union. You guys are trying to shove those boys any way you want to. We are here and we are going to stop you * * * a lot more of you guys are going to get your heads busted in." McClain testified that he knew Farley was the steward of appellant at the time and place in question; also that he had authority to remove Farley from that office. Despite such authority, Farley was not removed. McClain effectually approved and ratified the acts of his steward by his language. The officials of the Union knew that Farley, pursuant to his duties as prescribed in the "Working Rules" had tried by his interview with respondent to minimize the dissention between the hod carriers and the plasterers. From such knowledge, and his continued employment as steward, it is fairly inferable that the Union ratified his acts in dealing out punishment to respondent. Since it was Farley's duty to report all disputes to his local representative and since he had first to ascertain or inquire into them, his total behavior must have been approved by the Union. At least the evidence warranted such finding.

If Farley was hired to represent the Union to settle minor disputes as the trial judge observed, then "what he did in the scope of that authority, he did not merely as an individual, but as a representative of the union."

The numerous authorities cited by appellant to the effect that its agent's tortious act was done without the scope of his authority, *Godchaux v. Texas & Pacific Railway Company*, 144 La. 1041, 81 So. 706; *McDermott v. American Brewing Co.*, 105 La. 124, 29 So. 498, 52 L.R.A. 684; *Chase v. Knabel*, 46 Wash. 484, 90 P. 642, 12 L.R.A., N.S., 1155; *Home Telephone &*

Electric Company v. Branton, Tex.Civ. App., 7 S.W.2d 627; Copelin v. Berlin Dye Works, 168 Cal. 715, 144 P. 961, L.R.A. 1915C, 712; Figone v. Guisti, 43 Cal.App. 606, 185 P. 694, etc., are not pertinent for two reasons. (1) The court found on substantial evidence that Farley's act was committed within the scope of his authority. (2) The cited decisions involved factual situations not akin to that at bar.

The judgment is affirmed. The purported appeal from the order denying a new trial is dismissed.

McCOMB and FOX, JJ., concur.



134 Cal.App.2d 266

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Fred BROOKSHER, William Duarte, Mary Humphrey, also known as Babe Humphrey, Anthony Ferreira, also known as Handlebar Ferreira and Louis Pagllaro, also known as Gee Gee Pagllaro, Defendants,

Mary Humphrey and Anthony Ferreira, Defendants and Appellants.

Cr. 3086.

District Court of Appeal, First District,
Division 2, California.

July 6, 1955.

The appealing defendants were convicted in the Superior Court, Santa Clara County, Leonard R. Avilla, J., of pandering and contributing to a minor's delinquency, and they appealed. The District Court of Appeal, Nourse, P. J., held that defendants failing to object, in trial court, to testimony and argument could not claim, for first time on appeal, error in those regards.

Affirmed.

Dooling, J., dissented in part.

1. Criminal Law ⇐1036(1), 1037(1)

Defendants failing to object, in trial court, to testimony and argument could not claim, for first time on appeal, error in those regards.

2. Criminal Law ⇐730(10)

Any error in statement in argument that defendants' failure to testify constituted "the strongest confession" was cured by trial court's instructions to the contrary.

Mark C. Cali, Henry Mariani, San Jose, for appellants.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The five defendants were charged in one information with pandering, Section 266i of the Penal Code, Added by Stats.1953, ch. 32, § 4, and conspiring to contribute to the delinquency of a girl of 14 years. Defendants Duarte and Brooksher were both charged with statutory rape. All defendants were tried jointly to a jury. Separate verdicts were returned. Brooksher pleaded guilty on the charge of rape and on the charge of pandering not guilty. He was found guilty on the conspiracy charge. Duarte was found guilty of rape. He and the remaining defendants were all found guilty of both pandering and contributing to the minor's delinquency. Wel. & Inst. Code Section 702. Defendants Humphrey and Ferreira alone have appealed.

Defendant Humphrey, referred to in the testimony as "Babe", and Ferreira were living together in adultery while she was either practicing prostitution or engaged in procuring for the benefit of others. They were introduced to the prosecutrix by Brooksher who gave "Babe" \$25 with which she took the prosecutrix to an out of town store and purchased for her a complete outfit of underclothes and a dress. On this occasion "Babe" gave the young girl pertinent advice as to how she could best carry on the trade as a prostitute. The testimony of the prosecutrix as to the interest

and the activities of these two appealing defendants was clear and directly to the issues. Neither one of these defendants took the stand as witnesses, and neither one offered any competent evidence in their defense. The case, therefore, as it comes to us, is one where the verdict is supported by competent substantial evidence.

[1] The first ground urged by these appellants is that the trial court erred in permitting a police witness to testify as to matters he had learned from a microphone installed in the Pagliaro home. The testimony was not detrimental to these appellants. It concerned matters relating to another distinct crime in which the police thought that Pagliaro was involved. The recordings were so incomplete and unintelligible that the trial court refused to admit them in evidence and instructed the jury to disregard them. The witness was permitted to give some conclusions based partly on these recordings—but not in any sense detrimental to, or involving these appealing defendants. Possibly for that reason neither of these defendants objected to the testimony. In any event, having failed to object, they cannot claim error for the first time on appeal. *People v. Millum*, 42 Cal.2d 524, 526, 267 P.2d 1039; *People v. Dessauer*, 38 Cal.2d 547, 552, 241 P.2d 238; *People v. McMonigle*, 29 Cal.2d 730, 743, 177 P.2d 745. The rule of these cases has not been changed by the recent decisions in *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, and *People v. Berger*, 44 Cal.2d 459, 282 P.2d 509. In those cases timely objection was made to the admission of the evidence allegedly obtained illegally. Here no such objection was made. The rule of the *Millum* and similar cases is fully established and followed in the United States Courts. See *Segurola v. United States*, 275 U.S. 106, 112, 48 S.Ct. 77, 72 L.Ed. 186, 190.

The second ground urged is that the district attorney was guilty of misconduct in his closing argument to the jury—particularly in his reference to all the defendants as “wolves”. The expression referred to and was applicable to all defendants—to those who had engaged the fourteen year

old girl in intercourse, and to those who were advising her how to become a common prostitute.

Objection is also made to the remarks of the district attorney as to what the big brothers of the girl might do to the defendants. The remark was invited by the argument of defense counsel. But, in any event, these defendants did not object to the remarks and cannot claim error at this time. *People v. Sampsell*, 34 Cal.2d 757, 763, 214 P.2d 813; *People v. Sutic*, 41 Cal.2d 483, 496, 261 P.2d 241.

[2] Reference is made to the statement of the district attorney commenting on defendants’ failure to testify. He said: “That is the strongest confession.” The statement obviously was error and the trial court immediately instructed the jury that such silence was not a confession. In the formal instructions the trial court again referred to this subject and advised the jury that defendants had a constitutional right not to testify and that no presumption or inference of guilt could be drawn from their failure to do so alone.

Other criticisms of the instructions are inconsequential and do not require special treatment. Reading the whole charge to the jury we are satisfied that the instructions covered all essential elements of the crimes charged. The defendants were fairly tried and convicted and no other verdict could have followed the uncontroverted evidence of their guilt.

The judgments and the orders are affirmed.

KAUFMAN, J., concurs.

DOOLING, Justice.

I dissent from the portion of the opinion which states that the testimony of the officer as to what he heard on the microphone was “not in any sense detrimental to, or involving these appealing defendants.” Statements of both were testified to by the officer which reasonably would bear the construction that they were parties to a scheme to use the girl for prostitution.

134 Cal.App.2d 189

Marle A. KEENAN, Plaintiff and Cross-Defendant and Respondent,

v.

John M. DEAN, Defendant and Cross-Complainant and Appellant.

Civ. 16435.

District Court of Appeal, First District,
Division 1, California.

June 28, 1955.

Landlord brought action in the Municipal Court for unlawful detainer, and tenant filed what was labeled a cross-complaint, but what was in reality a counterclaim, for alleged libel. The action was then transferred to the Superior Court of the City and County of San Francisco. The Superior Court, Herman A. van der Zee, J., entered an order striking the cross-complaint, and the tenant appealed. The District Court of Appeal, Peters, P. J., held that cross-complaint alleging that landlord had written Fair Rent Committee that tenant had said that he would refuse to vacate apartment and that it would be a difficult process to get an attorney out of the apartment, did not state, and could not be amended to state, a cause of action for libel.

Order affirmed.

1. Courts ☞486

Where plaintiff brought action in municipal court for unlawful detainer, and defendant filed what was labeled a cross-complaint, but what was in fact a counterclaim, seeking to recover \$25,000 general damages and \$25,000 exemplary damages for alleged libel, cause was properly transferred to Superior Court. West's Ann.Code Civ. Proc. § 396.

2. Appeal and Error ☞78(3), 103, 870(5)

Generally, where complaint and cross-complaint are both filed in superior court, order striking cross-complaint is a nonappealable order, and is reviewable only on appeal from final judgment, but, if cross-complaint joins new parties, or names a codefendant a cross-defendant, the general rule is not applicable, and dismissal of

cross-complaint is a final adverse adjudication, and order of dismissal is an appealable judgment.

3. Appeal and Error ☞78(3)

Where defendant filed a cross-complaint against plaintiff and joined certain Does not parties to the complaint, but the Does were not served and did not appear, the case did not fall within rule that if cross-complaint joins new parties or names a codefendant as a cross-defendant, dismissal of cross-complaint is a final adverse adjudication and order of dismissal is an appealable judgment.

4. Courts ☞488(4)

Where plaintiff brought action in municipal court for unlawful detainer, and defendant cross-complained for alleged libel, and action was then properly transferred to superior court because of the cross-complaint, and cross-complaint was properly stricken by the superior court, the case was required to be returned for trial to the municipal court. West's Ann. Code Civ.Proc. § 396.

5. Appeal and Error ☞78(3)

Where plaintiff brought action in municipal court for unlawful detainer, and defendant filed a cross-complaint for alleged libel, and case was properly transferred to superior court, order of superior court striking the cross-complaint, on ground that superior court had no jurisdiction was a final judgment and appealable. West's Ann. Code Civ.Proc. §§ 396, 581a.

6. Action ☞45(3)

A cause of action for libel cannot be set up in an unlawful detainer action.

7. Landlord and Tenant ☞288

Where leased premises were surrendered prior to filing of unlawful detainer action, issue of possession was removed from the case, and the action became one for money damages.

8. Pleading ☞4

Courts will disregard label given a pleading by the parties and will determine the real nature of the pleading from its allegations.

9. Pleading ⚡4

Where plaintiff brought action for unlawful detainer, and defendant filed what he labeled a cross-complaint charging plaintiff with libel, the pleading which was labeled a cross-complaint would be treated as a counterclaim. West's Ann.Code Civ. Proc. §§ 438, 442, 666.

10. Courts ⚡488(1)

Where plaintiff brought action in municipal court for unlawful detainer, and defendant filed what was labeled a cross-complaint, but what was in fact a counterclaim, for damages for alleged libel, and case was properly transferred to the superior court, superior court erred in striking the cross-complaint, on ground that it had no jurisdiction. West's Ann.Code Civ.Proc. §§ 438, 442, 666.

11. Appeal and Error ⚡854(3)

Where plaintiff made motion to strike cross-complaint on two grounds, fact that trial court improperly granted motion on the first ground did not preclude plaintiff, on appeal by defendant, from urging the second ground in support of the order striking the cross-complaint.

12. Pleading ⚡354(2)

Motion to strike cannot be used to serve the purpose of a special demurrer.

13. Appeal and Error ⚡1042(1)

If cross-complaint not only did not state a cause of action, but could not be amended so as to state a good cause of action, it would be an idle gesture for District Court of Appeal on appeal to reverse order striking the cross-complaint merely because it was allegedly error to use motion to strike as a general demurrer, since alleged error would be nonprejudicial.

14. Libel and Slander ⚡85

In unlawful detainer action, cross-complaint of tenant alleging that landlord had written Fair Rent Committee that tenant had said that he would refuse to vacate apartment and that it would be a difficult process to get an attorney out of the apartment did not state, and could not be amended to state, a cause of action for libel.

15. Libel and Slander ⚡86(1)

Unless words used can reasonably be understood in a defamatory sense, innuendo pleaded in libel action cannot aid the pleader.

J. Joseph Sullivan, San Francisco, for appellant.

Vincent H. O'Donnell, Fredrik S. Waiss, San Francisco, for respondent.

PETERS, Presiding Justice.

Defendant appeals from an order striking his cross-complaint from the files.

The record shows the following: Plaintiff brought an action in the Municipal Court against defendant for unlawful detainer, praying for restitution of certain leased premises and for \$205 in unpaid rent. This complaint was signed October 22, 1953, but was not filed until July 8, 1954. Defendant, by answer, alleged that on March 31, 1954, he had offered, and plaintiff had accepted, a surrender of the premises. Defendant also cross-complained against plaintiff and certain unidentified Does for libel, alleging that on September 10, 1953, plaintiff, through her attorney, had written to the Fair Rent Committee in regard to a hearing involving the raising by plaintiff of defendant's rent and his refusal to vacate that Dean had said "that he would refuse to vacate the apartment and that it would be a difficult process to get an attorney out of it"; that on October 6th and 7th of 1953, plaintiff caused to be written and published in a daily newspaper covering the Fair Rent Committee hearings that Dean refused to vacate the premises with the comment that "it would be very difficult to force a lawyer to move out"; and that plaintiff meant thereby that defendant "would, and did, in violation of his duty as an attorney-at-law, employ means not consistent with the truth; would and did, mislead a judge * * * by artifice and by false statements of law; would, and did, engage in methods of the practice of the law in other than ethical methods"; and that said publication was false and defamatory. It is averred that defendant's

reputation had been injured thereby and that he had suffered shame, mortification, and hurt feelings for which he asked \$25,000 general damages and \$25,000 exemplary damages.

[1] Pursuant to the provisions of section 396 of the Code of Civil Procedure the cause was properly transferred to the Superior Court. No appearance or service was made by or on the fictitious parties. The plaintiff moved to strike the cross-complaint from the files, on the ground that the cause of action was not a proper ground of cross-complaint in this action, and because the cross-complaint did not state facts sufficient to constitute a cause of action. This motion was granted by the trial court on the first ground. Defendant appeals from this order.

[2] The first question to be determined is whether the order involved is an appealable order. In the normal situation where the complaint and cross-complaint are both filed in the Superior Court an order striking a cross-complaint is a non-appealable order, being like most orders relating to the pleadings, interlocutory in nature and, as such, reviewable only on the appeal from the final judgment.

This rule is well settled in this state. *Yandell v. City of Los Angeles*, 214 Cal. 234, 4 P.2d 947; *Sjoberg v. Hastorf*, 33 Cal.2d 116, 199 P.2d 668; *Evans v. Dabney*, 37 Cal.2d 758, 235 P.2d 604; *Wood v. Metzenbaum*, 90 Cal.App.2d 533, 203 P.2d 105; *Pritchard v. King*, 104 Cal.App. 460, 285 P. 1086; *Stockton Combined Harvester & Agricultural Works v. Glen Falls Ins. Co.*, 98 Cal. 557, 33 P. 633; see also 3 Witkin on California Procedure, p. 2154, § 13. This rule is also applicable to an order striking a counterclaim. *Merchants Nat. Bk. v. Clark-Parker Co.*, 97 Cal.App. 757, 276 P. 387. If, however, the cross-complaint joins new parties, or names a co-defendant a cross-defendant, the general rule is not applicable. In such a situation "the dismissal of the cross-complaint is a final adverse adjudication of the cross-complainant's rights against a distinct party, and the order is an appealable judgment." 3 Witkin on California Procedure,

p. 2154, § 13; see *Herrscher v. Herscher*, 41 Cal.2d 300, 259 P.2d 901; *County of Humboldt v. Kay*, 57 Cal.App.2d 115, 134 P.2d 501; *Howe v. Key System Transit Co.*, 198 Cal. 525, 246 P. 39; *Young v. Superior Court*, 16 Cal.2d 211, 105 P.2d 363; *Halterman v. Pacific Gas & Elec. Co.*, 22 Cal.App.2d 592, 71 P.2d 855.

[3] The instant case does not fall within this exception to the general rule because the cross-complaint involves only the defendant and plaintiff. While the defendant joined in his cross-complaint certain Does not parties to the complaint, these Does were not served nor did they appear. Obviously, the order striking the cross-complaint decided nothing between defendant and the parties who were not served or did not appear. This was the precise holding in *Kennedy v. Owen*, 85 Cal.App.2d 517, 193 P.2d 141.

The general rule is based on the theory that the order striking the cross-complaint can be reviewed on appeal from the final judgment. The exception to the rule is based on the theory that as between the defendant and new parties brought in by the cross-complaint the order striking the cross-complaint finally determines the rights between defendant and the new parties. Although, as pointed out, that exception does not here apply, the basic reason for it here exists.

[4, 5] In the instant case the action was commenced in the Municipal Court and then was properly transferred to the Superior Court solely because of the cross-complaint. That cross-complaint now has been stricken. All that remains to be tried is the original action properly filed in the Municipal Court. When that fact is called to the attention of the Superior Court, under the mandatory provisions of section 396 of the Code of Civil Procedure, it will have to return the case for trial to the Municipal Court. Neither that court, nor the Appellate Department of the Superior Court has power to review the propriety of the ruling of the Superior Court striking the cross-complaint. Thus, in a very real sense the order striking the cross-complaint was a final order or judgment. The Su-

perior Court has finally determined that it has no jurisdiction of the proceeding. Unless the propriety of that order can be reviewed on this appeal its propriety cannot be reviewed at all. The order to strike was tantamount to a dismissal of the action on the cross-demand, *Herrscher v. Herrscher*, 41 Cal.2d 300, 259 P.2d 901, and, under the circumstances, was a judgment within the meaning of section 581a of the Code of Civil Procedure. See *Costa v. Regents of the University of Cal.*, 103 Cal. App.2d 491, 229 P.2d 867. Since the propriety of such judgment cannot otherwise be reviewed it is necessarily a final judgment and therefore appealable.

[6,7] On the merits, the first question presented is whether the cause of action for libel constituted a proper ground of cross-complaint. Of course, a cause of action for libel cannot be set up in an unlawful detainer action, and the parties are agreed that this is so. But it is equally clear, under the allegations of the answer, that since the premises were surrendered prior to the filing of the action, the issue of possession was removed from the case and the action became one for money damages. *Servais v. Klein*, 112 Cal.App. 26, 296 P. 123; *Heller v. Melliday*, 60 Cal.App.2d 689, 141 P.2d 447. Plaintiff concedes that this is so.

Section 442 of the Code of Civil Procedure provides in part: "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought, * * * he may, in addition to his answer, file at the same time, * * * a cross-complaint." It is argued with some merit that the libel cause of action does not "relate" to or "depend" upon the "transaction" set forth in the complaint, in that there is not the necessary relation between the two causes of action, and therefore that the trial court properly ruled that the cause of action set forth in the cross-complaint was not a proper ground of cross-complaint. See generally *California Trust Co. v. Cohn*, 214 Cal. 619, 7 P.2d 297; *Hanes v. Coffee*, 212 Cal. 777, 300 P. 963; *Morris v. Warner*, 207 Cal. 498, 279 P. 152. But even if it be

so held, such holding would not necessarily be determinative of this appeal. If the pleading of defendant can be construed as a proper counterclaim then it was error to strike it from the files. The counterclaim statute is much broader than the cross-complaint statute. Section 438 of the Code of Civil Procedure simply requires that the "counterclaim * * * must tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action; * * *." Under section 666 of the Code of Civil Procedure "If a counterclaim, * * * exceed the plaintiff's demand, judgment for the defendant must be given for the excess; * * *." Certainly it cannot be doubted that the libel cause of action, if established, would tend "to diminish or defeat the plaintiff's recovery". On this there can be no doubt. Therefore, even if it be assumed that the pleading is not a proper cross-complaint, defendant's pleading was proper as a counterclaim unless his designation of it as a "cross-complaint" prohibits him from now urging the point.

[8,9] It is well settled law that the courts will disregard the label given a pleading by the parties, and will determine the real nature of the pleading from its allegations. In *Robertson v. Maroevich*, 42 Cal.App.2d 610, 616, 109 P.2d 708, 711, it was stated: "Respondent designated his pleading as, 'Answer to Complaint, and Cross-Complaint'. -However, the nature of a pleading will be determined from its allegations regardless of its designation. *Terry Trading Corp. v. Barsky*, 210 Cal. 428, 292 P. 474; *Cornblith v. Valentine*, 211 Cal. 243, 294 P. 1065. This pleading, although designated a cross-complaint, is probably a counterclaim, since it, like the complaint, prays for a money judgment. *Luse v. Peters*, 219 Cal. 625, 28 P.2d 357. The only importance, so far as this proceeding is concerned, as to whether the pleading is a counterclaim or cross-complaint is that a cross-complaint must relate or depend 'upon the contract, transaction, matter, happening or accident upon which

the action is brought', Code Civ.Proc., sec. 442, while a counterclaim, under section 438 of that code, need only 'tend to diminish or defeat the plaintiff's recovery and must exist in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action'. A counterclaim no longer need be related to, or connected with, the cause of action set up in the complaint. *Terry Trading Corp. v. Barsky*, supra; *Luse v. Peters*, supra. This becomes important because section 439 of the Code of Civil Procedure as amended in 1939, supra, requires the cause to be transferred to the superior court when any counterclaim in excess of the jurisdiction of the municipal court is filed. It is not required under that section, as it is by section 396 of the Code of Civil Procedure quoted, supra, that the counterclaim arise 'out of the transaction set forth in the complaint'. If the questioned pleading is a counterclaim, then under section 439 of the Code of Civil Procedure the municipal court properly transferred the cause to the superior court, and the latter court clearly had jurisdiction of the subject matter, whether or not the transaction set forth in the counterclaim arose out of, or was connected with, the transaction set forth in the complaint." See also *Farish v. Brown*, 111 Cal.App.2d 306, 244 P.2d 484; *Schrader v. Neville*, 34 Cal.2d 112, 207 P.2d 1057; *Tomales Bay Oyster Corp. v. Superior Court*, 35 Cal.2d 389, 217 P.2d 968.

[10] Inasmuch as the pleading at least states a good cause by way of counterclaim it was error to strike it from the files on the ground given by the trial court.

[11] The motion to strike was also predicated on the ground that the "cross-complaint does not state facts sufficient to constitute a cause of action." Although the trial court did not grant the motion on this ground, that does not preclude the plaintiff from urging it in support of the order appealed from. *Campbell v. Bauer*, 104 Cal. App.2d 740, 232 P.2d 590; *Evarts v. Jones*, 104 Cal.App.2d 109, 231 P.2d 74; *Sears v. Rule*, 27 Cal.2d 131, 163 P.2d 443.

[12, 13] While it is true that a motion to strike cannot be used to serve the purpose of a special demurrer, 2 Witkin on California Procedure, p. 1504, § 511, and while there is a dicta, at least that it cannot be used in place of a general demurrer, *Allerton v. King*, 96 Cal.App. 230, 274 P. 90, it is obvious that if this pleading not only does not state a cause of action, but cannot be amended so as to state a good cause of action, it would be an idle gesture to reverse the order appealed from. Under such circumstances, if it was error to use the motion to strike as a general demurrer, such error would be non-prejudicial.

[14, 15] It is quite apparent that this "cross-complaint," which we have held is in fact a counterclaim, as a matter of law, does not state, and cannot be amended to state, a cause of action for libel. The charge is that defendant stated on two occasions that he would refuse to vacate and that it would be very difficult to force a lawyer to move out. Certainly those words, standing alone, cannot be interpreted to mean that plaintiff was charging that defendant had stated that he would use unprofessional tactics. In the first instance, it is a question of law as to whether the words used are susceptible reasonably of a defamatory meaning. Unless the words used can reasonably be understood in a defamatory sense, the innuendo pleaded cannot aid the pleader. *Des Granges v. Crall*, 27 Cal. App. 313, 149 P. 777; *Mellen v. Times-Mirror Co.*, 167 Cal. 587, 140 P. 277; *Vedovi v. Watson & Taylor*, 104 Cal.App. 80, 285 P. 418.

In the instant case the only reasonable interpretation of the words used is that defendant had stated that he would use all legal means in resisting the eviction. Reasonable men could not interpret the words in any other way. This being so, the order striking the pleading should not be reversed.

The order striking the "cross-complaint" is affirmed.

BRAY and FRED B. WOOD, JJ.,
concur.

134 Cal.App.2d 149

PACIFIC GAS AND ELECTRIC COMPANY,
a corporation, Plaintiff and Appellant,

v.

STATE BOARD OF EQUALIZATION, an
agency of the State of California,
Defendant and Respondent.

Civ. 16297.

District Court of Appeal, First District,
Division 2, California.

June 27, 1955.

Hearing Denied Aug. 17, 1955.

Action by corporate taxpayer upon claim for tax refund. The Superior Court, City and County of San Francisco, Daniel R. Shoemaker, J., entered judgment denying the action on the ground it was barred by limitation. The taxpayer appealed. The District Court of Appeal, Nourse, P. J., held that under applicable statutes, the mailing of notice by the State Board of Equalization of its disallowance of the claim for refund had been properly made by mail addressed to the corporate taxpayer at its principal place of business, and that mailing of such notice to outside counsel of record was unnecessary.

Affirmed.

1. Licenses ⇨34

Under statute providing that State Board of Equalization may serve notice of its determination by mail addressed to retailer or person storing, using or consuming tangible personal property at his address as it appears on records of Board, notice was properly addressed to corporation rather than to designated representatives, i. e., its counsel of record. West's Ann. Code Civ.Proc. § 1013; Revenue and Taxation Code, §§ 6486, 6906.

2. Corporations ⇨52

Residence of a corporation is generally deemed to be where its principal place of business is.

3. Corporations ⇨507(12)

Rules relating to personal service on a corporation have no application to statutory substituted service by mail. West's

Ann.Code Civ.Proc. § 1013; Revenue and Taxation Code, §§ 6486, 6906.

4. Licenses ⇨34

Under statute providing that State Board of Equalization may serve notice of its determination by mail addressed to retailer or person storing, using or consuming tangible personal property at his address as it appears on records of Board, when notice is mailed correctly directed to corporation as such at its own address, service is completed, and whether it reaches specific agent or division which must act upon it is risk of addressee corporation and depends upon its care. Revenue and Taxation Code, §§ 6486, 6906.

5. Licenses ⇨34

Word "claimant" in statute providing for notice to claimant of disallowance of claim by State Board of Equalization, and word "retailer" in statute providing that board might serve notice of its determination by mail addressed to retailer or person storing, using or consuming tangible personal property at his address as it appears on records of Board, were descriptive of same party in interest. Revenue and Taxation Code, §§ 6486, 6906.

6. Licenses ⇨34

Whether or not section of Code of Civil Procedure providing for service by mail was applicable, notice of disallowance of corporate taxpayer's claim by State Board of Equalization was properly addressed to corporation at its address as shown on documents filed with board, which address was also its residence, i. e., principal place of business, and mailing of notice to outside counsel at his address as shown on claim was unnecessary. West's Ann.Code Civ.Proc. § 1013; Revenue and Taxation Code, §§ 6486, 6906.

7. Licenses ⇨34

Section of Code of Civil Procedure providing that where party has attorney in action or proceeding the service of papers must be upon attorney instead of party, with exceptions, was inapplicable to notice by State Board of Equalization of its disallowance of claim for refund.

West's Ann.Code Civ.Proc. §§ 1013, 1015; Revenue and Taxation Code, §§ 6486, 6906.

8. Licenses ⚡34

Notice of disallowance by State Board of Equalization of claim for refund, which notice contained name and address of claimant and exact amount of refund claimed and notified claimant that on certain date its claim for refund under Sales and Use Tax Law in such amount was denied, was sufficient to meet statutory requirements, though notice itself was not dated. Revenue and Taxation Code, §§ 6486, 6906.

9. Constitutional Law ⚡318

Statutory method of service of notice of disallowance of claim by State Board of Equalization, by mail addressed to claimant taxpayer, is just and reasonable and satisfies due process, and due process does not require mailing to counsel. Revenue and Taxation Code, §§ 6486, 6906.

10. Constitutional Law ⚡42

With respect to content of notice by State Board of Equalization of its disallowance of claim for tax refund, taxpayer was not entitled to raise constitutional question of due process where its rights were not injuriously affected by alleged defect in content, but only by fact that, because of lack of care of its employees, notice did not reach its counsel. Revenue and Taxation Code, §§ 6486, 6906.

11. Estoppel ⚡119

Existence of an estoppel is a question of fact.

12. Appeal and Error ⚡1010(1)

Finding of trial court, in action upon claim for tax refund, that facts did not estop State Board of Equalization from relying on limitation of 90 days from mailing of its notice, was binding upon reviewing court unless contrary finding was only one which could reasonably be drawn from facts.

13. Estoppel ⚡62(2)

Fact that State Board of Equalization had once sent copy of a notice to taxpayer's outside attorney, mentioning on notice to taxpayer that such was being done, did

not give taxpayer right to rely on sending of copy of notice of denial of claim for refund where taxpayer's copy of such notice of denial did not mention sending of such copy to outside counsel, and facts did not estop Board from relying on limitation of 90 days from mailing of its notice of denial. Revenue and Taxation Code, § 6933.

14. Estoppel ⚡118

Evidence in action upon claim for tax refund, including evidence of informal utterances by members of State Board of Equalization, did not require reversal of trial court's finding that board was not estopped to rely upon limitation of 90 days from mailing of its notice of disallowance of claim, even if estoppel doctrine could be applicable. Revenue and Taxation Code, § 6933.

15. Appeal and Error ⚡1010(1)

Where trial court found, in action upon claim for tax refund, that facts did not estop State Board of Equalization from relying on limitation of 90 days from mailing of its notice of disallowance of claim, and where reviewing court could not say that no other conclusion from facts was possible than that facts caused estoppel, finding was binding upon reviewing court. Revenue and Taxation Code, § 6933.

Chaffee E. Hall, Robert H. Gerdes, Richard H. Peterson, Malcolm M. Furbush, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., James E. Sabine, Irving H. Perluss, Asst. Attys. Gen., Ernest P. Goodman, Eugene B. Jacobs, Deputy Attys. Gen., for respondent.

NOURSE, Presiding Justice.

The Pacific Gas and Electric Company, hereinafter called the Company, appeals from a judgment denying its action for refund of sales tax paid in the amount of \$324,953.94 plus interest, on the ground that said action was barred by the provisions of Section 6933 of the Revenue and Taxation Code. Said section requires the court action to be brought by the claimant within 90 days after the mailing of the

notice of the State Board of Equalization's action upon the claim and provides further: "Failure to bring action within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments." It is undisputed that a notice of disallowance of claim for refund was mailed by the State Board of Equalization, hereinafter called the Board, on May 7, 1951, that it was received at the Company's principal office at 245 Market Street in San Francisco on May 8th and that on May 8th and 9th the general auditor, the comptroller and two other employees of appellant took notice of it. It was, however, not communicated to appellant's tax department or outside counsel. This suit was filed on November 2, 1951.

Appellant contends that the notice was not valid and effective to start the running of the above limitation period of 90 days because it did not comply with the requirements of the applicable statutes and of constitutional due process and moreover that the Board was estopped to assert the bar of the above 90 days limitation. Section 6906 Revenue and Taxation Code provides: "Within 30 days after disallowing any claim in whole or in part the board shall serve notice of its action on the claimant in the manner prescribed for service of notice of a deficiency determination."

Section 6486 of said code reads: "The board shall give to the retailer or person storing, using, or consuming tangible personal property written notice of its determination. The notice may be served personally or by mail; if by mail, service shall be made pursuant to Section 1013 of the Code of Civil Procedure and shall be addressed to the retailer or person storing, using, or consuming tangible personal property at his address as it appears in the records of the board. In case of service by mail of any notice required by this part, the service is complete at the time of deposit in the United States post office."

Section 1013 Code of Civil Procedure provides in part: "In case of service by mail, the notice or other paper must be deposited in the United States post office,

or a mail box, sub-post office, substation, or mail chute, or other like facility regularly maintained by the Government of the United States, in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, at his office address as last given by him on any document which he has filed in the cause and served on the party making service by mail; otherwise at his place of residence. The service is complete at the time of the deposit * * *."

[1-4] Appellant first contends that the above sections require the notice to be addressed to the designated representatives of the Company, its counsel of record. It is argued that to serve notice on a corporation it must be brought to the attention of a specific natural person authorized to receive the notice, in this case the counsel mentioned on appellant's petition for redetermination and its claim for refund. The above sections do not so provide. They permit service by mail "addressed to the retailer or person storing, using or consuming tangible personal property at his address as it appears in the records of the board." The meaning of one's address is the place to which mail can be sent to one, the place where one lives. Webster's New World Dictionary. It is normally the actual residence. A corporation's residence is generally deemed to be where its principal place of business is. *Patch v. Adams*, 55 Cal.App.2d 1, 6, 130 P.2d 244. Thus the corporation as such has an address and a provision for service by mail addressed to the address of the one to be served can be literally applied to a corporation in the same manner as to a natural person. Rules relating to personal service on a corporation have no application to such statutory substituted service by mail. The address of the corporation to which the notice is to be directed is complete without the name of the agent who acts for the corporation in the specific matter involved. When the notice is mailed correctly directed to the corporation as such at its own address, the service is completed and whether it reaches the specific agent or division which must act on it is the risk of the addressee corporation and depends on its care. In this case it is conceded that the address to which

the notice was addressed was that of appellant's principal office.

[5,6] Appellant next contends that because Section 6906, *supra*, requires service of notice "on the claimant" this means on the claimant as such at the address which appears in the records of the Board on the claim for refund. The contention is wholly without merit. The "claimant" in Section 6906 and the "retailer" etc. in Section 6486 are descriptive of the same party in interest, here the Company. Appellant's claim for refund states, at the top, names and addresses of counsel, as pleadings often do, but such addresses of counsel do not normally constitute the address of the party, if they are not expressly designated as such. The facts in this case make it especially clear that appellant did not designate another address as its own, than its main office address at 245 Market Street. The names and addresses of counsel at the head of the claim for refund read:

"Chaffee E. Hall
351 California Street
San Francisco 4, California
GARfield 1-2470
Robert H. Gerdes
Richard H. Peterson
John A. Sproul
245 Market Street
San Francisco 6, California
SUtter 1-4211"

The claim for refund was transmitted to the Board by a letter signed by Robert H. Gerdes which letter bears the letter-head:

"Pacific Gas and Electric Company
245 Market Street
San Francisco, California"

It also contains in small print the name of Mr. Gerdes as General Counsel and of ten associate attorneys among whom are Messrs. Peterson and Sproul. From the above the only sensible conclusion the Board could make was that 245 Market Street was the address of the Company and of the members of its legal staff which acted as counsel and that 351 California

Street was the address of the outside counsel Mr. Hall. If the matter presented any question of fact it was resolved against appellant by the finding: "The Notice of Denial of Refund was mailed on May 7, 1951, to the retailer, the Company, at its main office and its address as shown on the records of the Board, 245 Market Street, San Francisco, California." As Sections 6906 and 6486 provide for notice by mailing addressed to the party and not to its counsel, the above manner of addressing was the correct one. The sections do not contain any indication of a duty to mail to more than one address for one party, as also contended by appellant.

Appellant further relies on the words in Section 1013 Code of Civil Procedure: "addressed to the person on whom it is to be served, at his office address as last given by him on any document which he has filed in the cause and served on the party making service by mail; otherwise at his place of residence." As we have held that appellant did not give on any document as its office address an address other than 245 Market Street, and that that address is also the place of appellant's residence (principal place of business) and its address as shown on the records of the Board, the point is without importance and we need not decide what relation exists between the quoted provision of Section 1013 Code of Civil Procedure and the provision of Section 6486 Revenue and Taxation Code that the notice should be addressed to the party "at his address as it appears in the records of the board".

[7] Appellant next contends that to the notice in this case is applicable the provision of Section 1015 Code of Civil Procedure which provides that in all cases where a party has an attorney in an action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except certain papers not here involved. This is not so. Section 6486 Revenue and Taxation Code provides for service by mailing to the address of the party and refers to Section 1013 Code of Civil Procedure, which also provides for service by mailing to the address of the

party, but it does not refer to Section 1015 Code of Civil Procedure, which provides for service on the attorney of record. The latter provision inconsistent with the provision specifically governing the service of notice in this case cannot be applicable. In *Lyydikainen v. Industrial Acc. Comm.*, 36 Cal.App.2d 298, 97 P.2d 993, which case held Section 1015 applicable to mailing of papers in proceedings before the Industrial Accident Commission, there were references to the whole chapter in which Section 1015, *supra*, is contained so that it was made directly applicable, and there were no conflicting provisions.

We find nothing unreasonable or against common sense or good faith in a construction of the statute which upholds the addressing of an important paper to the address of appellant's main office, which is also the office of its legal staff. That the notice did not reach that staff or appellant's outside counsel although it was correctly delivered, seems the fault of appellant and its employees only.

[8] Appellant predicates the invalidity of the notice also on alleged defects in its content, to wit that it did not contain a proper designation of the transaction to which the Board's decision related as contained in the caption of the claim for refund, and because the notice was not dated. There is no statutory provision regulating requirements of form or content of such notice. With respect to the comparable notice of entry of judgment it has been held that any notice in writing which will convey to a losing party that the judgment has been entered is sufficient. *Bank of America, etc., Ass'n v. Superior Ct.*, 115 Cal. App. 454, 457, 1 P.2d 1081. The notice identified the matter as "the claim for refund filed by Pacific Gas and Electric Company, 245 Market Street, San Francisco, California in the amount of \$324,953.94," and notified appellant that on Wednesday, April 18, 1951, its claim for refund under the Sales and Use Tax Law, in said amount, was denied. There can be no doubt that for appellant the amount set forth clearly and specifically identified the claim which was denied and that in that

respect the notice was sufficient in law. Insofar as in this respect any matter of fact was presented the court below found in substance that the notice was reasonably certain to give the Company the required information, which finding is supported by the text and circumstances of the communication.

There is no statutory requirement that the notice be dated and the failure to start the action timely was evidently not caused by the lack of a date.

[9, 10] We hold that the statutory method of service of a notice of disallowance of claim by mailing addressed to the party, as here applied to the Company, is just and reasonable and satisfies due process and that, although addressing a notice to counsel contrary to or in excess of the statutory requirements might in this case have prevented the injury, due process did not require respondent to take such a measure, the less so because the manner in which the injury occurred was not readily foreseeable, and was caused by the lack of care of appellant's employees. With respect to the content of the notice appellant is not entitled to raise the constitutional question of due process because its rights were not injuriously affected by any alleged defect in the content, but only by the fact that the notice did not reach its counsel. *American Distilling Co. v. Johnson*, 132 Cal.App.2d 73, 281 P.2d 598; 11 Cal.Jur. 2d, Constitutional Law, § 68.

[11-13] Appellant contends that the Board was estopped from relying on the 90 days limitation from the mailing of its notice, because the notice was not given according to the precedent established by the Board of sending a copy of a notice, properly dated and informative, to appellant's outside counsel Mr. Hall. There is no merit whatever in this contention. The existence of facts constituting an estoppel was rejected in the findings. "The existence of an estoppel is a question of fact." *Parke v. Franciscus*, 194 Cal. 284, 297, 228 P. 435, 441. Unless the opposite conclusion is the only one which can reasonably be drawn from the facts, the finding of the trial court is binding on this court. The

evidence does not show conclusively or at all the establishing by the Board of a precedent as to the giving of notice on which appellant was entitled to rely and on which it relied to its detriment. The Board had sent the notice of deficiency determination, which gave rise to the controversy, to the Company at its Market Street address; it had acknowledged receipt of the Company's petition for redetermination addressed to Richard H. Peterson, Associate Attorney, Pacific Gas and Electric Company at the Market Street address; it had sent the notice of hearing on said petition to the Company at its Market Street address; it had addressed the ribbon copy of the notice of redetermination denying said petition to the Company, at its Market Street address, indicating on it that a carbon copy was being sent to the attorney Mr. Hall at his address and the carbon copy had been sent to Mr. Hall with an explanatory letter; the Board had acknowledged receipt of the Company's claim for refund to the Company at its Market Street address. It cannot be said that, because the Board had once sent a copy of a notice to the Company's outside attorney, mentioning on the notice to the Company itself that such was being done, the Company could rely on such copy being sent also when the notice of denial of claim for refund which the Company received at its office did not mention the sending of such copy. There is, moreover, no evidence that the high employees of the Company who took notice of the denial of the claim of refund failed to communicate it to the Company's attorneys because of their reliance on the sending of such copy. We held earlier that the alleged defects in the content of the notice could not be held responsible for said failure.

[14,15] As another ground of estoppel appellant proposes the following facts:

When in July, 1951, Mr. Carr, the Manager of the Company's Tax Department, not knowing of the disallowance having been decided and noticed, inquired from the secretary of the Board, Mr. Pierce, whether he had any objection to Mr. Carr's speaking

to the members of the Board concerning the placing of the claim for refund on the calendar, so that it would be taken up immediately, Mr. Pierce said that he had no objection. When thereafter on July 16, 1951 Mr. Carr informally met three members of the Board in a hotel in Sacramento, Mr. Bonelli, one of the members of the Board, who had not been present at the denial of the claim for refund, stated that at any time the Company wanted the Board to exhaust the administrative remedy in order that the Company could go to Court, the Board would be glad to do so. The other two members of the Board present acquiesced in Mr. Bonelli's statement. Mr. Carr did not discuss the status of the claim for refund with the Sales Tax Administrator or any other member of the staff of the Sales Tax Division of the Board. The rejection of any estoppel by the trial court is conclusive of this point as well as of the prior one. It cannot be said that no other conclusion from the above facts is possible than that they cause an estoppel. Litigants normally do not rely and are not necessarily entitled to rely for the time of exercising their remedies on implications of informal conversations with Board members. The trial court could reasonably conclude that the failure to timely start the court action was not caused by any reliance on the stated conversation but by reliance of appellant's counsel on the fact that they had not received notice of disallowance of claim. It is also doubtful whether such informal utterances should be considered as acts of and binding on the Board as such.

As we are bound by the decision of the trial court that there was no factual basis for any estoppel, we need not decide whether facts which normally cause an estoppel could, if proved, have overcome the limitation provision of Section 6933 of the Revenue and Taxation Code.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.
Hearing denied; EDMONDS, J., dissenting.

134 Cal.App.2d 50

William B. CIRIMELE, Plaintiff and Appellant,

v.

George SHINAZY and Ralph Shlnazy, Defendants,

George Shinazy, Defendant and Respondent.

No. 16449.

District Court of Appeal, First District,
Division 1, California.

June 24, 1955.

Landlord's action to recover rent due under lease. The Superior Court of San Mateo County, A. R. Cotton, J., awarded plaintiff the sum of \$862.50 plus an attorney's fee in the sum of \$100 for the trial of the action, and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that the award for trial services had not been disproportionately small but held that an additional allowance should be made for legal services rendered upon the two appeals necessitated in the case.

Amended and affirmed.

1. Landlord and Tenant ⇨238

The "reasonable attorney fee" for which lease provided in case suit was brought for recovery of rent was not necessarily gauged by legal services actually rendered but was limited to reasonable compensation for legal services that were reasonably necessary under circumstances of case.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable Attorney Fee".

2. Landlord and Tenant ⇨238

Where issues in landlord's rent recovery suit were not complicated and trial was not prolonged, attorney's fee award of \$100, which represented 40 per cent of amount which plaintiff recovered over and above amount which defendant admitted he owed and payment of which he had tendered by check when he filed his answer, was not disproportionately small.

3. Contracts ⇨233

A contract provision for a "reasonable attorney fee" in enforcing contract's provi-

sions embraces an allowance for legal services rendered upon appeal as well as during trial.

4. Appeal and Error ⇨1122(2)

Where trial court, to which landlord's rent recovery action had been remanded for ascertainment of reasonable attorney's fee as a part of plaintiff's damages, had failed to allow fees in respect to appeal, District Court of Appeal could find reasonable value of such attorney's fees without remanding cause to trial court, and would make such an award for both first and second appeal.

5. Appeal and Error ⇨1099(10)

Whatever right plaintiff in rent recovery action may have had to interest prior to judgment should have been claimed not later than his first appeal, and his claim therefor came too late when not made until second appeal.

6. Landlord and Tenant ⇨238

In determining whether Code of Civil Procedure section, which (as it read in 1952) prohibited recovery of costs in Superior Court when judgment was one which could have been rendered by inferior court, was a bar to plaintiff's recovery of costs in rent recovery action, court could consider not only amount of rent recovery but also attorney's fee awarded for trial and appeal pursuant to lease provision. West's Ann. Code Civ.Proc. § 1032

W. L. A. Calder, Abraham Glicksberg, San Francisco, for appellant.

Fahey, Castagnetto & Gallen, Thomas B. Gallen, Daly City, for respondent.

FRED B. WOOD, Justice.

This is plaintiff's second appeal in this action for the collection of rent which accrued pursuant to the provisions of a written lease. Upon the first appeal we reversed the judgment with directions that the trial court "ascertain and determine the amount of a reasonable attorney fee as a part of plaintiff's damages, amend the findings of fact and conclusions of law in accordance with this decision, including an award of \$862.50 (instead of \$612.50 and in addition to the attorney fee) for moneys due plain-

tiff from the defendant, and thereupon to enter judgment in accordance with the findings and conclusions as thus amended." *Cirimele v. Shinazy*, 124 Cal.App.2d 46, 53, 268 P.2d 210, 214.

In carrying out these directions the trial court awarded plaintiff the sum of \$862.50 plus an attorney fee in the sum of \$100 "for the trial of the action."

[1, 2] Plaintiff complains that \$100 is so disproportionately small that its award is an abuse of discretion. He asks this court to fix it in a larger sum. We cannot say, under the circumstances presented, that the trial court did abuse its discretion in this regard. \$100 represented 40 per cent of the amount (\$250) which plaintiff recovered over and above the amount (\$612.50) which the defendant admitted he owed and payment of which he tendered by check when he filed his answer. The issues were not complicated nor was the trial prolonged. (The reporter's transcript upon the first appeal was only 51 pages in length.) Plaintiff stresses the fact that a good deal of legal work was caused by defendant's successful motion for change of venue from San Francisco to San Mateo. That work the trial court well may have considered plaintiff brought upon himself by filing the action in San Francisco despite the fact that the demised premises are situated in San Mateo County and both parties reside in that county. The "reasonable attorney fee" for which the lease provides in case suit is brought for recovery of rent is not necessarily gauged by the legal services actually rendered. It is limited to reasonable compensation for legal services that are reasonably necessary under the circumstances of a case.

[3, 4] Plaintiff claims that the trial court erred in denying his request for a reasonable attorney's fee in respect to the prosecution of the first appeal. A contract for a reasonable attorney's fee in enforcing its provisions embraces an allowance for legal services rendered upon appeal as well as

during the trial. *Hahn v. Hahn*, 123 Cal. App.2d 97, 103, 266 P.2d 519. Upon the former appeal one of the causes for reversal was the refusal of the trial court to allow attorney fees as provided in the lease, that court acting apparently upon the erroneous theory that such fees would be "costs", not "damages". Neither in our discussion nor in our order upon the former appeal, 124 Cal.App.2d 46, 51-53, 268 P.2d 210, did we limit the allowance of fees to services for the "trial" of the action, nor did we make any differentiation between those services and legal services rendered upon appeal. Our direction to the trial court was not intended to be and was not limited in this regard. That court should have allowed fees in respect to the appeal. Subsequently, additional legal services have been rendered; i. e., upon the second appeal. "Under the rule of *Kirk v. Culley*, 202 Cal. 501, 261 P. 994, we may find the reasonable value of such attorneys' fees without remanding the cause to the trial court". *Maurice Mercantile Co. v. American Emp. Ins. Co.*, 140 Cal.App. 354, 360, 35 P.2d 1047, 1049. See also *Hahn v. Hahn*, supra, 123 Cal.App. 2d 97, 103, 266 P.2d 519. Accordingly, we make the additional and supplemental finding of fact that \$75 is a reasonable amount as attorney fee to award and it is awarded to plaintiff in respect to each of the two appeals, a total of \$150 for the two appeals.

[5] Plaintiff further claims he should be allowed interest on the amount of rent due (\$862.50) from and after December 15, 1950, as the latest possible date that it became due. Whatever right he may have had to interest prior to judgment should have been claimed not later than his first appeal. He did not mention this subject upon the former appeal. Indeed, it would appear that he did not do so even at the trial. This request for interest comes too late.

[6] With the revision upward which we are making, plaintiff's recovery¹ will exceed the \$1,000 jurisdictional amount of the justice court. Accordingly, section 1032 of the

1. This includes \$862.50 as rent due, \$100 as attorney fee for the trial of the action and \$75 as attorney fee for the first appeal, aggregating \$1,037.50 without

necessarily including the attorney fee for the second appeal in ascertaining whether section 1032 precludes costs.

Code of Civil Procedure (as it read in 1952) will no longer operate to preclude an award of costs to plaintiff and he will be entitled to his costs of suit.

The judgment as last amended is further amended by awarding plaintiff \$150 additional as attorney fees (\$75 for each of the two appeals) and allowance of his costs of suit. As thus amended, the judgment is affirmed. Plaintiff will also, of course, recover his costs upon this appeal.

PETERS, P. J., and BRAY, J., concur.



134 Cal.App.2d 219

Harry B. SIMPSON, Plaintiff and Respondent,

v.

Grace E. SIMPSON, Defendant and Appellant.

Civ. 20899.

District Court of Appeal, Second District,
Division 3, California.

June 29, 1955.

Divorce action. From interlocutory judgment of the Superior Court, Los Angeles County, Walter S. Gates, J., in favor of wife but limiting period of alimony payments to 28 months, the wife appealed. The District Court of Appeal, Ashburn, J. pro tem., held that under statute authorizing court to modify its order for alimony from time to time, jurisdiction was automatically reserved to make an appropriate modification of alimony provision of decree before expiration of prescribed period, and no error resulted from court's failure to insert an express reservation of jurisdiction in interlocutory judgment.

Judgment affirmed.

1. Divorce ⚡234, 245(1)

Statute providing that divorce court may compel husband to make suitable al-

285 P.2d—20½

lowance to wife for her support during her life or for a shorter period and that court may from time to time modify its order does not give court power to make award after judgment becomes final without any mention of alimony or with an express denial of same, unless jurisdiction is expressly reserved for that purpose, nor does power survive expiration of limitation of time contained in decree awarding alimony, but when award has been made for limited period, court has, by virtue of statute, continuing jurisdiction to modify award without an express reservation of jurisdiction. West's Ann.Civ.Code, § 139.

2. Divorce ⚡245(1)

Under statute authorizing court to modify its order for alimony from time to time, jurisdiction was automatically reserved to make an appropriate modification of decree awarding wife alimony for 28 months before expiration of that period, and there was no error in court's failure to insert an express reservation of jurisdiction in the interlocutory judgment. West's Ann. Civ.Code, § 139.

3. Divorce ⚡245(2)

A showing of changed circumstances is necessary to the procuring of any modification of alimony provision of divorce decree.

4. Divorce ⚡235

Court has broad discretion in fixing period of time during which alimony shall be paid to wife. West's Ann.Civ.Code, § 139.

5. Divorce ⚡235

Limitation of alimony payments to 28 months to wife, who had been an art teacher in public schools prior to her marriage and whose teaching credentials were in order, was not an abuse of discretion. West's Ann.Civ.Code, § 139.

Allard, Shelton & O'Connor, Pomona, for appellant.

Walker W. Downs, La Verne, for respondent.

ASHBURN, Justice pro tem.

Divorce action. The wife appeals from an interlocutory judgment in her favor, confining her claim of error to the phase of the decree which limits to 28 months the period of alimony payments—with no express reservation of jurisdiction to modify the award.

All property matters were adjusted by a mutually satisfactory property settlement agreement, approved by the court, which gives appellant occupancy of the home worth \$18,000 to \$20,000 until her remarriage or death. The custody of a 13 year old boy is awarded to appellant and the husband ordered to pay to the wife for his support \$100 a month. She is awarded alimony of \$200 per month from April 1, 1954 to January 1, 1955, inclusive, and thereafter "the sum of \$100 per month and continuing said payments until the payment of July 1, 1956 has been made. When said alimony payments have all been paid as herein provided the obligation of the cross-defendant [husband] to pay alimony shall terminate." This is ten months at \$200 per month and eighteen more months at \$100 each. Appellant does not complain of the amount awarded her for the ten months or for the eighteen month period. Her counsel says: "The sole issue presented on this appeal is the propriety of that part of the judgment terminating alimony at the end of twenty-eight months.

"The appellant respectfully contends that the failure of the trial court to retain jurisdiction to later modify or revoke alimony was not reasonable and was, in fact, an abuse of discretion." And: "Because jurisdiction is not reserved, the court will lose the power to award alimony after the twenty-eighth month unless the judgment is reversed. When the judgment becomes final, the wife can enforce no obligation against the husband not imposed by the court at the time of the judgment."

[1] Section 139, Civil Code expressly confers on the court discretion to limit the period of alimony payments and power to modify the award from time to time. It says: " * * * [T]he court may compel

the party against whom the decree or judgment is granted to make such suitable allowance for support and maintenance of the other party for his or her life, or for such shorter period as the court may deem just, having regard for the circumstances of the respective parties * * *. That portion of the decree or judgment making any such allowance or allowances, and the order or orders of the court to enforce the same may be modified or revoked at any time at the discretion of the court except as to any amount that may have accrued prior to the order of modification or revocation." As construed by the courts this section does not extend the court's power to the making of an award after judgment becomes final without any mention of alimony or with an express denial of same, unless jurisdiction is expressly reserved for that purpose. *Wilson v. Superior Court*, 31 Cal.2d 458, 464, 189 P.2d 266; *McClure v. McClure*, 4 Cal.2d 356, 359, 49 P.2d 584, 100 A.L.R. 1257; *Barry v. Barry*, 124 Cal.App.2d 107, 111, 268 P.2d 147. Nor does the power survive the expiration of the limitation of time contained in the decree awarding alimony. *Tolle v. Superior Court*, 10 Cal.2d 95, 97, 73 P.2d 607; *Long v. Long*, 17 Cal.2d 409, 410, 110 P.2d 383. But when an award has been made for a limited period, the court has by virtue of the statute a continuing jurisdiction to modify the same in any respect; no express reservation of jurisdiction is necessary; and no attempted abnegation of the power is effective. *Bechtel v. Bechtel*, 124 Cal.App. 617, 618, 12 P.2d 970; *Soule v. Soule*, 4 Cal.App. 97, 100-101, 87 P. 205; *Gates v. Gates*, 54 Cal.App. 407, 410-414; 202 P. 151; *Harrold v. Harrold*, 100 Cal.App.2d 601, 605, 224 P.2d 66. The theory of these rulings is stated in the *Soule* case, *supra*, 4 Cal.App. at page 100, 87 P. at page 206, where, referring to section 139 Civil Code, it is said: "This statutory provision enters into every decree in an action for divorce which provides for the payment by the husband of an allowance for the support of the wife, as fully as though it should be incorporated into the terms of the decree. The authority of the court to modify its decree in this respect

does not depend upon a reservation therefor in the decree itself, but exists by virtue of the statute, and, being conferred upon it by the Legislature, it is beyond its power to divest itself of such authority. *Campbell v. Campbell*, 37 Wis. 206." And in *Gates v. Gates*, supra, 54 Cal.App. at page 411, 202 P. at page 152, as follows: "That the interlocutory judgment had become final before the modification was made does not render said section 139 inapplicable. The provision rests upon the theory that the trial court has a continuing jurisdiction in reference to such award. Its authority is not exhausted by the original order, nor is it foreclosed by the expiration of the time for an appeal.

"It is equally plain that the court is not required by express provision to reserve the authority to modify the award in order to justify such action. The language of said section becomes a part of the original order as though written therein. The section itself reserves to the court the authority to modify the allowance."

The *Bechtel* holding is directly in point here. Alimony was awarded for a period of five years and plaintiff appealed from the interlocutory judgment containing that provision. Upon appeal it was claimed "that the court by limiting the alimony payments to the period mentioned abused its discretion," and appellant asked "that the error be corrected by this court." 124 Cal.App. at page 618, 12 P.2d 970. After reviewing the authorities the court concluded: "The award made was not in the circumstances unreasonable; and it is clear from the foregoing that the court may modify its order by requiring, if necessary, suitable payments to be made after the expiration of the five-year period notwithstanding the limitation contained in the decree. No abuse of discretion has been shown, and the decree should be affirmed."

The *Bechtel* case was distinguished in *Tolle v. Superior Court*, supra, 10 Cal.2d 95, 97, 98, 73 P.2d 607, and in *Long v. Long*, supra, 17 Cal.2d 409, 410, 110 P.2d 383, but not overruled. In both of those cases the application was made after the time for ali-

mony payments had expired and after the court's power had been exhausted. Such was the holding in each instance. In the *Tolle* case, supra, it is said in 10 Cal.2d at page 98, 73 P.2d at page 609: "Two authorities strongly relied on by the respondents may be distinguished as not applicable to the cause here, for the orders there under consideration were not made after the judgments providing for alimony had been fully executed, as in this case." The reference is to *Smith v. Superior Court*, 89 Cal.App. 177, 264 P. 573, and *Bechtel v. Bechtel*, supra, 124 Cal.App. 617, 618, 12 P.2d 970. Concerning the latter case it is further said: "The decree was affirmed, but, in discussing the case, and without even referring to the period of limitation, the court held that the lower court might modify its order (for alimony) by requiring, if necessary, suitable payments to be made after expiration of the five-year period, notwithstanding the limitation contained in the decree. The question of whether or not such modification might be made after the termination of the five-year period was not considered." In *Long v. Long*, supra, 17 Cal.2d at page 410, 110 P.2d 383: "Appellant, relying on *Smith v. Superior Court*, 89 Cal.App. 177, 264 P. 573, and *Bechtel v. Bechtel*, 124 Cal. App. 617, 12 P.2d 970, contends that the above section confers on the court an express power to modify an alimony decree even though the alimony was awarded for a limited time, which has expired, and the decree did not contain a reservation of jurisdiction.

"This contention is answered adversely and the authorities relied on are distinguished in *Tolle v. Superior Court*, 10 Cal.2d 95, 73 P.2d 607, which holds that if the court provides for alimony payments for a definite term without reserving the right to change or modify the term, the court has no power to make further allowance for the wife's support after such alimony has been paid and the final decree has been entered." The effect of the *Tolle* and *Long* cases is to sustain the ruling of the *Bechtel* case so far as it applies to an application made before expiration of the limited period. This view is consistent with

the statute and the numerous cases which have cited and applied the Soule decision¹ without any criticism of it or its logic. Indeed a recognition of a right to modify within the limited period is necessary in order to preserve vitality to the statutory phrase "That portion of the decree or judgment making any such allowance or allowances * * * may be modified or revoked at any time at the discretion of the court."

[2] It follows that there was no error in the court's failure to insert an express reservation in the interlocutory judgment in this case. Jurisdiction is automatically reserved to make any appropriate modification before the expiration of the prescribed period, namely, before July 1, 1956.

[3, 4] Of course a showing of changed circumstances is necessary to the procuring of any such modification. *Ralphs v. Ralphs*, 86 Cal.App.2d 324, 325, 194 P.2d 592. That may or may not occur in this instance within the time limit. Counsel for appellant seem to argue the possibility of a need of modification after July 1, 1956, perhaps years after, and from that standpoint seem to claim that an award limited to 28 months is *per se* an abuse of discretion. This is a difficult position to sustain, for the statute, § 139, expressly authorizes an award for a period less than life and it is firmly established that the court has a broad discretion in the matter. *Newbauer v. Newbauer*, 95 Cal.App.2d 36, 39-40, 212 P.2d 240, 242: "However it is the settled rule that in making an award of alimony the trial court has a wide discretion. 'Before the appellate courts will interfere, it must be made clearly and affirmatively to appear upon the face of the entire record in the case that this discretion has been abused.' *Baldwin v. Baldwin*, 28 Cal.2d 406, 413, 170 P.2d 670, 674; 1 Cal.Jur. 1012. The code itself recognizes the right of the trial court to award alimony to an innocent wife 'during her life or for a shorter period as the court

may deem just'. Section 139, Civ.Code. * * *

"That the members of this court might have been more liberal is not the test. The discretion was the trial judge's, not ours; and we can only interfere if we find that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did. *Fillmore v. Fillmore*, 74 Cal.App.2d 418, 168 P.2d 725; *Cozzi v. Cozzi*, 81 Cal.App.2d 229, 183 P.2d 739; *Furniss v. Furniss*, 75 Cal.App.2d 138, 170 P.2d 486."

[5] A brief resumé of the facts will disclose that there was no abuse of discretion here. Appellant suffers and long has suffered from a congenital low back condition that causes fatigue and pain after prolonged exertion. She is an art teacher, and worked at her vocation in the public schools for about nine years and until three months before her son was born in 1940; having married respondent in June 1938. She earned about \$2,000 yearly. Her teaching credentials are in order and she had a temporary teaching position at the time of trial, working four hours a week, and making \$49.25 a month "take home" pay. A hysterectomy in July 1952 improved her general health somewhat. She works some in the yard; took golf lessons about a year before the trial; has her time to herself from 8:00 a. m. to 3:00 p. m. Her present teaching does not bother her back. She testified she would not sign a contract to teach full time because she feels she has a job to do with respect to the boy,—“to make a home for him and carry on as normally as possible.” At the conclusion of the evidence the trial judge stated reasons for limiting the alimony to 28 months, as follows: "I think in view of the background of the Defendant and her education, she can at least get a part-time job teaching school, and after this thing is over, and the memories about it are

1. See *Mathews v. Mathews*, 49 Cal.App. 497, 499, 193 P. 586; *Cummings v. Cummings*, 97 Cal.App. 144, 147, 275 P. 245; *Johnson v. Johnson*, 104 Cal.App. 283, 287, 285 P. 902; *Willey v. Willey*, 51 Cal.App. 124, 127, 196 P. 101; *Johnson*

v. Superior Court, 128 Cal.App. 584, 587, 17 P.2d 1055; *Innes v. McColgan*, 47 Cal.App.2d 781, 786, 118 P.2d 855; *Baxter v. Baxter*, 3 Cal.App.2d 676, 682, 40 P.2d 536.

more or less dim, she'll be in a better frame of mind to go out for herself, and, of course, school teachers are paid much better now than they were some ten or twelve years ago. It seems to me she probably could earn \$2,000.00, or better, per year." This court cannot say that there was any abuse of discretion.

The judgment is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



134 Cal.App.2d 213

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

**Wendell HAVEL and Francis Gordon
Robinson, Defendants and
Appellants.**

Cr. 987.

District Court of Appeal, Fourth District,
California.

June 28, 1955.

Prosecution of both defendants for conspiracy and one of them for assisting the other in attempting to escape from jail. The Superior Court, Riverside County, O. K. Morton, J., entered judgment of conviction and sentenced both defendants to imprisonment, and they appealed. The District Court of Appeal, Griffin, J., held that arraignment of defendants and pronouncement of judgment in absence of their counsel was violation of their constitutional right to have counsel in criminal prosecution.

Judgment reversed and remanded for re-arraignment of defendants for judgment and pronouncing of judgment.

1. Criminal Law ⚖️200(6)

A conviction may be had for both conspiracy to commit crime and the con-

summated crime committed in pursuance of its purpose, and such conviction does not constitute double jeopardy. Pen.Code, § 182.

2. Escape ⚖️7

In prosecution of both defendants for conspiracy and one of them for assisting codefendant in attempting to escape from jail wherein defendant was convicted of assisting attempt to escape, fact that codefendant was not charged with and convicted of attempt to escape did not render conviction of defendant for that crime void.

3. Criminal Law ⚖️553, 1109(1)

Claims that record on appeal was faked and falsified and that finding of jury was predicated on perjured testimony were not sustained by record. Pen.Code, §§ 182, 4534.

4. Conspiracy ⚖️47

Escape ⚖️10

Evidence sustained convictions of both defendants for conspiracy and one for assisting codefendant in attempting to escape from jail. Pen.Code, §§ 182, 4534.

5. Criminal Law ⚖️988

Persons charged with and convicted of public crimes are entitled to services of their attorneys at all stages of proceeding, including arraignment for judgment when such persons are asked if they have any legal cause to show why judgment should not be pronounced. West's Ann.Const. art. 1, § 13.

6. Habeas Corpus ⚖️30(3)

A judgment pronounced against accused in criminal prosecution in absence of his counsel is liable to attack by habeas corpus. West's Ann.Const. art. 1, § 13.

7. Criminal Law ⚖️988

In prosecution of both defendants for conspiracy and one of them for assisting codefendant in attempting to escape from jail, defendants' failure to request counsel at arraignment for judgment could not be amplified into waiver of their right to counsel at that time.

8. Criminal Law ⚖️988

In prosecution of both defendants for conspiracy and one for assisting codefend-

ant in attempting to escape from jail, arraignment of defendants for, and pronouncement of, judgment by trial court in absence of defendants' counsel was error.

9. Criminal Law — 1188, 1216(5)

Where defendants in criminal prosecution of both of them for conspiracy and one for assisting the other in attempting to escape from jail were improperly arraigned for judgment and sentence, defendants should again be arraigned for judgment, and if again sentenced to prison, their confinement, based upon invalid judgments, should be credited upon new commitment. Pen.Code, § 2900.1.

Wendell Havel, in pro. per.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Both defendants, in propria persona, appealed from their "conviction and sentence". Defendant Havel alone has filed a brief on appeal. He was convicted and sentenced as charged in count one, with violating section 4534 of the Penal Code in that he did, on September 6, 1954, and September 11, 1954, unlawfully assist defendant Robinson, a paroled prisoner whose parole had been revoked, in attempting to escape from jail. And in count two, he was charged with defendant Robinson with the crime of violating section 182 of the Penal Code, i. e., that on said dates they conspired together in violating section 4534 of the Penal Code. Several overt acts are set forth, namely, that they solicited one Easley to procure hack-saw blades and he did bring them into the jail; that defendants used said blades to cut the bars; and that they solicited one O'Connor to procure, and he did procure a piece of cotton rope to effect said escape.

Defendants, appearing with counsel, pleaded not guilty to the charges and a jury convicted them all on charges indicated. The trial court set a date for the hearing of the report of the probation officer and to sentence defendants. This date was subsequently continued to December 13, 1954,

with the consent of defendants' counsel. Apparently, on that date the matter was continued to December 15, at the request of the probation officer. On December 15, according to the minutes of the court, the defendants were present without their counsel. The court considered the probation officer's report and probation was denied. Defendants, without the presence of their counsel, were arraigned for judgment, and the minutes show: "No legal cause" why judgment should not be pronounced. Havel was sentenced to prison on both counts, sentences to run consecutively, and Robinson's term was to run "consecutively to any unserved sentence heretofore pronounced".

It appears that in November, 1953, defendant Havel was picked up in El Centro on a warrant for escape from the Riverside jail. At that time he was questioned about it and he said to the officers that he got within a few miles of the border this time and "next time I will make it."

On August 28, 1954, he was confined in the Riverside County jail with defendant Robinson, whose parole had been revoked, together with other prisoners, including one Rippey, who was a painter and barber who had trusty working privileges throughout the jail.

Rippey testified generally that on or about that date Havel and Robinson, trustees in the jail, discussed with him plans about escaping from the jail, i. e., that they were going to get the guards separated, overpower them, tie them up, obtain the key to the penthouse on the roof, secure a rope used as a clothesline to dry clothes, obtain civilian clothes from Robinson, who was the trusty having charge of the prisoners' civilian clothes, and escape by means of a rope suspended from the roof. Rippey stated he did not agree to this plan because he was not in favor of any violence in reference to the guards; that thereafter they approached him again and told him of their arrangements to obtain some hack saws and saw the bars in the "recreation tank"; that when they later, on September 7, produced the three blades, he said he would go along with the plan; that at night Havel awakened him and said they were ready to com-

mence sawing and the three of them took turns in sawing the bar and standing watch; that when the sawing of one bar was about completed (photographs of the sawed bar were received in evidence) Robinson thought they were making too much noise and proposed another plan, i. e., that he and Rippey would induce another prisoner (O'Connor) to drink some floor soap which would make him sick and he would be taken to the county hospital; that he would then size up the situation as to escaping from the hospital and then they would do the same thing, be taken to the hospital, and then escape according to the plans agreed upon.

O'Connor testified about their plans for drinking the soap and said both Havel and Robinson asked him to obtain two pieces of rope which he secured and gave to defendants; that they later asked him to obtain two pair of barber shears from Rippey without Rippey knowing it, and he did this and kept them on his person until either Robinson or Havel asked for them; that when he offered them to defendants they said it was too late to do anything, so he gave them back to Rippey. It appears that O'Connor did drink the soap but it failed to make him sick enough to take him to the hospital. Apparently, some other plans were made involving two pairs of scissors which Rippey used for barber purposes, because they were missing from his kit on September 11th. Rippey said he heard defendants say something about more drastic action in reference to their escape and the possible use of some weapon such as barber shears; that he did not believe in any such violence and accordingly told one of the deputies of his suspicion of the contemplated plans of escape; and that Havel had said he hoped a deputy by the name of Rhymer would be the one involved as he had had some trouble with him on some other occasion and did not like him.

Easley testified he discussed escape plans with defendants, and Robinson asked him to obtain some saw blades for him and promised Easley some packages of cigarettes for his service; that he did bring the blades into the jail in the sole of his shoe, according to the method he related to Rob-

inson the night before, and left them at the door of the "tank"; and that two days later he received some packages of cigarettes from Robinson. The shoe with the loosened sole was identified by Easley.

A deputy sheriff testified that after talking to Rippey he found the bar sawed, as indicated by him; that he questioned Robinson, who, after denying any knowledge of such plans, finally stated he was afraid he was being involved in this plan by other prisoners and he wanted to admit removing the saw blades from the shoe; that there was a length of rope ordinarily kept in the exercise area for drying clothes, and a disaster rope, about 150 feet in length, was kept on the roof of the jail under lock and key; that the jailer on duty on the floor where defendants were kept had the key to this door as well as the door leading to the roof; that he remembered O'Connor being reported as sick; and that the shoes in evidence were found in the prisoners' clothing storage room over which Robinson had charge.

One Wheelis, who worked as a trusty at the training center, testified that Rippey asked him to obtain some saw blades but he refused; that he saw Easley place hack-saw blades in his shoe at the center; that Easley told him he was taking them into the jail to give them to Robinson; that Havel, about that time, asked him if he wanted to escape at night with him from the jail and he told Havel that he was not interested because he was going ahead and serve his time.

Havel testified he asked Wheelis about taking part in an escape but that it was just talk and he forgot about it because he decided to try and obtain parole and never would take part in any attempted escape of Robinson. Other prisoners implicated Rippey as being involved in the attempted escape.

Robinson denied any attempt to escape and admitted he told officers, when being questioned about the saw blades, that "For the moment we will say I am guilty, that I did have hack saws. I still don't see what a statement on my part concerning that, how that would affect Mr. Havel.

That is only an admittance of guilt on my part."

[1] The first contention made on this appeal is that Havel was improperly convicted of both a violation of Penal Code section 4534 and a conspiracy to violate that section because the same acts and intent were involved in both charges. It has been repeatedly held in this state that a prosecution may be had for either a conspiracy or a crime committed in pursuance thereof, and a conviction thereon may be had for both the conspiracy to commit a crime and the consummated crime committed in pursuance of its purpose.

In *People v. Martin*, 114 Cal.App. 392, 396, 300 P. 130, defendant was charged with bribery and conspiracy to commit bribery. It was there held that the crime of conspiracy is a distinct offense from the actual commission of the crime forming the object of the conspiracy, and the fact that the parties to the conspiracy succeeded in perpetrating the acts which of themselves constitute the crime they conspired to commit, in no wise relieves them from liability under section 182 of the Penal Code. In such prosecution the parties may be legally convicted of both crimes and the conviction does not constitute double jeopardy. See also *People v. Hoyt*, 20 Cal.2d 306, 317, 125 P.2d 29, and *People v. Gordon*, 71 Cal. App.2d 606, 629, 163 P.2d 110.

[2] The claim that Robinson was guilty of the charges set forth in the first count, and accordingly the failure to charge and convict him on that count rendered Havel's conviction on that count void is without merit. Robinson was not charged with nor acquitted of this offense.

[3] The next argument is that the trial court "faked and falsified" the transcripts; that the records were false, and that Havel was convicted on perjured testimony. The transcripts were duly certified as correct, and there is no showing to the contrary nor that the finding of the jury was predicated on perjured testimony. Accordingly, there is no merit to this contention. *People v. Stinchcomb*, 92 Cal.App.2d 741, 746, 208 P.2d 396; *People v. Mooney*, 178 Cal. 525, 529, 174 P. 325.

[4] The evidence was sufficient to support the verdicts. The corpus delicti was sufficiently established and the testimony of the accomplices was sufficiently corroborated by other evidence. *People v. Henderson*, 34 Cal.2d 340, 342, 209 P.2d 785; *People v. Trujillo*, 32 Cal.2d 105, 110, 194 P.2d 681.

[5-7] The claim that defendants were not represented by their attorney at the time of the probation hearing and when judgment was pronounced upon them is supported by the evidence. The minutes of the court show that only the attorney for the prosecution was present and that defendants were "without counsel". The reason for proceeding in the absence of defendants' counsel is not shown and no waiver of that right is indicated by the record. The trial court, after denying probation, asked the defendants if they had any legal cause to show why judgment should not be pronounced, and the only entry indicated is "No legal cause". Defendant, in his brief, states that defendants were "denied the right to counsel" by the actions of the trial court. It is a fundamental principle that persons charged with and convicted of public crimes are entitled to the services of their attorneys at all stages of the proceedings, and this includes arraignment for judgment when defendants are asked if they have any legal cause to show why judgment should not be pronounced. A defendant does have certain substantial rights at that time and it may be only a trained legal mind that would understand the significance of this query. In *re Levi*, 39 Cal.2d 41, 45, 244 P.2d 403, involved a similar occurrence. It was there held that the constitutional right of the accused to have counsel in "criminal prosecutions" (Const. Art. I, sec. 13) is not applicable to a hearing preceding revocation of probation, since a probation proceeding is not part of a "prosecution", but an arraignment for judgment is a "criminal prosecution" within the meaning of that article, and an accused therefore has the right to counsel at the time of pronouncement of judgment; and that a judgment pronounced against the accused in the absence of counsel is vulnerable to attack by habeas corpus. It is therein stated that

defendant's failure to request counsel could not be amplified into a waiver of his right to counsel. See also *People v. Fields*, 88 Cal.App.2d 30, 198 P.2d 104.

[8,9] Under the authority of these cases and those cited therein, it was error to arraign defendants and pronounce judgment in the absence of their counsel. Since there appears to be no other error and the judgment is fully supported by the evidence, defendants should again be arraigned for judgment and if again sentenced to prison, their confinement, based upon the invalid judgment, should be credited upon the new commitment. Penal Code sec. 2900.1.

The judgment is reversed and the cause remanded, but for the sole purpose of re-arraigning the defendants for judgment and the pronouncing of judgment. *People v. Fields*, supra.

BARNARD, P. J., and MUSSELL, J., concur.



134 Cal.App.2d 174

Dan E. HARD, Plaintiff and Appellant,
v.
HOLLYWOOD TURF CLUB, a corporation,
and **L. E. Dixon Company, Inc., a corporation, et al., Defendants,**
L. E. Dixon Company, a corporation,
Respondent.
Harry MACOFSKY, Plaintiff and Appellant,
v.
L. E. DIXON COMPANY, a corporation,
Defendant and Respondent.
Civs. 20434, 20433.

District Court of Appeal, Second District,
Division 1, California.

June 27, 1955.

Rehearing Denied July 20, 1955.

Hearing Denied Aug. 17, 1955.

Personal injury actions, consolidated for purpose of trial, by employees of paint-

ing subcontractor against the general contractor. The Superior Court, Los Angeles County, Thomas J. Cunningham, J., granted motion for nonsuit in each case and each plaintiff appealed. Appeals were presented on a consolidated record. The District Court of Appeal, White, P. J., held that the ruling on a prior appeal by one of the plaintiffs, that the general contractor owed no non-delegable duty to provide safe scaffolding for subcontractor's employees, was law of case on the instant appeal where the offers of proof on the second trial would have added little, if anything, of consequence to facts which were of record on the first appeal, and that, the facts being identical as to each plaintiff, there was no evidence sufficient to support a verdict in favor of the second plaintiff had it been returned.

Judgments affirmed.

1. Appeal and Error ◊1097(1), 1195(1)

Rule of "law of the case" is the rule requiring both trial and appellate tribunals to follow rules laid down upon former appeal whether such rules are right or wrong.

See publication *Words and Phrases*, for other judicial constructions and definitions of "Law of the Case".

2. Appeal and Error ◊1097(1)

Upon second appeal, the court, in determining applicability of rule of "law of case", will look not only to opinion rendered by court on previous appeal, but also to the record.

3. Appeal and Error ◊1097(3)

On second appeal, doctrine of "law of the case" applies even though the evidence may be different, unless evidence is substantially different in a material respect.

4. Appeal and Error ◊1097(1)

Ruling on first appeal, that general contractor owed no nondelegable duty to provide safe scaffolding for subcontractor's employee, was law of case on subsequent appeal where offers of proof on second trial of personal injury action would have added little if anything of consequence to facts which were of record on first appeal. Labor Code, §§ 7151, 7152.

5. Negligence Ⓒ55

General contractor may be liable for injuries resulting from defective appliances when he has privilege of selecting them or materials of which they are made, but he is not liable for injuries caused by defective scaffolds or other instrumentalities which he has not supplied. Labor Code, §§ 7151, 7152.

6. Trial Ⓒ139(1)

Where there was no evidence of sufficient substantiality to support verdict in favor of plaintiff in personal injury action if such verdict would be returned, motion for nonsuit was properly granted.

Samuel P. Young, Seth M. Hufstедler, Los Angeles, for appellant Hard.

Francis J. Gabel, Seth M. Hufstедler, Los Angeles, for appellant Macofsky.

Schell, Delamer & Loring, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiffs Dan E. Hard and Harry Macofsky, were employees of Arenz-Warren Company, a subcontractor who did painting on a grandstand of the Hollywood Turf Club which was in the course of being reconstructed. Defendant L. E. Dixon Company, a corporation, was the general contractor on the project. Plaintiffs were engaged as painters, employed by Arenz-Warren Company. Both sustained serious personal injuries when a high scaffolding which was erected and the materials for which were furnished by the subcontractor Arenz-Warren Company, and upon which they were working, collapsed and dropped them to the floor.

Plaintiffs filed separate personal injury actions. Plaintiff Hard's action was tried first, resulting in an award in his favor of \$55,000 damages by a jury against defendant Dixon Company. As to the defendant Hollywood Turf Club, a nonsuit was granted. Defendant Dixon Company's motion for a new trial was denied and the latter appealed. Division 2 of this court reversed the judgment and ordered a new trial. Hard v. Hollywood Turf Club, 112

Cal.App.2d 263, 246 P.2d 716. A hearing was denied by the Supreme Court. The case of plaintiff Hard was reset for trial and the action of plaintiff Macofsky, which had not theretofore been tried, was consolidated with it for the purpose of trial.

When the two cases were called for trial, the trial judge held a "pre-trial" hearing in his chambers, going over the various issues raised by the pleadings and by the prior opinion on appeal in the Hard case. At the pre-trial, all parties stipulated that all of the evidence, both oral and documentary, admitted in plaintiff Hard's first trial should be admitted in the consolidated trial for the purposes of the court's ruling upon plaintiffs' offers of proof and upon defendant's motion for a nonsuit. The court sustained defendant's objections to each and every one of plaintiffs' offers of proof. The court granted defendant's motions for a judgment of nonsuit in each case, and the judgments were accordingly entered against plaintiffs.

Motions for a new trial were denied and each plaintiff appeals from the judgment against him. By stipulation both appeals are presented on a consolidated record.

At the pre-trial hearing wherein it was stipulated that all of the evidence, both oral and documentary, admitted in plaintiff Hard's previous trial should be admitted in the second consolidated trial, the court stated that it was considering the opinion rendered in Hard v. Hollywood Turf Club, supra, to determine what was thereby established as the law of the case, and suggested that counsel for plaintiffs make offers of proof "as to any additional evidence they might have in addition to that that was presented to the trial court in the first instance", so that the court could rule whether these offers presented any additional matters of fact not introduced at the first trial. The suggested procedure was agreed to by stipulation. It was then further agreed that, "as evidenced by the transcript in the Hard case", the following constituted portions of the evidence.

"1. O. D. Malone was employed as foreman of the Arenz-Warren Company, Incorporated, being painting subcontractor, and acting in the scope of

his employment, and he was not an employee of L. E. Dixon Company.

"2. Said O. D. Malone while in the scope of such employment helped to physically move and re-erect the scaffold on which plaintiffs were standing at the time of the accident.

"3. The scaffold had so been moved and re-erected within two or three hours before said accident occurred.

"4. Dan Hard was not present when such scaffold was re-erected, the plaintiff Harry Macofsky was present and observed O. D. Malone as above referred to remove and erect said scaffold; that said plaintiff Macofsky during said re-erection of said scaffold helped move one of the planks to the new location where said scaffold was re-erected; *that except as hereinabove in this paragraph set forth all evidence relating to all issues of alleged negligence of said Defendant L. D. Dixon Company is identical in the two cases.*" (Emphasis added.)

So far as we are advised or have been able to discover, plaintiffs' offers of proof added nothing of consequence to the facts adduced at the prior trial other than, (1) that the foreman of Arenz-Warren built the scaffold, (2) Macofsky saw the scaffold-ing being moved, (3) Macofsky had nothing to do with its construction, except to help move one plank, and (4) both Macofsky and Hard suffered severe personal injuries. And, as pointed out by respondent, all of the foregoing, except the mention of injuries in subdivision (4), refers to and is in the record only as to plaintiff Macofsky, and as further pointed out, adds little if anything of consequence to the facts which were before the trial and appellate tribunals at the first trial.

For a consideration of what we regard as the determinative issues presented on these consolidated appeals, we consider the following as pertinent and uncontradicted facts adduced at both trials.

Defendant Dixon Company contracted with Hollywood Turf Club to perform services as a general contractor in the remodeling and renovating of part of the grand-

stand at the Hollywood Park Race Track. Dixon undertook this work on a "cost plus fixed fee" basis, and in order to fulfill the terms of the contract, it was necessary to engage the services of subcontractors. All subcontracts had to be approved by the architect and the Turf Club. About twenty-one subcontractors were employed on the job, one of which was Arenz-Warren, the painting subcontractor. Harry Moore, superintendent for Arenz-Warren, was in charge of all painting at the race track. Directly under Mr. Moore there were two foremen, Mr. Sheldon and Mr. Malone, who were in charge of rigging scaffolds and directing the painters on the job. Both of these foremen were employed by Arenz-Warren. Arenz-Warren carried its own payroll, Workmen's Compensation and social security for the men that they employed. They handled all of the details of the work themselves, although they were under the general direction and control of the architect—the owner's agent. Arenz-Warren received general instructions from Dixon Company, but these instructions only pertained to the work which was to be done. Dixon Company did not direct the details of the manner in which the work was to be done, nor did Dixon Company furnish Arenz-Warren with any equipment or material. The two foremen testified that they received their orders directly from Arenz-Warren, and not from Dixon.

Hard was an employee of Arenz-Warren. He received his instructions from the foreman, Mr. Malone. Mr. Hard had no discussion with the Dixon Company or the Turf Club with reference to his work. He knew that Arenz-Warren was the painting subcontractor and that he was working for Arenz-Warren. Macofsky, who was also injured in this accident and was working on the same scaffold with the plaintiff Hard, testified that he reported to foreman Malone who was supervising the job. Macofsky stated that he worked for Arenz-Warren and that no one told him what to do other than Mr. Malone, the Arenz-Warren foreman.

Plaintiffs introduced evidence to show that the scaffold upon which the men were working was defective. And although

plaintiffs alleged in their complaints that defendant Dixon Company built and owned this scaffold, the undisputed evidence discloses that this scaffold, as well as all other scaffolds used for painting, was constructed by Arenz-Warren. Mr. Paul Kahn, a painter, testified that Arenz-Warren men hoisted the materials up to the scaffold; that all the men who constructed the scaffold were employees of Arenz-Warren; and that Arenz-Warren men moved the scaffold when it was necessary to do so. Plaintiff Macofsky testified that the scaffolding was built by Mr. Malone and that Mr. Malone moved the strip of steel which formed part of the construction of the scaffold. This testimony was corroborated by the evidence given by Benny Wieggers. Mr. Malone, an experienced rigger, admitted that it was he who designed and built the scaffold and was in charge of its erection.

Prior to the time plaintiff Hard ascended the scaffold, he was aware of its condition. His foreman, Mr. Malone, had told him that he would not need a safety belt. Hard thought that it was safe to work on the scaffolding without a safety belt, and he did not tell his foreman or anybody else that he was unwilling to work on the scaffolding without a safety belt. Hard knew that if he had demanded a safety belt he could have had one, and he readily admitted that it was customary for him to look pretty carefully before he climbed onto a scaffold.

And, as to plaintiff Macofsky, the evidence, without contradiction, establishes that he stood in the same relationship to defendant Arenz-Warren Company and defendant Dixon Company as did plaintiff Hard.

We shall first give consideration to the appeal of plaintiff Hard because we are satisfied that as to him this cause must be determined, as contended by respondent, by an application of the principle of the law of the case.

[1-3] The rule of the law of the case is the rule requiring both trial and appellate tribunals to follow the rules laid down upon a former appeal whether such rules are right or wrong. And, upon the second

appeal the court will look not only to the opinion rendered by the court on the previous appeal, but also to the record for the purpose of determining whether or not the law of the case should control in the determination of the second appeal. On the second appeal, even though the evidence may be different, *unless it is substantially different in a material respect*, the doctrine of the law of the case applies.

[4] Appellants insist that the only question decided by the former appeal was that "the trial court had committed prejudicial error in instructing the jury that respondent was under a statutory duty to supply appellant (Mr. Hard), with scaffolding that conformed to standards set by Labor Code, sections 7151 and 7152." However, an examination of the decision rendered in the previous appeal does not support this claim. A clear statement of the facts involved in this case and an equally clear discussion of the law of the case may be found in the opinion rendered when this case was before the court after the first trial. *Hard v. Hollywood Turf Club*, supra. No good purpose would be served by repeating them here. Suffice it to say, that after considering the relationship existing between appellant Hard and the respondent Dixon Company, as hereinbefore narrated, the court on the former appeal said, 112 Cal.App.2d at page 269, 246 P.2d at page 720: "The Legislature could not reasonably have intended to operate a hardship upon employers by making one contractor liable for the neglects of another. If as the generalissimo of a construction job, the general contractor leaves holes in the floor or grease upon it whereby any invitee might suffer injury, of course he would be liable. But where he has agreed by subcontract with an experienced and reputable painter to paint the ceilings and walls of the building under repair and the reputable painter negligently constructs an inferior scaffold that cannot support his workmen, it is nothing short of oppression to require the general contractor to pay the total amount of damages suffered by the injured workman as the result of the painter's negligence and thereby relieve the subcon-

tractor of all charges he might have been obliged to pay on account of the accident.

* * * * *

"* * * The lawmakers must have reflected that to impose the duty upon the general contractor directly to oversee all labor being performed and to inspect every device imported for use by the workmen on a particular construction and to impose nondelegable duties upon him to enforce all statutory safety provisions would be to place an extremely onerous burden upon him who has the general control over the ultimate result of the labor done yet without control or management of the means utilized to achieve the purpose planned. To adjudge appellant liable for errors of judgment on the part of 21 separate subcontractors and to hold him responsible for the enforcement of the safety statutes would be tantamount to making it an insurer of every subcontractor's activities. For appellant efficiently and effectively to direct the operations of 21 subcontractors essential to the successful consummation of so stupendous a task as the contract with the Turf Club demanded would have required such an outlay in time, labor and expense as to frustrate computation. At the same time it is doubtful that the undertaking of such manifold duties would have proved to be of greater safety or protection to the workers on the grandstand than they enjoyed under the provisions of the Workmen's Compensation and Insurance Act whereby every immediate employer is in duty bound to furnish his employees with all necessary, safe appliances and safe working area. Certainly such employer is in the best possible position more effectively to guard his own employee's welfare. Because the Legislature adopted this view it did not direct the scaffolding legislation to apply to an owner or general contractor. Adequate provision was made for the benefit of an injured worker to recover from his own employer before the Industrial Accident Commission which was granted judicial power." And, from the foregoing and other reasoning contained in the previous opinion the court concluded that the respondent herein was under no statutory nondelegable duty to provide the safe-

guards required by the Labor Code sections 7151 and 7152, relied upon by appellant Hard herein. Since the former decision in the instant case resolved all the questions here presented adversely to the contentions of appellant Hard, the decision becomes the law of the case and is controlling here.

[5] Coming now to a consideration of the appeal of Harry Macofsky, we deem it unnecessary to pass upon the applicability of the doctrine of the law of the case in his appeal for the reason that under well known and firmly established rules governing the power of the court to grant a nonsuit, we are satisfied that the conclusion of the trial court was correct. The record reflects that appellant Macofsky, like appellant Hard, was the employee of the subcontractor Arenz-Warren Company, and not of respondent Dixon Company. The latter had no control, management or direction over appellants in the work they were doing, nor did respondent general contractor direct the details of the manner in which the work was to be done by the subcontractor or furnish any of the scaffolding or other equipment or materials with which the painting work was to be done. As stated by the court in the previous appeal, *Hard v. Hollywood Turf Club*, supra, 112 Cal.App.2d at page 274, 246 P.2d at page 724: "A general contractor may be liable for injuries resulting from defective appliances only when he has the privilege of selecting them or the materials out of which they are made [citing cases], but he is not liable for injuries caused by defective scaffolds or other instrumentalities unless he has supplied them [citing cases]."

[6] While appellant Macofsky, strictly speaking, may not come within the doctrine of the law of the case, nevertheless, he relies upon the identical evidence which was given at the first trial of appellant Hard, and which evidence, under the previous decision of this court, was held to establish that respondent Dixon Company was not the employer of appellant. From this it necessarily follows that respondent Dixon Company had no statutory duties to fulfill toward either of the appellants herein. Manifestly, it must be said that there

is no evidence of sufficient substantiality to support a verdict in favor of appellant Macofsky, if such a verdict was returned. *Biondini v. Amship Corp.*, 81 Cal.App.2d 751, 754, 185 P.2d 94. The motion for a nonsuit was, therefore, properly granted as to appellant Macofsky.

For the foregoing reasons, the judgments, and each of them, from which these appeals were taken, are affirmed.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; CARTER, J., dissenting.



134 Cal.App.2d 250

Muriel S. LINEHAN, Plaintiff and Respondent,
v.

Margaret Schuyler LINEHAN, Defendant and Appellant.
Civ. 20722.

District Court of Appeal, Second District,
Division 1, California.
July 5, 1955

Hearing Denied Sept. 1, 1955.

Action charging defendant with libel, slander and invasion of plaintiff's right to privacy in making statements that defendant was still lawfully married to her ex-husband, whom plaintiff had married, and that plaintiff was living with him illegally and sinfully. From adverse judgment of the Superior Court, Los Angeles County, Kenneth C. Newell, J., the defendant appealed. The District Court of Appeal, White, P. J., held that evidence was sufficient to sustain finding that defendant was guilty of slander and that she had invaded plaintiff's right to privacy.

Judgment affirmed.

1. Libel and Slander ☞112(1)

Torts ☞27

In action charging defendant, who claimed she was lawful wife of plaintiff's

husband, with libel, slander, and invasion of plaintiff's right to privacy, in making numerous charges that plaintiff was not lawful wife of defendant's ex-husband and that she was consorting with him illegally and sinfully, evidence sustained finding that defendant was guilty of slander and of invasion of plaintiff's right to privacy.

2. Appeal and Error ☞989

Function of reviewing court is not to retry cause and it is not authorized to review evidence except where, on its face, it must justly be held that it is insufficient to support ultimate issues involved.

3. Appeal and Error ☞994(3), 1012(1)

Trier of facts is exclusive judge of credibility of witnesses, and is judge of effect and value of evidence addressed to him, except in those instances where it is declared by law that it shall be conclusive proof of the fact of which it relates. *West's Ann.Code Civ.Proc.* §§ 1847, 2061.

4. Appeal and Error ☞931(1)

On appeal, every intendment is to be indulged in which tends to support the judgment, and every reasonable inference that may be drawn from facts which tends to support the findings must be accepted.

5. Appeal and Error ☞931(1)

On appeal by defendant from judgment in favor of plaintiff, construction of evidence is to be in support of findings, with all conflicts resolved in favor of plaintiff.

6. Appeal and Error ☞901, 1010(1)

Where appeal is based on claim that evidence is not sufficient to sustain determination arrived at by trial court, burden rests upon appellant to demonstrate that there is no substantial evidence to support challenged findings, and reversal may be ordered only when reviewing court can say as matter of law that there is a lack of substantial facts in record upon which trial court could have based any reasonable inference in support of his findings.

7. Appeal and Error ☞989, 996

When a verdict is attacked as being unsupported, power of reviewing court begins and ends with determination as to

whether there is any substantial evidence, which will support the conclusion reached by the jury, and when two or more inferences can be reasonably deduced from the facts, reviewing court is without power to substitute its deductions for those of trial court.

Margaret Schuyler Linehan, in pro. per.

George E. Lindelof, Jr., Herbert C. Meade, Los Angeles, for respondent.

WHITE, Presiding Justice.

[1] In a complaint containing ten causes of action plaintiff charged defendant with libel in Counts I, II and III; Counts IV, V, VI, VII, VIII and IX charged slander, while Count X alleged invasion of plaintiff's right to privacy. Following a trial before the court without a jury judgment was rendered in favor of plaintiff on Counts IV, V, VI and IX (slander), and Count X (invasion of privacy). Damages were assessed at \$1,500 compensatory and \$2,500 as punitive. Motion for a new trial was denied. Defendant prosecutes this appeal from the judgment.

After all briefs were on file and at the time the cause was called for oral argument, respondent presented a motion to dismiss the appeal upon the ground that " * * * no valid ground of appeal is presented by Appellant's Opening Brief and that said appeal is made frivolously and for the purpose of delay." Said motion was submitted for decision. Upon consideration of the record we have concluded to deny the motion to dismiss and to determine the appeal on the merits.

The following we regard as a fair epitome of the factual background surrounding this litigation as reflected by the record. At all times embraced within the pleadings defendant was a former wife of one Robert E. Linehan, having obtained a judgment of divorce from him on October 23, 1946, in the Second Judicial District of the State of Nevada, County of Washoe, and in which action she was the plaintiff and testified. Prior to the events about to be narrated, appellant was never re-married to

Linehan. Respondent in this action married Linehan April 15, 1950, at Las Vegas, Nevada. There was evidence that following this marriage between respondent and Linehan, appellant held herself out publicly as the only lawful wife of Linehan. The record below discloses that pursuant to a design on her part, and over a period of some two years, appellant made repeated personal and telephone calls to the home of respondent and respondent's relatives, and stated to third persons that respondent was not the lawful wife of Linehan but was cohabiting with him knowing him to be the husband of appellant. The latter repeatedly engaged in public episodes of name-calling and vilification of respondent in connection with the latter's marriage. Appellant followed respondent from Whittier, California to Boston, Massachusetts, to Montreal, Canada, in each of which places respondent then resided, and repeated the foregoing charges to third persons. Appellant wrote relatives of respondent, repeating the above charges and accusing respondent of poisoning Linehan. In a divorce proceeding between respondent and Linehan, appellant appeared in the courtroom and repeated the above charges and characterized respondent's marriage as "bigamous." Appellant stated to another relative of respondent, and to a friend, that respondent was consorting with Linehan illegally and sinfully. In the presence of various persons, appellant stated respondent was a narcotics addict.

Until the time of trial of this action the divorce secured by appellant in 1946 had not been modified or set aside, and during such times was in full force and effect. Respondent secured an interlocutory decree of divorce from Linehan in the Superior Court of Los Angeles County on February 27, 1952. Thereafter, on June 28, 1952, appellant herein entered into a re-marriage with Linehan in Storey County, Nevada.

There was evidence that appellant asserted she was living intermittently with Linehan at various times following the foregoing 1946 Nevada divorce, and that she prepared and widely distributed documentary material purporting to show an intimate association with Linehan during

the period he was married to respondent. The record however, is barren of any evidence to support appellant's claim that she was legally married to Linehan at any time subsequent to October 23, 1946, and the date of trial of this action.

The court made comprehensive and specific findings that respondent's marriage to Linehan was legal and lawful, and that appellant herein herself instituted the above action for divorce against Linehan, was personally present in the courtroom at the time the decree of divorce was granted and testified in the case. That, "It is true that continuously since the said April 15, 1950, the defendant has falsely and knowingly represented herself and held herself out to the whole world, orally and in writing, as the lawful wife of the said Linehan." That appellant herein spoke to other persons of and concerning respondent substantially as follows, "'Muriel is not Robert Linehan's legal wife. I am his only legal wife. Muriel was warned not to marry Bob, but instead she went through a fake marriage and now pretends to be Mrs. Linehan. She is living with Bob illegally and sinfully.' It is true that the aforesaid words of defendant were wholly false and were uttered by defendant with full knowledge of their falsity, and were uttered and published by the defendant maliciously." That appellant made other false statements, such as, "That woman (meaning respondent herein) is consorting illegally with my husband, and she has been warned of it repeatedly." Also the court found that appellant uttered statements of and concerning respondent such as, "Muriel has no right pretending to be Mrs. Linehan and keeping Bob (meaning Robert E. Linehan) here against his will. She is doing a shocking and immoral thing."

Upon competent evidence the court found that, "It is true that on or about the 15th day of April, 1950, the defendant conceived and formulated a design, the object of which was to harass the plaintiff by representing to the world, orally and in writing, that plaintiff was not the lawful wife of the said Robert E. Linehan but was associating with the said Linehan

immorally and sinfully. It is true that in execution of the said design, defendant made repeated personal and telephone calls to the home of plaintiff and plaintiff's relatives, and stated to plaintiff, to plaintiff's mother, brother and sister-in-law, and to a friend of plaintiff's, and in the presence and hearing of other persons, that plaintiff was not the lawful wife of the said Linehan but was associating with him knowing him to be the husband of defendant, and was living with him in a sinful and unlawful state. It is true that in execution of the aforesaid design, the defendant followed plaintiff from plaintiff's home in Whittier, California to an apartment plaintiff maintained in Boston, Massachusetts, and later to a relative's home in Montreal, Canada, and that in each of the said places she made substantially the same statements of and concerning plaintiff. It is true that many of the aforesaid statements were made by defendant in a loud and boisterous tone of voice, and that defendant conducted herself loudly and boisterously. It is true that the defendant visited the police station in the City of Whittier, California, and there made certain allegations and complaints to authorities of and concerning plaintiff, and that the defendant visited the police station in the City of Boston, Massachusetts, and there made certain statements and complaints of and concerning the plaintiff. It is true that the defendant caused to be prepared certain writings and photographic and documentary materials in purported support of her aforesaid statements of and concerning plaintiff. It is true that the aforesaid words and conduct of defendant were uttered and performed pursuant to the aforesaid design to harass plaintiff. It is true that the aforesaid words and conduct of defendant were wholly false and were uttered and performed by defendant with full knowledge of their falsity, and were uttered and performed maliciously. It is true that the aforesaid course of conduct of defendant constituted a willful invasion of plaintiff's right of privacy, and that as a direct result of the said course of conduct the plaintiff suffered public humiliation and embarrassment."

Throughout the trial and on this appeal appellant advances the claim that she was repeatedly informed by Linehan that his marriage to respondent was invalid. That any and all of her acts, statements, utterances and writings were made "in the best of faith and upon the invitation of respondent and her mother, who constantly invited appellant to confer with them concerning the situation created by the association of Robert E. Linehan, appellant, respondent and her mother." As stated in appellant's brief, "Appellant takes the position, as brief as it may be, that any of the acts, statements, communications or actions done by her as related by testimony in the transcript of the lower court *were not done with malicious intent*, but were done in duty and good faith and for the purpose of clarification of a confused association of the individuals concerned, and such acts were brought about and induced by the utterances of the respondent, her mother and Robert E. Linehan." (Emphasis added.)

[2-6] We are confronted with an appeal wherein the appellant mistakes the powers and limitations of a reviewing tribunal. Our function is not to retry the cause and we are not authorized to review evidence except where, on its face, it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact but purely one of law. Reviewing judges are, obviously, in no position to determine the credit which should be accorded to witnesses or weigh their testimony. The trier of facts is the exclusive judge of the credibility of witnesses, Code Civ.Proc., sec. 1847, and is the judge of the effect and value of evidence addressed to him, except in those instances where it is declared by law that it shall be conclusive proof of the fact to which it relates, Code Civ.Proc., sec. 2061. No questions of law are presented on this appeal. It offers only questions of fact because, if the statements allegedly made by appellant were in fact uttered and published by her in the manner

and form, and under the circumstances shown by testimony in the record, there can be no question but that they were actionable. Under well established and elementary principles of law, where an appeal is taken, every intendment is to be indulged in which tends to support the judgment, and every reasonable inference that may be drawn from the facts which tend to support the findings must be accepted. In *re Estate of Bristol*, 23 Cal.2d 221, 223, 143 P.2d 689. The construction of the evidence is to be in support of the findings, *Patten & Davies Lumber Co. v. McConville*, 219 Cal. 161, 164, 25 P.2d 429, with all conflicts resolved in favor of the respondent. And where as here, the contention is advanced that the evidence is not sufficient to sustain the determination arrived at by the trial court, the burden rests on the appellant "to demonstrate that there is no substantial evidence to support the challenged findings", *Nichols v. Mitchell*, 32 Cal.2d 598, 600, 197 P.2d 550, 552. It is only when the appellate court can say as a matter of law that there is such a lack of substantial facts in the record upon which the trial court could have based any reasonable inference in support of its findings, that a reversal may be ordered. The scope of appellate review is thus stated in *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 429, 45 P.2d 183, 184:

[7] "It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. [Citing cases.]"

The motion to dismiss the appeal is denied. The judgment is affirmed.

DORAN AND DRAPEAU, JJ., concur.

134 Cal.App.2d 34

Albert GOODWIN, Plaintiff and Respondent,
v.

W. L. BRADEN et al., Defendants,

W. L. Braden, and Zipper Gun Club, an unincorporated association, Defendants and Appellants.

Civ. 8637.

District Court of Appeal, Third District,
California.

June 23, 1955.

Action by lessee against owners and lessees of adjoining land to recover damages for partial loss of growing crop of milo corn caused by alleged negligent flooding of land by defendants. The Superior Court, Sutter County, Warren Steel, J., entered judgment in favor of plaintiff and defendants appealed. The District Court of Appeal, Schottky, J., held that trial court did not err in giving plaintiff's requested instruction as to damages even though it did not instruct jury to deduct 25 per cent of gross value of crop which was lessor's share, where it appeared from record that plaintiff was paying a share of crop as rent and therefore had title to entire crop until plaintiff delivered to lessor his share, but cost of harvesting should have been deducted from damages.

Judgment affirmed as modified.

1. Waters and Water Courses $\S$ 179(5)

In action by lessee against owners and lessees of adjoining land to recover damages for partial loss of growing crop of milo corn caused by alleged negligent flooding of land by defendants, trial court did err in giving plaintiff's requested instruction that plaintiff was under no duty to anticipate flooding of his land by negligence of others and his failure to protect his land by dams did not constitute contributory negligence, since the plaintiff was under no duty to keep water from flooding his land.

2. Negligence $\S$ 68

Landowner may make any lawful use of his land and it is not contributory neg-

ligence to neglect to take precaution to avoid future injury which can only occur as result of another's negligence.

3. Waters and Water Courses $\S$ 179(1)

In action by lessee against owners and lessees of adjoining land to recover damages for partial loss of growing crop of milo corn caused by alleged negligent flooding of land by defendants, defendant's denial of negligence would be enough to place in issue the question of unavoidable accident.

4. Trial $\S$ 260(7)

In action by lessee against owners and lessees of adjoining lands for damages for partial loss of growing crop caused by alleged negligent flooding of land by defendants, instruction as to unavoidable accident, while not erroneous if given, was not erroneously refused where case was tried upon respective parties' theories of negligence occasioned by want of ordinary care of one or the other, and where all elements of defendants' liability were covered by other instructions, which also covered only basis upon which unavoidable accident could have been determined.

5. Appeal and Error $\S$ 882(12)

In action by lessee against owners and lessees of adjoining land to recover damages for partial loss of growing crop of milo corn caused by alleged negligent flooding of land by defendants, defendants could not complain of trial court giving plaintiff's requested instruction on damages, where defendants requested a similar instruction.

6. Waters and Water Courses $\S$ 179(5)

In action by lessee against owners and lessees of adjoining land to recover damages for partial loss of growing crop caused by alleged negligent flooding of land by defendants, trial court did not err in giving plaintiff's requested instruction as to damages which instruction did not instruct jury to deduct 25 per cent of gross value of crop which was lessor's share since it appeared from record that plaintiff was paying a share of crop as rent and therefore had title to entire crop until he delivered lessor his share and was entitled to recover all damages. West's Ann.Civ.Code, $\S$ 1926.

7. Waters and Water Courses §178(1)

In action by lessee against owners and lessees of adjoining land to recover damages for partial loss of growing crop of milo corn caused by alleged negligent flooding of land by defendants, cost of harvesting corn should have been deducted from award of damages.

Maurice H. Roach and Sea & Hanna, Oakland, for appellants.

Hewitt & McBride, Yuba City, for respondent.

SCHOTTKY, Justice.

Plaintiff commenced an action against defendants to recover damages for the partial loss of a growing crop of milo corn caused by the alleged negligent flooding by defendants of land leased by plaintiff. Defendants denied any negligence on their part and also pleaded the defenses of contributory negligence and unavoidable accident. The jury rendered a verdict in favor of plaintiff in the sum of \$4,132.86, and defendants have appealed from the judgment entered on said verdict.

Before discussing the contentions urged by appellants for a reversal of the judgment we shall summarize the factual situation, as shown by the record.

From 1948 through 1952 plaintiff leased and farmed certain land in Sutter County in what is known as the Sutter By-Pass. The lease provided, among other things, that lessor should get one-fourth of the milo corn crop as rent and that plaintiff should bear all expenses of farming.

Plaintiff's land was bounded on the south and southwest by lands leased for a gun club. To the west was another gun club known as the Haley Club. To the east of plaintiff's land was a borrow pit, created by excavation of material to construct the original levees on the by-pass, and which was apparently a body of water existing the year around. Somewhere to the west of defendant's land and adjoining it, and apparently south and west of the Haley land, was the west borrow pit, also a year around existing body of water. The west borrow pit received run-off water from

plaintiff's land which drained roughly south and west through the lands of the two gun clubs, and it also received both percolating and surface waters draining from the rice fields of Sutter County to the northeast. Within the west borrow pit the natural flow of the water was generally southerly.

Plaintiff obtained irrigation water from the east borrow pit and by a series of checks or small levees of about 18 to 20 inches in height controlled its flow through his crops until it reached the common boundaries with the Haley and Zipper lands. These boundaries were marked by the same type and sized levees, and plaintiff allowed the surplus irrigation water to drain from his fields through several openings made in these levees for that purpose.

Defendants had for a number of years obtained water to flood their land to provide a feeding area for water-fowl from the west borrow pit. Controlling the flow and level of water in the borrow pit and located therein was an earthen dam with a concrete spillway with removable flashboards. Defendants' employee, one Roy Addington, emplaced flashboards in the top of the dam in September, 1952. This caused water to back upon the lands of the two gun clubs and against the checks or levees marking the boundaries of the plaintiff's land with that of the two gun clubs. On the 8th of November, 1952, this water inundated about 110 acres of plaintiff's crop land. The water washed out several of the drain openings placed in the checks and also went over the top of the checks in several places. Witness Amarel, a neighboring farmer and former lessee of plaintiff's land, testified the water on plaintiff's land was over his hip boots in some places, and witness Murphy, also a neighboring farmer, testified the water was as deep as thirty inches in some places.

In September of 1952 Addington told plaintiff he was going to emplace the flashboards and flood defendants' land and that he was going to close the several drain openings on the boundary levees that day. Plaintiff told Addington he did not want the openings closed because he was not through irrigating, and that he would re-

move the board if put up then. Addington did not return that day, however. Plaintiff told Addington that he did not want the openings closed because he was not through irrigating, and that he would fill up the openings himself after he finished his irrigation, which was finished about one week later. Addington told plaintiff further at the time that he had "*closed one of them already*" and "*closed the other partially*," referring to the drain openings. When plaintiff finished this irrigation in September, he filled in the drain openings with soil and tamped it down with his feet.

Plaintiff had experienced trouble with defendants previous to 1952 when they had commenced the flooding of their land before he finished his irrigating and harvesting, but no actual flooding of his land had occurred.

Plaintiff learned of the flooding of his land from his neighbor, Amarel, on the 8th or 9th day of November and on the day following went to see for himself. He then found the water had washed out the levees in some places and had gone over them in some spots.

There was testimony in the record that after emplacing the flashboards in the dam, defendants made no effort to determine the effect thereof with regard to plaintiff's land or to inspect the condition of the levees.

Plaintiff testified he had about 233 acres of tillable land under lease and that in 1952 he put 220 acres of it to milo corn and this was supported by other testimony. The flooding inundated about 110 acres of planted land. Plaintiff's loss was about one-half of his crop. He computed his loss in this fashion: From the 110 acres that were not flooded he received a total harvest of 1566 sacks; from the 110 acres that were flooded he salvaged 253 sacks; and subtracting 253 from 1,566 he arrived at 1,313 sacks as the crop lost. Counsel for the respective parties stipulated the value of milo corn at Yuba City on November 8, 1952, was 3.3 cents per pound. Plaintiff estimated his loss to be 143,875 pounds of corn, but his counsel used the figure of 143,948 pounds in his argument to

the jury, giving a gross figure for loss of \$4,748.85. This larger poundage figure was obviously used by the jury in its computations of damage. Appellants, however, make no objection on this appeal to this relatively slight discrepancy and use the larger figure in their briefs for purposes of their own. In computing his net loss, plaintiff then deducted \$287.74 as the probable expense of hauling to market the lost crop of 1,313 sacks of corn and the sum of \$328.25 drying expense on the same. This left the net of \$4,132.86, which is the figure the jury gave as its verdict.

Plaintiff made no deduction for harvesting on the lost crop, which he admitted would be about one-half cent per pound ordinarily. Plaintiff said he made no deduction for harvesting costs because the flooded area was "harder to harvest and harder than it would have been for the whole thing if dry." He later said that it cost more to harvest the wet ground than the "whole thing" if dry. There was testimony in the record that the harvesting machine bogged down in the flooded area, that the grain left standing was scattered here and there, and that the grain that was harvested had to be removed to the dry area because it could not be left in the wet fields.

In their opening brief appellants make only two contentions, the first being that the court erred in giving an instruction requested by respondent, and the second being that the court erred in refusing to give two instructions offered by appellants on unavoidable accident.

[1] At the request of respondent the court gave the following instruction:

"I instruct you that the plaintiff was under no duty to anticipate that his lands would be flooded by the negligence of another, or others, and he was not obliged to protect his lands by dams, checks or otherwise against such flooding, and failure on plaintiff's part so to do, does not constitute contributory negligence."

Appellants contend that this instruction was prejudicial error, in that it directed the jury to find for the plaintiff without

any qualifications and removed the questions of contributory negligence from their consideration. They state:

"The evidence shows that plaintiff volunteered to do an act, the closing of the holes in the levees, and took this duty from the hands of the defendants. He would not permit the defendants to protect his property because he wanted to drain across their land. In so volunteering, in this circumstance he was under a duty to use ordinary care in performing the act. The defendants therefore had done all they could under the circumstances. The final acts of protection were no longer under their control. Certainly the issue of whether or not the plaintiff had exercised ordinary care should be left to the jury."

[2] Appellants appear to be under the impression that respondent was under some obligation to keep water which was backed up in the by-pass by appellants from flooding the land of respondent. But no such duty devolved upon respondent who was farming his leased land in a lawful manner. There was, however, a duty devolving on appellants to so conduct their operations that no water flowed upon respondent's land and crop. The fact that in the growing of his crops respondent made use of a small levee on his land did not require respondent to keep his levees in condition to keep out the water backed up by appellants. Respondent could have removed the levee altogether and appellants would still have been required to keep their water off of respondent's land. In giving the instruction complained of the court was following the rule laid down in *Kleinclaus v. Marin Realty Co.*, 94 Cal.App.2d 733, at page 738, 211 P.2d 582, at page 584, as follows:

"The tenor of the vast majority of the decisions is that a landowner may make any lawful use of his land and that it is not contributory negligence to neglect to take precautions to avoid future injury which can only occur as the result of another's negligence.

* * * * *

"We are satisfied to hold that plaintiffs were not obliged to anticipate the negligent flooding of their land by defendants and that their permitting the drainage ditch to become clogged before the flooding started cannot constitute contributory negligence. If they had chosen to fill up the drainage ditch deliberately before the danger from flooding by defendants' negligence occurred they would only have been exercising the rights of an owner to use his land in any lawful fashion. The evidence is clear that the culvert was already clogged when the water first began to accumulate in the ditch."

We are satisfied that the court did not err in giving said instruction. Furthermore, there is abundant evidence that the water flowed over the top of the levee in a number of places so it is difficult to understand how appellants could have suffered any prejudice from the giving of said instruction even if it were held to be an erroneous statement of law.

[3,4] Appellants next contend that there was prejudicial error by the court in refusing to give the jury an instruction on unavoidable accident. Appellants tendered two proposed instructions on unavoidable accident. In defining the term "unavoidable accident" this court said in *Tesone v. Reiman*, 117 Cal.App.2d 211, at page 216, 255 P.2d 48, at page 51:

"* * * By this term is not meant an accident that could not be avoided at all. The term simply means an accident which is caused by something other than the actionable negligence of the parties involved. *Parker v. Womack*, 37 Cal.2d 116, 120, 230 P.2d 823. The so-called defense of inevitable or unavoidable accident amounts to nothing more than a denial by the defendant of actionable negligence."

'Appellants' denial of negligence would be enough to place in issue the question of unavoidable accident, *Parker v. Womack*, 37 Cal.2d 116, 230 P.2d 823, but here such defense was specifically pleaded. The *Parker* case, and another one cited by

appellants, to wit, *Sitkei v. Ralphs Grocery Co.*, 25 Cal.App.2d 294, 77 P.2d 311, both stand for the proposition that under a denial of negligence it is not error to give an instruction to the jury on unavoidable accident.

In *Lloyd v. Southern Pacific Co.*, 111 Cal.App.2d 626, 245 P.2d 583, 589, a judgment for plaintiffs was affirmed on appeal where it was claimed, among other matters, that failure to give an instruction on unavoidable accident was error. Petition for rehearing and petition to the Supreme Court for hearing were denied. The court quoted the case of *Jaeger v. Chapman*, 95 Cal.App.2d 520, at page 523, 213 P.2d 404, at page 406, for the proposition that "while it would not have been error to have given such an instruction, it was not error to refuse to give it where all elements of defendant's liability were covered by other instructions." The case of *Parker v. Womack* was distinguished in that there the upper court held that it was not prejudicial error to give such an instruction and therefore a motion for a new trial after a verdict for plaintiffs was in error.

The *Parker v. Womack* case did reject the contention that the defense of unavoidable accident was limited to cases where the defendant relies upon evidence of a proximate cause beyond his control, and indicated it was available where there was no evidence that the accident was caused by factors other than the lack of care. The court pointed out in that case that the burden of showing unavoidable accident was not necessarily on the defendant; that a determination of unavoidable accident was also proper where the evidence merely shows that the plaintiff has failed in his proof.

The record in the instant case shows that the case was tried upon the respective parties' theories of negligence occasioned by want of ordinary care of one or the other, and the evidence adduced was entirely directed toward these theories and not upon any ground that the flooding was caused by any outside agency. Therefore, to have given the instructions offered by defendants would not have been error; but on

the authority of the *Lloyd* and *Jaeger* cases, supra, it does not appear that the failure of the court to give one or both of the instructions was error unless the other instructions as given failed to cover the elements of defendants' liability. Instructions were given on negligence, contributory negligence, ordinary care, proximate cause, burden of proof, and duty to mitigate damages. No objection is raised as to the form and sufficiency of these instructions as given and they certainly cover all elements of defendants' liability and cover the only basis upon which unavoidable accident could have been determined under the record of this case, to wit, failure of plaintiff to prove negligence by defendants.

Appellants have filed a supplemental brief in which they contend that the damages awarded by the jury were excessive and incorrectly calculated.

[5] Appellants contend that the court committed prejudicial error in giving the following instruction offered by respondent:

"You are instructed that, in determining the amount of damage in this case, if you find from a preponderance of the evidence that any damage has been caused as a proximate result of the negligence upon which you base your findings of liability, you are first to determine from the evidence the market value of the probable yield of milo corn from the plaintiff's field, and you should then deduct therefrom the reasonable cost of producing and marketing such crop and also deduct therefrom the net market value of the crop actually produced, if any."

Appellants first contend that the giving of the instruction was prejudicial error because it did not direct the jury to deduct the 25 per cent of the gross value of the crop, which was the share of the landlord. Appellants chose to try their case on the same theory as respondent, inasmuch as they offered an instruction which is virtually identical to the one given and certainly their instruction does not even mention such

reduction in damages as they now argue for. The said instruction offered by appellants, and not given by the court because covered by the instruction on damages offered by respondent, was as follows:

"If you find that the plaintiff is entitled to damages, they may be held to be the market value of the crop when matured less the cost of producing, harvesting and marketing it, deducting the value of any portion of the crop that may have been saved."

Furthermore, in his argument to the jury, which appears in the record, appellants' counsel made no mention of any such deduction of 25 per cent. So appellants would hardly be in a position to complain that the giving of said instruction on damages was error when they themselves requested a similar instruction, and when they at no time during the trial urged the point they are now making. For as stated in *Yolo Water & Power Co. v. Hudson*, 182 Cal. 48, at page 51, 186 P. 772, at page 774: "A party cannot complain of an instruction given at his own request, or of an error in an instruction given at the instance of his adversary, when he requests a substantially similar one. 14 R.C.L. 815, and cases cited." See also *Collins v. Graves*, 17 Cal.App.2d 288, 61 P.2d 1198; *Story v. Nidiffer*, 146 Cal. 549, 80 P. 692.

[6] But even if appellants were entitled to raise the issue upon appeal, their contention would still be without merit. For all that the record shows is that respondent as lessee was paying a share of the gross crop as rent of the land. In 14 Cal.Jur.2d, page 603, it is stated:

"If, however, a lease exists, creating a landlord and tenant relation, and even though it provides for payment of a portion of the crop, rather than money, as rent, the tenant has title to the entire crop until such time as he delivers to the landlord his share, unless the lease otherwise provides."

And as stated by this court in *Cox v. Miller*, 15 Cal.App.2d 494, at page 498, 59 P.2d 628, at page 630:

"It is true, as laid down in the case of *Clarke v. Cobb*, 121 Cal. 595, 54 P.

74, that where the relationship of landlord and tenant exists, and where the rent is to be paid by a share of the crop grown on the demised lands, and where there is no agreement to the contrary, the title to the crop is in the tenant and he is not a tenant in common in the crop with his landlord."

See also *Imperial Valley Land Co. v. Globe G. & M. Co.*, 187 Cal. 352, 202 P. 129; *Wolfsen v. Hathaway*, 32 Cal.2d 632, 198 P. 2d 1; *Holt Manufacturing Co. v. Thornton*, 136 Cal. 232, 68 P. 708; *Hicks v. Butterworth*, 30 Cal.App. 562, 159 P. 224; *Civil Code*, § 1926.

We therefore conclude that upon the record here and the law applicable thereto, respondent as lessee of the land had title to the crops damaged or destroyed, and so was entitled to recover in this action all damages to his crops resulting from the acts of appellants.

[7] Appellants' final contention is that the amount of damages awarded respondent should be reduced by the sum of \$719.74, for harvesting expense. This would be on the basis of one-half cent per pound on 143,948 pounds. It is apparent from the record that the jury took the figure of 1,313 sacks or 143,948 pounds at \$3.30 per hundred pounds, making \$4,748.85, and deducted therefrom \$287.74 for hauling charges and \$328.25 for drying charges, leaving a balance of \$4,132.86, the amount of the jury's verdict. These were the figures used by counsel for respondent in his argument to the jury.

Appellants argue correctly that the jury should have followed the court's instructions on damages and deducted the cost of harvesting. Respondent testified that the reasonable cost of harvesting a crop of corn was one-half cent per pound, and this was the only testimony as to said cost. If the 143,948 pounds of corn for which respondent was allowed damages had been harvested the cost of said harvesting would have been \$719.74. Respondent was not entitled to be awarded the full market price of the corn lost due to the acts of appellants without deducting therefrom the said sum of \$719.74.

The judgment appealed from is hereby modified by reducing same in the amount of \$719.74, and in all other respects the judgment is affirmed, the parties to bear their own costs on appeal.

VAN DYKE, P. J., and PEEK, J.,
concur.



134 Cal.App.2d 97

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Robert E. MORGAN, Defendant and
Appellant.
Cr. 5202.

District Court of Appeal, Second District,
Division 2, California.

June 24, 1955.

Rehearing Denied July 20, 1955.

Prosecution for checking without sufficient funds with intent to defraud and for grand theft. Defendant was found guilty in Superior Court, Los Angeles County, Clement D. Nye, J., and appealed. The District Court of Appeal, McComb, J., held that the record failed to show any prejudice in procedure whereby, after two continuances at the request of defendant, the trial court had denied his motion for further continuance on substitution of counsel.

Affirmed.

1. Criminal Law ☞1166(8)

Record on appeal from conviction for checking without sufficient funds with intent to defraud and for grand theft failed to show prejudice in procedure whereby, after two continuances at request of defendant, trial court denied his motion for further continuance on substitution of counsel. West's Ann.Const. art. 6, § 4½.

2. Criminal Law ☞1035(1)

Where an accused neither objects to going to trial nor moves in trial court to dismiss under section providing for dismissal if defendant whose trial has not been postponed upon his application is not brought to trial within 60 days after signing of indictment or filing of information, error may not be predicated in appellate court upon failure of defendant to have an earlier trial. Pen.Code, § 1382.

3. Criminal Law ☞1115(2)

Error in criminal prosecution could not be predicated on court's allowing woman to remain as juror after it appeared her husband was employed by school board, where her husband's employment did not appear from record on appeal.

4. Criminal Law ☞1137(2)

When defendant in criminal prosecution was granted leave on request to file application for probation, he could not predicate error on court's referral of case to probation department and continuing time of sentence until after receipt of probation officer's report.

5. Criminal Law ☞619, 1152(1)

Motion for consolidation in criminal case is directed to discretion of trial court, and in the absence of showing of prejudice order granting motion will be upheld by an appellate court. Pen.Code, § 954, West's Ann.Const. art. 6, § 4½.

6. Criminal Law ☞1166½(1)

Record on appeal from conviction for checking without sufficient funds with intent to defraud and for grand theft failed to show prejudice from consolidation of two informations for trial. Pen.Code, § 954; West's Ann.Const. art. 6, § 4½.

Robert E. Morgan in pro. per.

Edmund G. Brown, Atty. Gen., and
Elizabeth Miller, Deputy Atty. Gen., for
respondent.

McCOMB, Justice.

From a judgment of guilty on four counts of issuing checks without sufficient funds, with intent to defraud, and one count of

grand theft, defendant appeals. There are also appeals from orders denying (1) a motion for a new trial, and (2) a motion in arrest of judgment.

Defendant does not question the sufficiency of the evidence to sustain the judgment but claims that the court erred in:

[1] (a) Denying his motion for a continuance, thus forcing him to trial without allowing him an opportunity to consult with his counsel and prepare a defense;¹

[2] (b) That the court had no jurisdiction to try defendant since the trial did not commence within 60 days from the time that the informations were filed against him;²

1. This contention is devoid of merit. The case was originally set for trial November 25, 1953. On that date defendant's attorney requested a continuance upon the ground that defendant wanted to make restitution, and that possibly defendant would plead guilty to one of the counts with which he was charged. The court continued the trial to December 23, 1953, on which date at the request of defendant the case was continued until January 14, 1954. On the latter date defendant appeared in court and requested that attorney Lowell Lyons be substituted in place of his previous attorney, and that the case be continued for trial. The court granted the motion for substitution of attorneys but denied the motion for a continuance. On January 15, 1954, another motion for continuance by defendant was denied and the case was tried, attorney Lyons representing defendant at all stages in the proceedings. The record fails to show that defendant suffered any prejudice by this procedure. (People v. Dowell, 204 Cal. 109, 113, 268 P. 807; People v. Whinnery, 55 Cal.App. 2d 794, 798 et seq., 131 P.2d 33; People v. Shaw, 46 Cal.App.2d 768, 772 et seq., 117 P.2d 34.)

2. It is settled that where, as in the instant case, a defendant neither objects to going to trial nor makes a motion to dismiss the action under section 1382 of the Penal Code in the trial court, error may not be predicated in an appellate court upon failure of defendant to have an earlier trial. (People v. Scott, 74 Cal.App.2d 782, 783, 169 P.2d 970; People v. Newell, 192 Cal. 659, 669 [5], 221 P. 622.)

3. The record fails to disclose that Mrs. Farr's husband was employed by the City

[3] (c) That the court erred in allowing Mrs. Farr to continue as a juror after it appeared that her husband was employed by the Los Angeles City School Board;³

(d) That the trial judge erred in allowing the district attorney to state to the jury facts not shown by the evidence;⁴

[4] (e) The trial court erred in referring defendant's case to the probation department and continuing the time of sentence until after receipt of the probation officer's report;⁵

[5,6] (f) That the trial judge erred in ordering that two informations filed against defendant be consolidated for trial;⁶ and

school board, therefore error may not be predicated upon a matter which is not within the record. (People v. Hirschler, 98 Cal.App. 499, 501 [3], 277 P. 170; People v. Jocelyn, 29 Cal. 562, 563.)

4. The record discloses that the matters objected to by defendant were predicated upon evidence duly received and in most instances introduced by defendant.

5. This contention is devoid of merit for the reason that defendant, when the verdicts of guilty were returned on January 18, 1954, expressly asked leave to file an application for probation which was granted.

6. A motion for consolidation is directed to the discretion of the trial court and in the absence of a showing of prejudice, of which there is none in the instant case, an order granting the motion will be upheld by an appellate court. (People v. Johns, 69 Cal.App.2d 737, 740 [1], 160 P.2d 102.) Section 954 of the Penal Code reads in part thus: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. * * *" The second information filed against defendant charged him with issuing a check without sufficient funds. This was obviously of the same class as that charged in the first information which charged one count of grand theft and three counts of issuing checks without sufficient funds. Therefore the trial judge's order was correct.

(g) That defendant was denied a fair and impartial trial for the reasons previously stated.⁷

Article VI, section 4½ of the Constitution of the State of California reads as follows: "No judgment shall be set aside, or new trial granted, *in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure*, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Italics added.)

We have examined the record and are of the opinion the record sustains the verdict of guilty on each count and there has not been a miscarriage of justice in the present case. Hence, since it needs no citation of authorities to support the thesis that this court is bound by the mandate of the Constitution of the State of California, it follows the judgment and order must be affirmed. (People v. Scott, 112 Cal.App. 2d 350, 352 [1], 246 P.2d 122 (hearing denied by the Supreme Court.))

It is likewise apparent no useful purpose would be served by an extended discussion of the errors alleged by defendant, which would only be, as indicated in the cases cited in the footnotes, a repetition of principles of law well established in this state and repeatedly reiterated in opinions of the appellate courts. We therefore refrain from further discussion of the alleged errors. (Cf. Thatch v. Livingston, 13 Cal.App.2d 202, 203, 56 P.2d 549.

The judgment and orders are, and each is, affirmed.

MOORE, P. J., and FOX, J., concur.

7. An examination of the record fails to disclose that defendant was denied any constitutional right or that any prejudice resulted from the trial judge's action or

Charles J. MARQUESS, Plaintiff and Appellant,

v.

Joseph E. BIALLAS et al., Defendants and Respondents.

Civ. 16291.

District Court of Appeal, First District, Division 2, California.

July 5, 1955.

Action on a common count for money had and received against security brokers and one of their salesmen, whom plaintiff claimed had induced him to buy worthless stock by false and fraudulent representations. From adverse judgment of the Superior Court, Alameda County, A. T. Shine, J., the plaintiff appealed. The District Court of Appeal, Dooling, J., held that evidence was sufficient to sustain finding that plaintiff was not induced to buy the stock by false representations.

Judgment affirmed.

1. Appeal and Error ⇨843(1)

When one sufficient finding supports judgment of trial court, it is not necessary for reviewing court to consider other findings or matters which have no relation to and cannot affect that finding.

2. Brokers ⇨106

In action on a common count for money had and received against security brokers and one of their salesmen, whom plaintiff alleged had induced him to buy worthless stock by false and fraudulent representations, evidence sustained finding that plaintiff was not induced to buy stock by fraudulent representations.

3. Trial ⇨382

In action tried to court without a jury, it is function of court to weigh the evidence.

conduct. On the contrary, the record discloses that defendant was afforded a full, fair and impartial trial,

4. Fraud — 58(1)

Proof of fraud must be clear and convincing.

J. Maxwell Peyser, San Francisco, for appellant.

Fitzgerald, Abbott & Beardsley, Stacy H. Dobrzensky, Oakland, for respondents.

DOOLING, Justice.

Plaintiff appeals from a judgment against him in an action on a common count for money had and received. Respondents Biallas and Street had been security brokers and Schultz was one of their salesmen. The gist of plaintiff's action against them as developed at the trial was that they had induced him to buy worthless stock in three corporations by false and fraudulent representations.

[1, 2] The trial court found against appellant on the issue of fraud and since that finding is conclusive we need not consider any other findings discussed in the briefs, following the rule that "when one sufficient finding supports the judgment, it is not necessary to consider other findings or matters as to evidence which have no relation to and cannot affect this finding." 4 Cal.Jur.2d 382. From a reading of the record we are satisfied that the evidence reasonably supports this finding. It would be fruitless to go over the testimony item by item. Simply by way of example, in connection with the purchase of stock in Citizens Underwriters Corporation, which was incorporated to engage in the insurance business, appellant testified that before he bought this stock he attended a meeting with a Mr. Pettrick, who was the important figure in the company, at which Schultz was present and in which Pettrick promised appellant and Schultz a general agency. Schultz testified that he was not present at any meeting with appellant and Pettrick and that the question of a general agency was never suggested until after appellant had bought his stock. In similar fashion Schultz, who was the salesman who dealt with appellant and with whom of the three he had the most contacts, denied all of appellant's testimony with regard to false

representations. The testimony of Biallas and Street was less specific, but they denied generally any recollection of discussing the purchase of any of the stock with appellant.

While it might be argued that appellant's testimony of certain representations which he testified were made by Street and Biallas was not expressly contradicted by them, none of it was admitted and the tenor of their testimony is that they made no false representations to him.

[3, 4] It is the function of the trial court to weigh the evidence. It is a rule for the guidance of the trial court that proof of fraud must be clear and convincing, 12 Cal.Jur. 832, and we are satisfied that the trial court's finding negating the making of any fraudulent representations finds adequate support in the record.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.



134 Cal.App.2d 133

William F. DUGAN, Plaintiff and Appellant,

v.

John E. PETTIJOHN, Administrator of the Estate of Louis Luckel, deceased, Defendant and Respondent.

Civ. 20752.

District Court of Appeal, Second District, Division 3, California.

June 24, 1955.

Action on promissory note. The Superior Court, Los Angeles County, Clarence M. Hanson, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Ashburn, J. pro tem., held that the evidence would sustain a finding that there had been no consideration for the note.

Affirmed.

1. Bills and Notes ⇨518(1)

Evidence would sustain finding that there had been no consideration for promissory note.

2. Joint Adventures ⇨4(4)

In absence of an agreement so to do, there is no obligation on the part of one joint adventurer to protect the other from loss of investment or to personally reimburse him for advances made in conduct of joint business.

3. Joint Adventures ⇨4(4)

Where one adventurer contributes service and other adventurer contributes property to the joint adventure, the one who contributed only services cannot recover upon dissolution (absent an express agreement on subject), compensation from co-adventurer for same; and likewise the one who has contributed capital must bear his own loss if assets are insufficient to return his investment in full.

4. Joint Adventures ⇨4(4)

Adventurer advancing more than his share of necessary expenses of joint adventure would have no claim against co-adventurer for reimbursement or contribution.

5. Contracts ⇨76

A mere moral obligation is sufficient to support an express promise only where a good and valuable consideration once existed, but not where there was no prior legal obligation. West's Ann.Civ.Code, § 1606.

6. Joint Adventures ⇨1.14

Joint adventure for an undefined term is terminable at will.

7. Bills and Notes ⇨92(3)

Abandonment of right and intention to terminate joint adventure and agreement to continue to render personal services to enterprise would constitute good consideration for promissory note from co-adventurer.

8. Appeal and Error ⇨931(3)

Where an omitted finding must be inferred from consideration of findings actually made, reviewing court will recognize necessary inference and consider finding in question as having, in effect, been made.

9. Appeal and Error ⇨1071(6)

Appellant cannot successfully complain of trial court's failure to find on issue when, in light of (1) evidence and reasonable inferences therefrom, (2) facts actually found and (3) judgment ordered, finding would have been adverse to him.

Alden F. Houck, Los Angeles, for appellant.

Potter & Rouse; Bernard Potter, Los Angeles, for respondent.

ASHBURN, Justice pro tem.

Plaintiff Dugan sues John E. Pettijohn as administrator of the estate of Louis Luckel, deceased, upon a promissory note made by Luckel on February 9, 1950 payable to order of plaintiff on September 1, 1950 in the sum of \$24,000. From a judgment for defendant plaintiff appeals. The case was tried without a jury. It appeared at the trial that plaintiff and Luckel, at the time the note was made and delivered, were engaged in a joint venture of operating the Noah Beery Paradise Trout Club located in the mountains near Palmdale. Luckel owned the land and the original arrangement was a 20 year lease to Dugan who was to bear all expenses and pay Luckel as rent one half of any net profits. Then a partnership was formed for operation of the trout club, the members being Dugan, Luckel and one Reitzler. It was soon dissolved and thenceforth Dugan and Luckel operated the enterprise as a joint venture.

After Luckel's death (on May 3, 1952) plaintiff filed a claim against his estate based upon the note, same was rejected, and he then brought suit upon the note. At the trial it developed that the note was given "as collateral security to protect plaintiff for moneys he had laid out in the past and was obligated to lay out, plus what he might have to lay out in the future, in connection with a joint venture between plaintiff and Louis Luckel, deceased, whereby they were attempting to promote what is known as the Noah Beery Paradise Trout Club." And the court held, among other things, that "plaintiff could not legally file a claim

based upon the Promissory Note aforesaid because of the fact that said note was given merely as security, as set forth in Paragraph III of these findings; that plaintiff could have filed a claim for any indebtedness of Louis Luckel to him arising from said joint venture, supported by the note as collateral security, which he failed to do, and the time for filing a claim against said estate has expired, and the court further finds that there can be no recovery on said Promissory Note."

Appellant assails this finding, or conclusion, as erroneous, relying primarily upon *Thompson v. Koeller*, 183 Cal. 476, 480, 191 P. 927, 929, wherein the court said: "The plaintiff proved the note which was overdue by its terms, and that nothing had been paid on it. By so doing he made out a *prima facie* case. The defendants did not deny this or controvert it in any way. They showed merely that payment of the note was conditional because it had been given and accepted as security. This was a good defense, unless there had been a default in the obligation secured, and even then was a good defense, except to the extent of such default. The plaintiff then by way of proper replication to this defense showed that a default on the principal obligation had in fact taken place, and to an extent in excess of that sought to be recovered on the security. The effect of this proof was to show, not that the plaintiff was entitled to recover on a different cause of action from that pleaded in his complaint, but that the defense which the defendants pleaded was not a good defense, that the contingency upon which the defendants were liable upon the note sued upon had in fact occurred." The court held not only that there was no variance between pleading and proof, but also that the claim against the decedent's estate was not defective because confined to the note without mention of the principal obligation it secured. Appellant also relies upon the liberal rule concerning claims against estates which is established by *Tabata v. Murane*, 24 Cal.2d 221, 231, 148 P.2d 605 wherein some nine previous decisions are overruled. But this contention of appellant, though apparently well founded,

requires no further consideration because it appears that, regardless of this point, he cannot recover.

Findings III and IV are now quoted in full: "III That the consideration for the signing of said Note was as collateral security to protect plaintiff for moneys he had laid out in the past and was obligated to lay out, plus what he might have to lay out in the future, in connection with a joint venture between plaintiff and Louis Luckel, deceased, whereby they were attempting to promote what is known as the Noah Beery Paradise Trout Club.

"IV That plaintiff paid out certain money in promoting said venture, the amount of which was not definitely shown by the evidence; that the said Louis Luckel advanced or paid out at least an equal amount on behalf of said venture, and the court further finds that there was no obligation on the part of plaintiff or Louis Luckel, deceased, to repay the other for any moneys so advanced or paid by either of them."

And finding VI: "In view of the above findings, it is unnecessary to find whether the allegations set forth in answer on file herein are true or untrue except that the court finds there was no consideration for the execution of said Note as hereinabove set forth in Paragraph III of these findings."

These findings of want of consideration are not challenged by appellant in either of his briefs. No point is made with reference to them. They are indirectly questioned, however, in arguing another point and to that matter reference will be made.

[1,2] The evidence amply sustains the quoted findings and the court correctly concluded that, as matter of law, there was no consideration for the note. For, in the absence of an agreement so to do, there is no obligation on the part of one joint venturer to protect the other from loss of investment or to personally reimburse him for advances made in the conduct of the joint business. This statement refers to an existing venture as to which the rights and obligations of the members have become fixed, by express agreement or implication of law, before any

promise is made by one of them to protect the other from loss or to reimburse him for advances.

[3] Primarily plaintiff contributed services and Mr. Luckel property to the venture. The rule is settled that in such a venture, in the absence of an express agreement on the subject, the one who contributed only services cannot upon dissolution recover from the co-venturer any compensation for same and that the one who has contributed capital must bear his own loss if the assets are insufficient to return his investment in full. 48 C.J.S., Joint Adventures, § 11, p. 839: "Where, however, one member has supplied money and the other labor, it has been held that neither member is liable to the other for contribution for any loss sustained." See also *Bowling v. Duvall*, 270 Ky. 494, 109 S.W.2d 1200, 1201; *Heran v. Hall*, 1 B.Mon., Ky., 159; 35 Am.Dec. 178; *Meadows v. Mocquot*, 110 Ky. 220, 61 S.W. 28; *Tiffany v. Short*, 22 Cal.2d 531, 533, 139 P.2d 939; 30 Am.Jur. § 53, p. 705; 48 C.J.S., Joint Adventures, § 9, p. 836; 48 C.J.S., Joint Adventures, § 6, p. 830.

[4] It also appears that plaintiff made some cash advances to the enterprise as did Mr. Luckel. Finding IV upon this subject says that the amount of moneys advanced by plaintiff "was not definitely shown by the evidence" and that Luckel "advanced or paid out at least an equal amount on behalf of said venture." But plaintiff would have no claim on Luckel for reimbursement or contribution if perchance he had advanced more than his share of necessary expenses. *Simpson v. Fulcher*, Tex.Civ.App., 45 S.W. 2d 1012, 1014; *Baker v. Safe Deposit & Trust Co.*, 90 Md. 744, 45 A. 1028, 1029-1030; L.R.A.1917E, pp. 877, 879, annotation; 48 C.J.S., Joint Adventures, § 10, pp. 836-837.

[5] A mere moral obligation is sufficient to support an express promise only where a good and valuable consideration once existed, but not where there was no prior legal obligation. 12 Cal.Jur.2d § 39, p. 236; *Foltz v. First Trust & Savings Bank*, 86 Cal.App.2d 59, 62, 194 P.2d 135; *Dow v. River Farms Co.*, 110 Cal.App.2d 403, 408,

243 P.2d 95; *In re Estate of McConnell*, 6 Cal.2d 493, 58 P.2d 639. The last cited case is well summarized in the *Dow* opinion, 110 Cal.App.2d at page 409, 243 P. 2d at page 99, viz.: "In [Re] *Estate of McConnell*, 6 Cal.2d 493, 58 P.2d 639, X and Y had been partners for many years. X had devoted more time to the partnership affairs than had Y because of the latter's sickness. The partnership was dissolved, each sharing equally. Thereafter, X gave Y occasional beneficial business advice. Several years later Y gave X a \$5,000 note in payment for these past services. There was no evidence that when these services were rendered Y expected to pay for them, or that X expected to be paid. The promise was held to be unenforceable, the court stating 6 Cal.2d at page 498, 58 P.2d at page 642: 'It is true that in some states a moral, as distinguished from a legal consideration, will under some circumstances be sufficient to form a valid and binding contract (citing a Minn. case [*Rask v. Norman*, 141 Minn. 198, 169 N.W. 704, 17 A.L.R. 1299]), but such has never been the rule in this state. California cases have construed said code section (§ 1606, Civ.Code) to mean that "a moral obligation is sufficient to support an express promise, where a good and valuable consideration has once existed." (Citing seven cases and two encyclopedias.)' (See cases collected 6 Cal.Jur. p. 181, § 124.)" Nor is a past consideration sufficient to support a contract. *Simmons v. California Institute of Technology*, 34 Cal.2d 264, 272, 209 P.2d 581; *Dow v. River Farms Co.*, 110 Cal.App.2d 403, 243 P.2d 95.

[6, 7] Appellant's counsel argues that plaintiff told Luckel shortly before the note was given that the club was a failure and he had decided to quit; that Luckel offered and gave him the note (to secure him against any loss) as an inducement to continue in the venture and devote his time to it. This appears to have been a venture for an undefined term and hence terminable at will, *Harris v. Hirschfeld*, 13 Cal.App. 2d 204, 206, 56 P.2d 1252, and an acceptance of such an offer would constitute valid consideration for the note,—i. e. abandonment of right and intention to terminate

and agreement to continue to render personal services to the enterprise.

There is some testimony of plaintiff which would support this claim of a new consideration. But there is a considerable amount emanating from the same witness which supports a contrary finding. Exemplified by the following extracts.

"Q. You don't have any distinct recollection—do you have any recollection of any conversation between you and Mr. Luckel at the time he gave you the note? A. No, except that he said 'Here is the note, it will take care of you.'

"Q. Did he give any reason for why he dated the note September 1, 1950? A. Well, for the simple reason that it was the outcome of talking about giving a note to me that brought the idea out that we could give notes to our creditors and thereby get by until the end of the season of 1950.

"Q. Did he give you any reason why he made that note come due on September 1, 1950? A. No, except that it was given at the same time all the others were.

"Q. Did you ask him why that came due on September 1, 1950? A. No, I did not, I just accepted it as, well, to take the place of something that he wanted to do for me, that is all."

Also,

"Did you at any time subsequent to the giving and delivery of this \$24,000.00 note to you state to anyone that the consideration for the giving of that note was for protection and investment? A. Yes, I have already stated that.

"Q. That was the consideration? A. Yes.

"Q. What did you mean by 'protection and investment'? A. Well, he said he wanted to sell [will] me the whole place. I said that I didn't want to accept that. Then he said, 'We will, then, pay for your time and everything you have done—what you have done—and the way you have treated me. I will give you that note.'

"Q. What was the meaning of the word 'investment' there? I can understand the word 'protection' but what was meant by 'investment'? A. Oh, the investment was owed to me before I signed the lease."

Letter of September 6, 1950 from plaintiff to Luckel says in part: "Your note came due on the first as I guess you remember. I still can't fathom out why you gave me this note in such a large amount instead of simply giving me a paper stating that we are partners in this venture and no minimum rental is due you under the terms of the lease." Further testimony: "A. No, it was not to pay for any labor. That note was to repay me for the monies that I had given him personally, and for the time and the efforts that I had put in there; and also to reimburse me for money I had lost by reason of the foreclosure of that mortgage, which tied my hands."

[8, 9] The court did not specifically find upon the alleged giving of the note as inducement to stay with the venture. But the contrary is implicit in findings III, IV, and VI, quoted supra. It seems apparent that a specific finding on this matter would have gone against plaintiff. "Where an omitted finding must be inferred from a consideration of the findings actually made, an appellate court will recognize the necessary inference and consider the finding in question as having in effect been made (citing cases)." *Schultz v. Los Angeles Doris, Inc.*, 107 Cal.App.2d 718, 725, 238 P.2d 73, 77. Plaintiff cannot successfully complain of the court's failure to find on this issue when, in the light of the evidence and the reasonable inferences therefrom, the facts actually found and the judgment ordered, the finding would have been adverse to him. *Walpole v. Prefab Mfg. Co.*, 103 Cal.App.2d 472, 481, 230 P.2d 36." *Logan v. Forster*, 114 Cal.App.2d 587, 596, 250 P.2d 730, 735.

The finding of want of consideration is supported by adequate evidence and pertinent legal principles; it is determinative of the merits of this appeal.

Judgment affirmed.

SHINN, P. J., and VALLÉE, J., concur.

134 Cal.App.2d 73

MARKET BASKET, a corporation, and Fitzsimmons Stores, Ltd., a corporation,
Plaintiffs and Respondents,
v.

W. C. JACOBSEN, as Director of Agriculture of the State of California, et al.,
Defendants and Appellants.

MARKET BASKET, a corporation, et al.,
all copartners doing business as Jersey-
maid Milk Products Co., Plaintiffs and
Respondents,

v.

W. C. JACOBSEN, as Director of Agriculture of the State of California, et al.,
Defendants and Appellants.

Heber C. ERICKSON and Harry E. Erickson, copartners doing business as Market Distributors, Plaintiffs and Respondents,
v.

W. C. JACOBSEN, as Director of Agriculture of the State of California, et al.,
Defendants and Appellants.

Civ. 20655.

District Court of Appeal, Second District,
Division 2, California.
June 24, 1955.

Action for declaratory and injunctive relief. The Superior Court, Los Angeles County, Alfred L. Bartlett, J., granted the relief sought, and defendants appealed. The District Court of Appeal, McComb, J., held that use, in Agricultural Code section prohibiting sale of imitation ice cream or ice milk in any "place" where ice cream or ice milk is sold, of quoted word, which has no reasonable or definitely accepted meaning either in general usage or in trades and industries affected by enactment, rendered such section so vague, indefinite, and uncertain as to be repugnant to due process clause.

Affirmed.

1. Constitutional Law ☞258

Criminal Law ☞13

A statute providing for criminal penalties is invalid unless it informs citizen with reasonable clarity and precision what acts are prohibited; and a statute which

either forbids or requires doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates first essential of due process of law.

2. Declaratory Judgment ☞124

Fact that constitutionality (under due process clause) of statute, the violation of which was punishable as a misdemeanor, had been questioned in declaratory judgment action rather than in a criminal prosecution was immaterial.

3. Criminal Law ☞13

That legislative history of statute, the violation of which was punishable as a misdemeanor, might make clear its meaning and application would not save enactment if it were impossible for a person to know by reading the law what it meant.

4. Statutes ☞241(1)

The rule of ejusdem generis is applied with stringency in statutes providing criminal penalties.

5. Constitutional Law ☞258

Food ☞1

Use, in Agricultural Code section prohibiting sale of imitation ice cream or ice milk in any "place" where ice cream or ice milk is sold, of quoted word, which has no reasonable or definitely accepted meaning either in general usage or in trades and industries affected by enactment, rendered such section so vague, indefinite, and uncertain as to be repugnant to due process clause. West's Ann.Agric.Code, §§ 580, 705; West's Ann.Gov.Code, § 11374.

Edmund G. Brown, Atty. Gen., and Stanford D. Herlick, Deputy Atty. Gen., for appellants.

Latham & Watkins by Austin H. Peck, Jr., Los Angeles, Charles E. Horning, Jr., and Ira M. Price, II, Los Angeles, for respondents.

McCOMB, Justice.

These are consolidated appeals involving two wholesale distributors of imitation ice cream (Jerseymaid Milk Products Company, a co-partnership, Los Angeles Superior

Court No. 615255, and Market Distributors, a co-partnership, Los Angeles Superior Court No. 615297) and two food market chains (Market Basket, a corporation, and Fitzsimmons Stores, a corporation, Los Angeles Superior Court No. 615254). Declaratory relief actions were instituted by plaintiffs to determine the constitutionality of section 580 of the Agricultural Code which reads:

"Imitation ice cream or imitation ice milk shall not be manufactured, processed, frozen, handled, distributed or sold in any place where ice cream or ice milk is manufactured, processed, frozen, handled, distributed or sold."

Each of the complaints contains substantially the same allegations. In seeking declaratory and injunctive relief, plaintiffs contend that the statute is too vague to be constitutionally applied; that defendants as the administrators and enforcement officers of the provisions improperly interpreted the word "place" with respect to retail sales of imitation ice cream, to mean "store" or "building"; that the statute as interpreted constitutes arbitrary exercise of plenary power in contravention of the State and Federal constitutional requirements of equal protection of the law, and in deprivation of due process of the law; that a reasonable interpretation which would render the statute constitutionally acceptable is that ice cream and imitation ice cream would not be deemed sold in the same place if stored or placed in separate cabinets or freezers within the same store.

Following a trial on the merits, the trial court found:

"28. The word 'place' is extremely indefinite and vague. It has no definite or accepted meaning either in common usage or in the business or industry in which plaintiffs are engaged, and is not made reasonably definite or certain by the context in which it is used in said statute or by other proper means of construction.

"29. It is impossible to determine with any degree of certainty or definiteness what act or acts are prohibited by Section 580, California Agricultural

Code, in view of the vagueness and uncertainty of the word 'place', as used therein. Persons, including plaintiffs, who may be subject to the criminal penalties provided for violation of Section 580, are not given any reasonably definite or certain warning by that statute of what conduct is intended to be prohibited thereby."

The court drew the following conclusions of law:

"(1) The meaning of the word 'place', as used in Section 580 of the Agricultural Code of California, is so vague and indefinite that the application or enforcement of said statute in respect to the sale, handling, or distribution of imitation ice cream by plaintiffs, or by any of them, denies to plaintiffs, and to each of them, due process of law, in violation of the Constitution of the United States and the Constitution of the State of California.

"(2) To the extent that Section 580 of the Agricultural Code of California attempts to prohibit the distribution, handling, or sale of ice cream and imitation ice cream by plaintiffs in the same 'place', said statute is unconstitutional and void because it does not inform plaintiffs, or any of them, with reasonable certainty or definiteness what act or acts it intends to prohibit, as required by the Constitution of the United States and the Constitution of the State of California.

"(5) Plaintiffs are entitled to a judgment declaring that insofar as it relates to the distribution, handling and sale of imitation ice cream by plaintiffs, the word 'place' as used in Section 580 of the Agricultural Code is so vague and indefinite that it is repugnant to the due process clause of the Constitution of the United States and of the Constitution of the State of California.

"(6) In view of the above conclusions, the Court does not deem it necessary or appropriate to make conclusions of law respecting the other constitutional issues raised by the complaints."

Judgment was rendered enjoining defendants from enforcing the provisions of section 580 of the Agricultural Code. The court adjudged:

"It is further ordered, adjudged and decreed that insofar as it relates to the distribution, handling, sale, and offering for sale of imitation ice cream by plaintiffs the word 'place' as used in Section 580 of the Agricultural Code is so vague and indefinite that it is repugnant to the due process clause of the Constitution of the United States and of the Constitution of the State of California."

From the judgment defendants have appealed.

Facts: Plaintiffs are licensed wholesalers and retailers of imitation ice cream, a frozen dessert product which differs from ice cream only in that vegetable fats or oils are substituted for the butter fat which is found in ice cream. Imitation ice cream contains nothing harmful to human health and does contain substances which are valuable in human nutrition. Plaintiffs distribute and sell imitation ice cream only in package form and make no sales of their product in bulk.

Plaintiffs' sales and distribution of imitation ice cream were halted in June, 1953, by defendants' serving on them written notices to "cease immediately" the sale of imitation ice cream "in the same store or building" where ice cream was sold. This notice was purportedly based on section 580 of the Agricultural Code, set forth, *supra*. Plaintiffs immediately ceased the distribution and sale of imitation ice cream upon the service of the stop notices.

The containers in which plaintiffs' ice cream is sold clearly state the nature of the product. Banners with six-inch red lettering stating "Imitation Ice Cream Sold Here" are displayed in stores which sell imitation ice cream. With occasional and unavoidable lapses, the retail stores concerned in these actions have sold ice cream and imitation ice cream only from separate freezer cabinets. Plaintiffs have taken every reasonable precaution to prevent fraud or confusion or the possibility thereof in the sale of the product. There was no evidence that

any customer had ever been confused or defrauded on the purchase of imitation ice cream.

[1-5] *Question: Is section 580 of the Agricultural Code too vague, indefinite and uncertain to be constitutionally applied to plaintiffs' operations?*

Yes. Section 705 of the Agricultural Code makes a violation of section 580 a misdemeanor, punishable by fine or by imprisonment or both.

A statute providing for criminal penalties is invalid unless it informs the citizen with reasonable clarity and precision what acts are prohibited. A statute "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." (*Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127 [70 L.Ed. 322, 328].)

The *Connally* case involved the interpretation of the word "locality," a word which is one of the many synonyms for "place." California courts have fully accepted and applied this rule. In *People v. Saad*, 105 Cal.App.2d Supp. 851, at page 854[5], 234 P.2d 785, at page 787, the court held invalid the statute, Pen.Code, § 337.5, using the words "touting" and "'practices inimical to the public interest'", saying:

"As stated in *Lanzetta v. [State of] New Jersey* (1938), 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888, 891; 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 [328]: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or

requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.””

In *Ex parte Schmolke*, 199 Cal. 42, at page 48 [7], 248 P. 244, at page 245, speaking through Mr. Justice Shenk, the Supreme Court said, that the statute which was found fatally uncertain was one which attempted to exempt from its operation vehicles operating within “* * * incorporated cities or towns or the usual transfer delivery zone adjacent thereto * * *.” St.1925, p. 833, § 9. The court further stated, “We fail to be cognizant of any standard of measurement by which an operator could foretell the extent of any such ‘zone’ and be certain that he was not transgressing the law when he proceeded to conduct his business on the public highways therein.”

In *re Peppers*, 189 Cal. 682, 209 P. 896, 897, the Supreme Court held a statute which prohibited the shipment of oranges, “‘when frosted to the extent of endangering the reputation of the citrus industry, if shipped’”, St.1921, p. 1239, § 10, unconstitutional for the reason that the statute was too uncertain. In this case the court quoted with approval at page 686 of 189 Cal., at page 897 of 209 P. from *United States v. Reese*, 92 U.S. 214, 23 L.Ed. 563, as follows: “‘If the Legislature undertakes to define a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind: Every man should be able to know with certainty when he is committing a crime. * * *

It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and see who could be rightfully detained, and who should be set at large.’” (See also, *In re Harder*, 9 Cal. App.2d 153, 49 P.2d 304; *Barry v. Board of Directors*, 7 Cal.App.2d 412, 46 P.2d 298; *Perez v. Sharp*, 32 Cal.2d 711, 198 P.2d 17.)

Our Supreme Court has held invalid the argument that a statute must be upheld because of the presumption that an act of

the legislature is constitutional. In *re Lockett*, 179 Cal. 581, 586, 178 P. 134, 136, in passing upon such a contention the court said, “If the rule for which contention is made were to attach to all language used in statutes, then would the Court’s duty to construe statutes stand helpless before an impassable wall of presumption. When the Legislature uses language in a statute we must interpret it as language. No peculiar sanctity attaches to it because it is language used in a legislative enactment. Ambiguity is not presumed to be intelligibility merely because it attaches to a statute, nor is hopeless obscurity illuminated by the fact that two houses have passed, and a busy governor has signed, a bill.”

There is likewise no merit in the contention that in fact no criminal prosecution has been initiated against plaintiffs. In *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284, at page 296, 74 S.Ct. 593, at page 600, 98 L.Ed. 699, the United States Supreme Court in dealing with a similar contention said, “It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give § 1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. Not only does it lack support in the decided cases, judicial and administrative, but also it would do violence to the well-established principle that penal statutes are to be construed strictly.”

Section 580 of the Agricultural Code is vague, uncertain and ambiguous because of the use of the term “place”, a word which is not defined by statute, has no reasonable or definitely accepted meaning either in general usage or in the trades and industries here affected. It is not made reasonably certain by the context in which it is used.

In Webster’s New International Dictionary, Second Edition, Unabridged, (1939) Volume II, p. 1877, there are listed 19 main definitions and some 50 subsidiary defini-

tions, including "locality, spot, building, part of a building, or other spot set apart for a special purpose." It is readily apparent that the dictionary does not provide a guide for conduct under section 580 of the Agricultural Code, and that a person reading such definitions will emerge confused and uncertain if he attempts to determine with any accuracy the meaning of "place," relying on the dictionary.

2 Bouv. Law Dict., Rawle's Third Revision, 1914, likewise does not give a definite or established meaning for the word in legal parlance. In Volume 2, page 2595, it is said, "Any locality limited by boundaries however large or small. It may be used to designate a country, state, county, town, or a very small portion of a town. The extent of the locality designated by it must, generally, be determined by the connection in which it is used."

The Attorney General of California has likewise indicated uncertainty as to the meaning of the word "place," because in an opinion interpreting a similar statute, section 28000 of the Health and Safety Code, which provided, "Horse meat shall not be sold in public markets where other meat and meat food products are sold", he says in his opinion that under this statute horse meat may be sold in public markets "in *places* territorially or physically separated from those *places* at which meat or other meat products are sold (emphasis supplied)." On the basis of this opinion it could logically be contended that "place" refers to a particular spot within a store and that section 580 will not be violated if ice cream and imitation ice cream are sold in the same store in *places* territorially or physically separated from each other within the store.

The decisions of the appellate courts have likewise indicated that the term "place" has no definite and certain meaning. In *Standley v. Knapp*, 113 Cal.App. 91, at page 98, 298 P. 109, at page 112 (hearing denied by the Supreme Court), the court stated: "In American and English Encyclopedia, second edition, at page 829, it is stated: 'The term place, in popular usage, is very indefinite. In legal parlance it is equally in-

definite. The extent of the locality designated by it must generally be determined by the connection in which it is used.'"

Defendants attempt to show that "place" in section 580 of the Agricultural Code means "place of business" or "establishment" by citing other sections of the Agricultural Code which use these latter terms. An examination of these sections leads more reasonably to the conclusion that when the legislature meant "place of business" or "establishment" it meant just exactly what it said and knew how to say it.

The net result of any attempt to determine the meaning of "place" is complete uncertainty and confusion. A grocer cannot know whether he can sell imitation ice cream in the same "locality" where ice cream is sold. He cannot guess with any accuracy whether or not it is permissible to sell imitation ice cream in the same building or part of a building where he sells ice cream. If, for example, a producer of ice cream has a concession in his store which sells ice cream there, he does not know whether a sale by him of imitation ice cream in a different part of his store will violate the law if his store has several separate departments, and ice cream is sold in one and imitation ice cream is sold in another. In the event he rents a "stall" in the Grand Central Market, extending between Broadway and Hill Streets in Los Angeles, he is uncertain whether he may sell imitation ice cream at his "stall" if any other seller handles ice cream at any other location in that market. If our seller has a store on the fifth floor of a building, he does not know whether he will violate the law by selling imitation ice cream there when a tenant on the first floor is selling ice cream.

The inevitable result of the use of such a vague, uncertain, ambiguous term as "place" in section 580 is to force the citizen to guess at what the law proscribes. Section 580 leaves him no "measuring stick" as to what is within and what is outside the law. Clearly the "void for vagueness" principle is here applicable.

No person may be compelled, as the citizen is here compelled, to guess blindly as

to what he may or may not do, and to run the substantial risk, if not the certainty, of being imprisoned or fined for guessing wrong. "It is the right of every person to know exactly what particular acts are prohibited." (In re Harder, 9 Cal.App.2d 153, 155, 49 P.2d 304, 305.) Section 580 of the Agricultural Code is so vague that men of common intelligence must necessarily guess at its meaning and application; thus it violates the first essential of due process. (See Connally v. General Const. Co., supra, 269 U.S. 391, 46 S.Ct. 127.) It is apparent from the record that the same confusion has beset defendants. In their opening brief, with reference to the meaning of the word "place", they say, "* * * where two distinct and separate businesses are carried on by different proprietors under one roof one may handle imitation ice cream the other, ice cream; neither may handle both."

On the other hand, Mr. O. A. Ghiggoile, Chief of the Bureau of Dairy Service of the Department of Agriculture, testified as follows:

"Q. Remember a conversation you had with Mr. Neal Wells in April or May, 1953, in which you expressed the opinion that in construing the word 'place' that if you had a 14-story building and you sold ice cream on the first floor you could not sell imitation ice cream on the 14th floor, or words to that effect? A. Words to that effect, but I don't recall a 14-story building.

"Q. What were your words? A. 'Place' in my opinion would be construed, would be that building as long as it was in the same ownership, regardless of how many stories.

"Q. Would it make any difference if it was under separate ownership? A. No.

"Q. It is your interpretation, then, and the interpretation of the Department of Agriculture, it is a place or building; is that correct? A. Yes.

"Q. Without respect to ownership? A. Yes."

Clearly the statement in the brief and the testimony of defendants are inconsistent.

There is likewise no merit in defendants' contention that the legislative history of section 580 makes its meaning and application clear. Even if this were so the statute would be impossible for a person to know, by reading the law, what it means. (Mayhew v. Nelson, 346 Ill. 381, 178 N.E. 921, 923.) A consideration of the legislative history of this statute fails to demonstrate that the statute means what defendants say it does, but in fact supports an interpretation under which the statute would not apply to plaintiffs' sales of imitation ice cream.

In its original form this statute (Stats. of 1923, Chap. 392), used instead of the single word "place", the words "factory, plant, hotel, restaurant, boarding house, inn, soda fountain or other place." St.1931, p. 457, § 12(f). The subsection heading for the statute reads "place of sale or manufacture." The section covers two different functions of sale and manufacture. These cases are not concerned with the effect of the statute on the manufacturing process; "factory and plant" can therefore be omitted from present consideration. The remaining specific words, "hotel, restaurant, boarding house * * * [and] soda fountain" have a common analogous meaning, and were included by the legislature because they were all businesses which served food for consumption on the premises. The statute may not on the strength of the specific businesses enumerated be expanded to encompass businesses not performing this function. The words "or other place" do not authorize such expansion because of the rule of *ejusdem generis* which has been defined as follows:

"* * * where, in a statute, general words follow a designation of particular subjects or classes of persons, the meaning of the general words will ordinarily be presumed to be, and construed as restricted by the particular designation and as including only things or persons of the same kind, class, character or nature as those specifically enumerated. The general words are deemed to have been used, not to the wide extent which they might bear if

standing alone, but as related to words of more definite and particular meaning with which they are associated." (50 Am.Jur. (1944), Statutes, Sec. 249, pp. 244, 246.)

Since the words concerning sale refer only to places where food is sold for consumption on the premises, the expression "or other place" merely refers to other places of this same nature—for example, drug stores or tea shops. The rule of *ejusdem generis* is applied "with stringency" in statutes providing criminal penalties. (People v. Thomas, 25 Cal.2d 880, 889, 156 P.2d 7; People v. McKean, 76 Cal.App. 114, 121, 243 P. 898; United States v. Bevans, 3 Wheat. 336, 390, 16 U.S. 336, 390, 4 L.Ed. 404.)

There is no merit in the suggestion that section 580 of the Agricultural Code provided a valid standard for regulation. In the first place, plaintiffs and this court are not faced with any such regulation. The Director has been requested to promulgate regulations interpreting the section, but has consistently refused to do so. In the second place, the promulgation of regulations interpreting section 580 would not be a mere filling out of a statutory framework but would be either a usurpation of the prerogative of the courts to determine the nature of the existing framework, or a usurpation of the power of the legislature to establish such a framework. In any event the regulations are not above the law, but subject to it. "Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute

and reasonably necessary to effectuate the purpose of the statute." (Govt.Code, Section 11374.)

Finally, there has been no long-continued interpretation of section 580 of the Agricultural Code as contended by defendants. Defendant Ghiggoile testified that no interpretation of that word or section was made by the Department of Agriculture from the time the present statute was enacted until sometime in 1952, when an oral or written interpretation was given to several unnamed persons, and that not even an oral interpretation was given by the Attorney General until 1953; that on June 11, 1953, at hearings held by the Department there was no representative of the Department who expressed the opinion that "place" meant "store or building". There was no application of the section prior to its application to plaintiffs in 1953.

The trial court's finding that the statute in question was so indefinite, vague and uncertain as to be unconstitutional as applied to plaintiffs, is in accordance with the statement of the United States Supreme Court in *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322, "* * * a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

In view of our conclusions it is unnecessary to consider the other grounds of unconstitutionality of the statute urged by plaintiffs.

Affirmed.

MOORE and FOX, JJ., concur.

134 Cal.App.2d 124

REPUBLIC OF CHINA, Plaintiff and Respondent,

v.

C. K. CHANG, also known as Chih-Ku Chang and Charles K. Chang, Defendant and Appellant.

Civ. 20592.

District Court of Appeal, Second District,
Division 3, California.

June 24, 1955.

Action for alleged fraudulent appropriation of money belonging to plaintiff. From ex parte order of the Superior Court, Los Angeles County, Arnold Praeger, J., appointing a receiver and order confirming the appointment, the defendant appealed. The District Court of Appeal, Parker Wood, J., held that allegations in verified complaint and affidavit in support of application for appointment of receiver, that defendant, pursuant to conspiracy with plaintiff's agent, received \$810,000 of plaintiff's funds, that defendant admitted he received that amount and that portion of it had been expended for art objects, which defendant intended to remove from United States, were legally sufficient to show that plaintiff had probable interest in property and that there was danger that property would be removed from jurisdiction of court, and appointment of receiver under such circumstances was a matter within discretion of trial court.

Order confirming appointment of receiver affirmed and purported appeal from ex parte order dismissed.

1. Receivers $\hookrightarrow$ 8, 36, 37

Allegations in verified complaint and affidavit in support of application for appointment of receiver that defendant, pursuant to conspiracy with plaintiff's agent, received \$810,000 of plaintiff's funds, that defendant admitted he received that amount and that portion of it had been expended for art objects, which defendant intended to remove from United States, were legally sufficient to show that plaintiff had probable interest in property and that there was

danger that property would be removed from jurisdiction of court, and appointment of receiver under such circumstances was matter within discretion of trial court. West's Ann.Code Civ.Proc. § 564.

2. Receivers $\hookrightarrow$ 4

Where basis of action was alleged fraudulent appropriation of money belonging to plaintiff, addition of third cause of action for money had and received did not change nature of action or deprive plaintiff of right to have a receiver appointed to protect his interest in property, which had been allegedly purchased with plaintiff's misappropriated funds and which was in danger of being removed from jurisdiction of court. West's Ann.Code Civ.Proc. § 564.

3. Receivers $\hookrightarrow$ 36, 37, 38

Evidence to justify appointment of a receiver may be presented in form of allegations in a complaint or other pleading, by affidavit or by testimony. West's Ann.Code Civ.Proc. § 564.

4. Receivers $\hookrightarrow$ 36, 37

Pleadings and affidavits alleging that defendant, pursuant to conspiracy with plaintiff's agent, received a sum of plaintiff's money, that art objects had been purchased by defendant with such funds and that defendant intended to remove art objects from United States were sufficient to justify appointment of a receiver. West's Ann.Code Civ.Proc. § 564.

5. Trover and Conversion $\hookrightarrow$ 32(1)

Complaint, which alleged that defendant and plaintiff's agent falsely represented to plaintiff that they had expended plaintiff's money for authorized purposes, that plaintiff relied upon such representations and, because of trust placed in agent, did not audit his account, was sufficient to state a cause of action for recovery of the misappropriated money.

6. Limitation of Actions $\hookrightarrow$ 100(3)

Action for recovery of money instituted about six months after plaintiff discovered plaintiff's agent had turned over a large sum of plaintiff's money to defendant and had falsely represented that money had been expended for authorized purposes

was not barred by statute of limitation. West's Ann.Code Civ.Proc. § 338, subds. 3, 4.

7. Appeal and Error ⇐101(1)

Ex parte order appointing a receiver is not an appealable order.

Morris Lavine, Los Angeles, or appellant.

Newell & Chester and Theodore A. Chester, Los Angeles, for respondent.

PARKER WOOD, Justice.

Defendant appeals (1) from an ex parte order appointing a receiver, and (2) from the order confirming said appointment. He contends that it was error to appoint a receiver. He argues that: there was no statutory provision authorizing the appointment of a receiver in this kind of action; a writ of attachment could have been issued herein; the affidavit in support of the application for appointment of a receiver was insufficient; and the complaint did not state a cause of action.

The complaint alleges three causes of action. The first cause of action alleges that: in February, 1943, P. T. Mow was appointed by plaintiff as director and placed in charge of one of its purchasing offices in the United States, which office was thereafter named "Chinese Air Force Office in U. S. A."; plaintiff made advances of several million dollars to Mow; as such director it was Mow's duty to receive and hold for the account of plaintiff all moneys advanced by plaintiff to him, to pay therefrom all bills for aircraft equipment purchased by Mow, to make other expenditures authorized by plaintiff, and to return the unexpended balance to plaintiff. It is alleged further therein, upon information and belief, that in the summer of 1946 defendant Chang and Mow entered into a conspiracy to embezzle funds belonging to plaintiff. It is alleged further that, in pursuance of said conspiracy, defendant and Mow represented to plaintiff that they expended \$810,000 of plaintiff's money for the purchase of aircraft equipment and payment of administration expenses; said repre-

sentations were false and were made for the purpose of inducing plaintiff not to audit the account of Mow; plaintiff relied upon such representations, and, because of the trust it reposed in Mow, plaintiff did not audit his accounts; \$810,000 was given by Mow to defendant, and it was expended by defendant for his use in a manner unknown to plaintiff, as a result of which plaintiff was damaged in the sum of \$810,000. It was alleged further that by an order dated April 30, 1951, plaintiff abolished the office of Chinese Air Force in U. S. A., and directed Mow to deliver to plaintiff all records and funds pertaining to that office; Mow failed to comply with the directive; in November, 1951, plaintiff filed an action in the United States District Court against Mow for an accounting; prior to the date for taking Mow's deposition therein, he fled to Mexico; thereafter, the court made an order "striking the pleadings of Mow," and ordered him to account to plaintiff and to deliver to plaintiff all records and moneys pertaining to said air force office; in November, 1953, plaintiff took depositions of certain officials of the Corn Exchange Bank of Philadelphia, and discovered that Mow had turned over to defendant \$810,000 belonging to plaintiff.

The second cause of action realleged the allegations of the first cause of action relating to: appointing Mow as director, advancing money to him for certain purposes, abolishing the office, Mow failing to deliver the records and funds, filing an action against Mow, taking depositions of bank officials in 1953, and learning for the first time that Mow had delivered \$810,000 to defendant. It alleged further therein that about August, 1946, Mow, without the knowledge or consent of plaintiff, delivered to defendant \$810,000 which belonged to plaintiff; defendant knew that Mow was an agent of plaintiff, that the \$810,000 delivered to him by Mow belonged to plaintiff, that Mow was acting in excess of his authority and without plaintiff's consent. It alleged further, upon information and belief, that defendant had used said funds to purchase real and personal property in various states including California; among

other properties purchased by defendant are various Chinese objects d'art including Ming vases, and also a 1953 Oldsmobile automobile; defendant has threatened to leave the United States permanently in the near future and to take with him the above described personal property; unless a receiver is appointed to take charge of said property defendant will remove the same permanently from the United States; plaintiff has no adequate remedy at law in that a writ of attachment will not lie, and defendant is now engaged in removing all of his assets including the above described personal property from California.

The third cause of action realleged the allegations of the first cause of action relating to appointing Mow as director and advancing money to him for certain purposes. It alleged further therein that defendant became indebted to plaintiff in the amount of \$810,000 for money had and received, no part of which has been repaid, and that said amount is now due from defendant to plaintiff.

The prayer of the complaint was for \$810,000 general damages; an order declaring that defendant holds all his property in California "including those certain objects d'art and that certain 1953 Oldsmobile," in trust for plaintiff; an order appointing a receiver to take immediate possession of the assets of defendant; and an order that defendant render an accounting.

An affidavit of Chao-Cho Shih, in support of an application for an order for arrest of defendant, stated, in part, that: Chao-Cho Shih is a citizen of the Republic of China and is in charge of the procurement office of the Chinese Air Force in the United States; he verified the complaint herein, and the allegations of said complaint are incorporated by reference in this affidavit; in May, 1953, defendant applied for a visa for entry into Indonesia, and gave his residence as Chicago, Illinois, when in truth he was residing in California; defendant has been packing his personal belongings and crating various objects d'art, consisting largely of Ming vases located at 921 South Dewey Street, Los Angeles, which defendant values at \$50,000. It was stated further therein, upon

information and belief, defendant intends to leave the United States permanently and "to ship all of his personal belongings, including said objects d'art." It was further stated that the art objects were purchased with funds which were received by defendant from Mow.

An affidavit of Robert M. Newell, in support of the "Order for Appointment of a Receiver," stated, in part, that on March 18 and 22, 1954, he, as attorney for plaintiff, took the deposition of defendant, and defendant testified as follows: he owns approximately 90 Chinese antiques consisting of porcelain and pottery vases and figurines, the great majority of which are packed in boxes, and are located at 951 South Dewey Avenue, Los Angeles; in his opinion they are worth between \$50,000 and \$60,000; he received \$810,000 from Mow, and a portion of that sum was expended for said antiques. The affidavit stated further that on March 23, 1954, he (Attorney Newell) took the deposition of defendant's wife, and she testified that there are approximately 85 Chinese art objects in the residence at 951 South Dewey Avenue which belong to defendant; in addition thereto, there are approximately six porcelain vases and figurines which have been removed to her brother's ranch in Lancaster, California. It was stated further in the affidavit that the art objects at the Dewey Avenue address are in the actual possession of defendant's wife and mother-in-law; a majority of the art objects are packed in boxes, apparently for shipment to places unknown to affiant; said art objects are not a part of the plant, equipment or stock in trade of any business; since March 17, 1954, defendant has been in the custody of the sheriff under an order of civil arrest issued in this action; on March 21, 1954, defendant executed several general powers of attorney in favor of one Lee; on March 23, 1954, Lee, under authority of said powers of attorney took possession of defendant's 1953 Oldsmobile automobile, which was in storage; the whereabouts of the Oldsmobile is unknown to affiant; Lee has threatened to take possession of the art objects by virtue of said powers of attorney. It was further stated, upon informa-

tion and belief, that Lee intended to take possession of said art objects and to conceal them. It was stated further that irreparable injury will be suffered by plaintiff during the time necessary for a hearing, upon notice, for the appointment of a receiver of said art objects in that during said period Lee will take possession of said objects, and dispose of or conceal them.

An affidavit of an official of the Corn Exchange Bank, filed after the ex parte order was made, stated that in August, 1946, he opened an account for Chang in said bank; Chang presented two checks, signed by Mow, as the initial deposit—one check for \$300,000 and the other for \$210,000; Chang stated that he was an agent of the Chinese government, working with Mow, and that the money so deposited was to be used by Chang to make purchases for China.

Appellant contends, as above stated, that there was no statutory provision authorizing the appointment of a receiver in this kind of action. He argues that no provision in section 564 of the Code of Civil Procedure, authorizing the appointment of a receiver, applies herein. Said section 564 provides, in part, that a receiver may be appointed by the court in which an action is pending in the following cases: "1. In an action by a vendor to vacate a fraudulent purchase * * * or by a creditor * * * or between partners or others jointly owning or interested in any property * * * on the application of the plaintiff, or of any party whose right to or interest in the property or fund * * * is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured; 2. In an action by a mortgagee * * *; 3. After judgment, to carry the judgment into effect; 4. After judgment, to dispose of the property according to the judgment * * *; 5. In the cases when a corporation has been dissolved * * *; 6. In an action of unlawful detainer; 7. In all other cases where receivers have heretofore been appointed by the usages of courts of equity."

Plaintiff (respondent) asserts that it has an interest in the property, and that said property was in danger of being removed;

and that the determination by the trial court that the protection of plaintiff's interest requires the appointment of a receiver may not be reversed unless there was an abuse of discretion.

Plaintiff cites *Goes v. Perry*, 18 Cal.2d 373, 108 P.2d 719, 115 P.2d 441, and argues that the facts in that case are analogous to the facts in the present case. The *Goes* case was an action in claim and delivery to recover possession of certain furniture and fixtures. An intervenor therein sought to impose a trust upon said property, in favor of herself and co-owners of a trust fund, on the ground that the property was purchased with money which was wrongfully appropriated from the trust fund. Upon the verified complaint in intervention and the affidavit of plaintiff's attorney therein, a receiver was appointed. It was held therein that the trial court did not abuse its discretion in appointing a receiver.

In *Snidow v. Hill*, 84 Cal.App.2d 702, 191 P.2d 513, which was an action to quiet title to real property, a receiver was appointed to care for and harvest fruit thereon. Appellants therein contended that the court had no jurisdiction to appoint a receiver in that case. It was stated therein, 84 Cal. App.2d at pages 704-705, 191 P.2d at page 514: "If we scan the provisions of the contract * * * and examine the averments in the affidavit * * * we find a situation in which the plaintiffs' interest in the fund is probable and the property or fund is in danger of being lost or materially injured. There is no doubt as to its being the type of action in which courts of equity have exercised their inherent power in aid of their jurisdiction to appoint receivers. * * * In *Davies v. Ramsdell*, 40 Cal.App. 432, 183 P. 702, the court says: 'This is an appeal from an order appointing a receiver *pendente lite*, in a suit in equity * * *. The appellant contends the order should not have been made * * *. In this case there were equitable considerations before the court in addition to those of the ordinary suit to quiet title. Equity has inherent power in aid of its jurisdiction to grant injunctions and to appoint receivers, and the exercise of the power rests very largely in the discretion of the chancellor. * * *'"

Takeba v. Superior Court, 43 Cal.App. 469, 185 P. 406, was a petition for a writ of prohibition restraining the superior court from exercising any control of property which was involved in an unlawful detainer action then pending in said court. The sole question for determination therein was whether the court exceeded its jurisdiction in appointing a receiver to take possession of certain fruit growing on the land. The action therein was commenced prior to the time section 564 of the Code of Civil Procedure was amended by adding the present subdivision 6, which provides that a receiver may be appointed in an action of unlawful detainer. It was held therein, however, 43 Cal.App. at pages 475-476, 185 P. 406, that the superior court was authorized to appoint a receiver under another provision of section 564, now subdivision 7, permitting the appointment of a receiver in "all other cases where receivers have heretofore been appointed by the usages of courts of equity."

Armbrust v. Armbrust, 75 Cal.App.2d 272, 171 P.2d 75, was an action by plaintiff against his former wife to rescind an agreement entered into during their marriage which provided that they would hold certain separate property in joint tenancy. Defendant filed a verified cross-complaint therein in which she prayed for an accounting and for the appointment of a receiver, alleging that plaintiff was in possession of a parcel of the joint tenancy property. Plaintiff therein appealed from an order appointing a receiver. It was stated in that case, 75 Cal.App.2d at page 275, 171 P.2d at page 77, that: "The appointment of a receiver is a matter in the discretion of the trial court (22 Cal.Jur. 435). If it appears that the party seeking the appointment 'has at least a *probable* right or interest in the property' and that 'there is danger of its being lost or destroyed or misappropriated', then if 'upon conflicting testimony, such right or interest and danger of the destruction or misappropriation of the property or fund are found to exist, a reviewing court is as a general rule in no position to say that a *nisi prius* court has abused its discretion in the appointment of a receiver.'"

[1] In the present case, in view of the allegations of the verified complaint, and of the affidavit of plaintiff's attorney, the court had for its consideration allegations to the effect that appellant, pursuant to a conspiracy with plaintiff's agent Mow, received \$810,000 of plaintiff's funds; that appellant admitted that he received said amount of money and that a portion of it was expended for the art objects (the subject of the receivership herein) which were located at Dewey Avenue; and that appellant intended to remove said art objects from the United States. The allegations were legally sufficient to show that plaintiff has a probable interest in the property and that there was danger that the property would be removed from the jurisdiction of the superior court. Under these circumstances the appointment of a receiver was a matter within the discretion of the trial court.

[2] Appellant's contention that a writ of attachment could have been issued herein and that therefore it was error to appoint a receiver is not sustainable. He asserts that each of the three causes of action alleged herein is, "in the last analysis," for money had and received; that such an action is upon an implied contract, and that an attachment will issue in such an action. As above shown, the basis for the action herein was the alleged fraudulent appropriation of money belonging to plaintiff. The addition of the third cause of action for money had and received did not change the nature of the action or deprive plaintiff of the right to have a receiver appointed to protect its interest in the property which was allegedly purchased with its misappropriated funds. In *Stone v. Superior Court*, 214 Cal. 272, at page 274, 4 P.2d 777, at page 778, 77 A.L.R. 743, it was stated that: "The fact that plaintiff's complaint * * * contained two counts, and that the second count therein was in the form of a common count for money had and received, cannot be held to change the situation or to entitle the plaintiff to the issuance of a writ of attachment in said action, since her cause of action is admittedly the same in each count, and is founded upon the facts set forth in detail in the

first count of her complaint, from which it clearly appears that her only cause of action is one founded upon the defendants' alleged fraud and deceit." See also *Stowe v. Matson*, 94 Cal.App.2d 678, 681, 211 P.2d 591.

[3, 4] As to appellant's contention, that "the affidavit" (of plaintiff's attorney) in support of the application for the appointment of a receiver was insufficient, it is to be noted that the appointment was not based solely on the affidavit of plaintiff's attorney. The court recited in its *ex parte* order appointing a receiver that it had before it, in support thereof, the complaint, plaintiff's petition for an appointment of a receiver, and the affidavits of plaintiff's attorney and of Chao-Cho Shih. "Evidence to justify the appointment of a receiver may be presented 'in the form of *allegations in a complaint or other pleading*, by affidavit or by testimony.'" *Armbrust v. Armbrust*, supra, 75 Cal.App.2d 272, 274, 171 P.2d 75. Appellant asserts that "there is neither in the complaint nor the affidavits any legally competent evidence" from which property purchased by appellant with the funds of plaintiff can be identified. The affidavit of Chao-Cho Shih states that the art objects to be taken into custody by the receiver herein were purchased with funds, or "proceeds thereof," which were received by defendant from Mow. The affidavit of plaintiff's attorney states that defendant testified in his deposition that a portion of the money he received from Mow was expended for the art objects involved herein. The pleadings and affidavits were sufficient to justify the appointment of a receiver.

[5, 6] Appellant contends further, as above stated, that the complaint did not state a cause of action against the defendant and that therefore it was error to appoint a receiver. Appellant demurred to the complaint on the grounds, among others, that no cause of action was stated, and that the action was barred by subdivisions 3 and 4 of section 338 of the Code of Civil Procedure. Appellant argues that the action was not filed within three years after the alleged misappropriation, as required by subdivisions 3 and 4 of said section 338; and that the complaint shows that plaintiff did not use reasonable diligence in ascer-

taining the facts constituting the alleged fraud. The complaint herein was filed March 8, 1954 and it alleged, as above shown, that in November, 1953, plaintiff discovered that Mow had turned over \$810,000 of plaintiff's money to defendant; that defendant and Mow falsely represented to plaintiff that they had expended \$810,000 of plaintiff's money for the purchase of aircraft equipment and administration expenses; that plaintiff relied upon said representations and, because of the trust plaintiff reposed in Mow, did not audit his accounts. The complaint stated a cause of action. The action is not barred by the statute of limitations.

[7] The *ex parte* order appointing a receiver is not an appealable order, *Moore v. Oberg*, 61 Cal.App.2d 216, 220, 142 P.2d 443; *Baumann v. Bedford*, 18 Cal.2d 366, 368, 115 P.2d 437, and the appeal from said order should be dismissed.

The order confirming the appointment of a receiver is affirmed. The purported appeal from the *ex parte* order is dismissed.

SHINN, P. J., and VALLÉE, J., concur.



Harold K. BERESFORD, Catherine A. Beresford and Nellie V. Beresford,
Plaintiffs and Respondents,

v.

PACIFIC GAS AND ELECTRIC COMPANY, a corporation, and Public Utilities California Corporation, a corporation, Defendants,

Pacific Gas & Electric Company, a corporation, Defendant and Appellant,

Civ. 8416.

District Court of Appeal,
Third District, California.

June 23, 1955.

Rehearing Denied July 19, 1955.

Hearing Granted Aug. 17, 1955.*

*Action against electric company for fire damage allegedly sustained when tree

* Opinion vacated 290 P.2d 498.

on plaintiffs' property fell across transmission line, energizing telephone wires and igniting switchboard in plaintiffs' building. The Superior Court, Tehama County, Ben R. Ragain, J., rendered judgment on verdict for plaintiffs, and defendant appealed. The District Court of Appeal, Peek, J., held, inter alia, that owners of land adjacent to electric company's easement for transmission line were not chargeable with negligence, in respect to fire damage which occurred when tree on their property fell across transmission line and energized telephone wires, for failure to inspect trees along easement and in failing to remove any which might have appeared to be dangerously close thereto nor were they called upon to anticipate negligence on part of electric company and to make provision against its defects.

Judgment affirmed.

See also, 275 P.2d 525.

1. Electricity Ⓒ19(5)

In action against electric company for fire damage allegedly sustained when tree on plaintiffs' property fell across company's power line, thus energizing a telephone wire leading to plaintiffs' building and igniting telephone switchboard therein, evidence was sufficient to sustain that electric company had been negligent in failing to protect against falling of the tree.

2. Electricity Ⓒ14(1)

Care exercised by an electric company must be commensurate with and proportionate to dangerous propensities of electricity.

3. Electricity Ⓒ16(3)

Electric company could be found negligent in failing to protect against the falling of a tree across its transmission line, even though tree was on property adjacent to electric company's easement.

4. Negligence Ⓒ28

A man does not become a wrongdoer by leaving his property in a state of nature.

5. Electricity Ⓒ18(3)

Owners of land adjacent to electric company's easement for transmission line were not chargeable with negligence, in respect to fire damage which occurred when tree on their property fell across transmis-

sion line and energized telephone wires, for failure to inspect trees along easement and in failing to remove any which might have appeared to be dangerously close thereto nor were they called upon to anticipate negligence on part of electric company and to make provision against its defects.

6. Witnesses Ⓒ268(2)

In action against electric company for fire damage sustained when tree on plaintiffs' land fell across company's transmission line, energizing telephone wires, limiting company's cross-examination of plaintiff's witnesses concerning plaintiff's knowledge of possibility that tree might fall, was not error, since plaintiffs had no duty to inspect trees or to remove trees likely to fall.

7. Evidence Ⓒ150

Testimony as to experiments is addressed primarily to discretion of trial court, but it must appear that conditions and circumstances were in general same in illustrative case and case at hand, and the determination whether conditions were sufficiently similar to make experiments of any value in aiding jury is a matter resting in sound discretion of judge.

8. Evidence Ⓒ557

In action against electric company for fire damage allegedly sustained when tree fell across transmission line, energizing telephone wires and igniting switchboard in plaintiffs' building, admission of testimony concerning experiments illustrating the effect of excessive voltage on an installation such as existed in plaintiffs' building was not abuse of discretion.

9. Evidence Ⓒ547

Questions posed to witnesses, who were experts in electrical field, in action for fire damage allegedly sustained when telephone wires became energized by defendant's transmission line, concerning force of electricity of certain voltage when exerted upon other objects were proper for these witnesses, even though they were not experts on fire.

10. Electricity Ⓒ19(5)

In action against electric company for fire damage allegedly sustained when tree fell across transmission line, energizing tel-

ephone wires and igniting switchboard in plaintiffs' building, evidence was sufficient to sustain finding that there had been causal relationship between transmission line and fire.

11. Appeal and Error — 1170(7)

In action against electric company for fire damage allegedly sustained when tree fell across transmission line, energizing telephone wires and igniting switchboard in plaintiffs' building, admission of witness' testimony that he had been awakened by sparks flying from a switch, that he was sure telephone line had been operating before tree fell, and that it did not operate thereafter until repaired, was, in view of great amount of like testimony by other witnesses to same effect, not so prejudicially erroneous, if error, as to warrant reversal. West's Ann.Const. art. 6, § 4½.

12. Appeal and Error — 1170(7)

In action against electric company for fire damage allegedly sustained when tree fell across transmission line, energizing telephone wires and igniting switchboard in plaintiffs' building, admission of photograph of tree, if error, was not so prejudicial as to warrant interference with trial court's determination. West's Ann.Const. art. 6, § 4½.

John J. Briare, San Francisco, Edmund M. Moor, Red Bluff, Anthony J. Kennedy, Sacramento, for appellant.

Rawlins Coffman, Red Bluff, and L. C. Smith, Redding, for respondents.

PEEK, Justice.

This is an appeal by defendant P. G. & E. Company from a judgment in favor of plaintiffs in an action for damages for the destruction of plaintiffs' property by fire, alleged to have resulted from defendant's negligence.

Plaintiffs operated a resort at Mineral which is located in the mountains approximately 40 miles east of Red Bluff. During the early morning hours of January 10, 1949, the main lodge building at the resort was completely destroyed by fire. The primary basis of plaintiffs' claim of negli-

gence is predicated upon the falling of a tree across a power line of defendant's, causing that line to come in contact with and energizing telephone lines leading to plaintiffs' lodge, thereby causing a fire to break out in the telephone switchboard located therein.

The record shows that in 1939 plaintiffs granted to defendant a right of way for the erection of a transmission line, referred to throughout the testimony as a "tap line". Pursuant to the easement granted, defendant constructed the tap line from its main power line which was located a short distance south of the highway running through Mineral. The line so constructed was parallel to the highway, along the side of which were telephone lines, some leading to a switchboard at the lodge building about one half mile to the east. The tap line, which was uninsulated, carried approximately 11,000 volts of electricity. Near the south end of the tap line was located a transformer from which appellant took two 110-volt service connections.

At a point approximately one half mile from the lodge and about 25 feet from where defendant chose to erect its tap line along the highway, there stood a 110-foot cedar tree. This tree had a fire burn referred to in the record as a "catface" which, according to the testimony, weakened the tree to a degree. The tree was approximately 36 inches in diameter at breast height and leaned approximately five to ten degrees in the direction of the road across which the tap line was strung. The tree had some dry rot and possibly was somewhat unsafe for the further reason that it was located by itself in a cut-over area so that high winds could exert full force against it. It stood approximately 59 feet north of the telephone lines which were 30 feet from the highway, and it rose approximately 75 feet above the 35-foot poles that supported the tap line. On the night of January 10, 1949, at the hour of 12:35 a. m. or shortly thereafter, and during a high wind, the tree fell across the tap line, forcing it in contact with the bare telephone lines, thereby transmitting high voltage electric current over the telephone lines. Apparently no one witnessed the inception

of the fire. Shortly after 1 a. m. an employee of plaintiffs observed a fire in the lodge which he described as coming from the area of the telephone switchboard. Witnesses living in the neighborhood testified to the steady continuous ringing of their telephones at various times beginning shortly after 1 o'clock. They also testified to blue flames and sparks shooting out from electric switches in their homes. In addition they testified that fuses in their homes were blown in some instances and the carbon blocks burned. One of two repeater coils which were located side by side on a terminal pole near the lodge, and through which the escaping power traveled, was burned out. The second, which was in no way connected with the lines on which the power was escaping, remained undamaged. A second fire occurred in a cabin near the lodge some time after 4 a. m. When the tree fell the lines were not broken and the power remained on until approximately 3:14 a. m. when a truck which was then being driven past the fallen tree came into contact with the lines and broke them causing an alarm to ring in the South Power House, awakening the attendant.

Prior to that hour no safety or protective device on defendant's power system interfered with or shut off the escaping power, although there was testimony that such alarms or protective devices could have been so regulated. The communications officer of the U. S. Forest Service testified that the damage to the repeater coils on that agency's lines was caused by "a high rate of current flow through a repeater coil for some little time—not an instantaneous surge that was discontinued," and that the damage was more severe than that caused by lightning. A witness for the defendant testified on cross-examination that if he had been informed that the repeater coil burned out shortly after the tree fell onto the line, then he "would say it had some connection with the falling of the tree." One Lynch, an electrical engineer and manufacturer of telephone equipment, testified that the voltage involved would destroy or burn out the telephone lines. Two experts, both electrical engineers and presently employed as instructors at the University of

California, were called by plaintiffs, and in response to hypothetical questions involving in general the testimony previously summarized, stated that such conditions would result in a fire. They further testified that relocation of the transformer so that the power crossing the highway would be reduced to 110 volts from the 11,000 it carried, would have reduced the fire hazard as insulated wires would have done.

[1] It is appellant's first contention that the trial court erred in denying its motion for a nonsuit and for judgment notwithstanding the verdict since no actual negligence on their part was shown by the evidence. There can be no question but that defendant operated a power line; that a tree fell, bringing that line into contact with telephone lines leading into plaintiffs' resort; and that the telephone lines were abnormally energized. Under these circumstances whether or not defendant was negligent was a question of fact for the jury.

In *Polk v. City of Los Angeles*, 26 Cal.2d 519, 525, 159 P.2d 931, the court made the following statement, quoted with approval in the recent case of *Dunn v. Pacific Gas & Electric Co.*, 43 Cal.2d 265, at page 272, 272 P.2d 745, at page 749:

"On the subject of negligence the standard of care is, that one maintaining wires carrying electricity is required to exercise the care that a person of ordinary prudence would exercise under the circumstances. Among the circumstances are the well known dangerous character of electricity and the inherent risk of injury to persons or property if it escapes. Hence, the care used must be commensurate with and proportionate to that danger."

Again, in *Lozano v. Pacific Gas & Elec. Co.*, 70 Cal.App.2d 415, 422, 161 P.2d 74, 78, and also cited with approval in the *Dunn* case, this court held that:

"The duty of due care with which the company was charged consists not only in the proper installation of the dangerous instrumentality but in the maintenance thereof in a safe condition at all times and places and under the changing circumstances of the particu-

lar case. Even if at the outset of the installation of the equipment the company may have been entirely free from fault, yet, if, under changing circumstances, a hazardous condition arose, nonaction or the failure to remedy such condition would constitute culpable negligence."

[2] As noted in the Polk case the care used must be commensurate with and proportionate to the dangerous propensities of electricity. It has further been held that it is not unreasonable to require the defendant to anticipate that during a high wind a tree might fall across high voltage lines as was the situation in the present case. *Irelan-Yuba Gold Quartz Mining Co. v. Pacific G. & E. Co.*, 18 Cal.2d 557, 116 P.2d 611, 617.

[3] Here the defendant is arguing the same as it did in the Irelan-Yuba case, that since the tree was on the property of plaintiffs it had no obligation and no right to enter upon the plaintiffs' land and cut down the tree. But as the court in that case said, "It is not decisive that the tree was not within the limits of the portion of the right of way which had been cleared." In *Rocca v. Tuolumne County Elec., etc., Co.*, 76 Cal. App. 569, 245 P. 468, 472, a like question was presented, and this court held that such an argument was "untenable, and does not relieve the company from liability for failure to protect its wires or take the ordinary precautions which the circumstances demanded." Again in *Smith v. San Joaquin etc., Power Corp.*, 59 Cal.App. 647, 649, 211 P. 843, the court sustained the contention of plaintiff that if the tree in question stood in such a position as to endanger the defendant's wire, the defendant should have properly protected the same, and in failing to do so its omission was an act of negligence.

In the case of *Sullivan v. Mountain States Power Co.*, 139 Or. 282, 9 P.2d 1038, 1044, which case is cited with approval in the Irelan-Yuba case, the court held as follows:

"The required degree of care is always graduated according to the danger attendant upon the activity one is

pursuing. The standard does not vary—it is the conduct of an ordinarily prudent person. But such an individual exercises care commensurate with the dangers to be avoided and the likelihood of injury to others. Such being true, it may be well to take note of the harmful quality of electricity. Electricity is a dangerous force whose destructive qualities are greatly facilitated by its subtle, invisible, and mysterious nature. Since the plant where it is generated is often many miles distant from the place of consumption, the transmission lines frequently pass over country roads, city streets, through forests, and other places where danger to life or property lurks if the electrical current escapes from the conduit. The length of the transmission wires renders impossible the character of supervision generally bestowed upon other dangerous substances.

* * * * *

"* * * Accordingly, we conclude that the defendant, in the performance of its duty to maintain its right of way safe for the transmission of electricity, was bound to exercise a degree of care commensurate with the highly dangerous commodity which it was conveying over its wires. This duty remained unperformed so long as it permitted trees to grow in such close proximity to its uninsulated wires that it, in the exercise of the judgment of a reasonably prudent person, should have known that the tree and the wires would come into contact in a manner that would endanger the safety of others or their property."

Defendant's second contention is that the court committed reversible error in precluding its cross-examination of a witness for the plaintiffs, Harvey Brown, concerning his arrangements with the plaintiffs relative to the cutting down of trees on their property. Defendant's argument in support of such contention is that since its answer raised the issue of contributory negligence, it should have been allowed to show that if Brown considered the tree hazardous, then by reason of the alleged agency relationship

between him and plaintiffs, his knowledge, under the law, would become the knowledge of plaintiffs. The same argument is also made as to the court's restriction of its cross-examination of plaintiffs concerning the same matter. Obviously such contention includes two assumptions: (1) That Brown was the agent of plaintiffs, and (2) that plaintiffs as owners of the adjacent land were thereby under a duty to inspect the trees naturally growing on their land.

[4] The last mentioned contention of defendant, and the assumptions therein contained, can best be considered together with its next contention that the trial court erred in taking the issue of plaintiffs' alleged contributory negligence from the jury. Defendant's argument in this regard in substance appears to be that if it was a question of fact for the jury whether or not defendant was negligent in failing to take precaution against the tree falling thereby causing the power line to come in contact with the telephone lines, then likewise it was a question of fact whether or not plaintiffs were contributorily negligent for the same reason, and hence both were questions of fact for the jury. As previously noted, inherent in such contention is the assumption that plaintiffs as the owners of adjacent land were thereby under some duty to inspect the trees naturally growing on their land, and if necessary to alter the natural conditions of their property. Neither party has cited us to any California case directly in point. However, to carry defendant's contention to its end result would be to charge the owners with responsibility for damage arising from the natural conditions of the country through which the power line ran. As the court noted in *Salmon v. The Delaware, Lackawanna and Western Railroad Co.*, 38 N.J.L. 5, 20 Am.Rep. 356, in the absence of special legislation a man does not become a wrongdoer by leaving his property in a state of nature.

The only statute in point appears to be Rule 35 of General Order 95 of the P.U.C. which provides in part that when overhead wires pass through trees, safety demands

a reasonable amount of trimming; and that " * * * trees so located they can fall into a crossing span or into any span that could communicate the trouble to a crossing span, shall be removed wherever practical."

It would thus appear that the inspection and removal of trees near a power line is the duty of the defendant—not the property owner. Furthermore there is no question but that it was the defendant alone who selected the location of its power line, unaided and unaffected in any way by plaintiffs. The route so selected was in virgin mountain territory. The tree itself was not planted by plaintiffs—it was a wild native tree which partook of the character of the land itself. Under such circumstances it cannot be said that the taking of plaintiffs' land under the statutory authority vested in defendant, and the building of the power line, that thereby defendant could impose upon plaintiffs the duty of inspecting trees in order to make safe the transmission of power over those lines. The very essence of Order Number 35 in no way reflects upon the use to be made of the franchise, but rather is to effect the safety of its operations.

[5,6] In view of what has heretofore been said, it is manifest that plaintiffs were not chargeable with any legal neglect for failure in not inspecting trees along defendant's right of way, nor for failure to remove any which might have appeared to be dangerously close thereto. Neither were they called upon to anticipate negligence on the part of defendant and by way of prevention to make provision against its effects. Here the fire in question was found by the jury to have been caused by the tree which fell upon the high-powered lines of defendant which in turn energized the telephone lines, and since, as we have concluded, plaintiffs owed no duty to defendant to anticipate such an occurrence, plaintiffs were not compelled to alter the natural characteristics of their land or to place it in a condition to withstand such a result, and hence could not be guilty of contributory negligence in failing so to do. It necessarily follows that the trial court did not

err in taking the question of contributory negligence from the jury. For like reasons the trial court did not err in limiting defendant's cross-examination of the witness Brown or of plaintiffs since the result sought by defendant related to plaintiffs' knowledge of the possibility that the tree might fall—a fact immaterial to the issues.

Defendant next contends that the trial court erred in admitting over its objection, testimony relative to experiments made by the witnesses Saunders and Pritchett. As previously noted, these witnesses were electrical engineers now serving as professors at the University of California. After exhaustive questioning concerning their knowledge of the case, they were asked concerning the experiments which they made; that is, whether power escaping down telephone lines and into a telephone switchboard in the manner shown by the evidence could break down such equipment and cause a fire. They both replied in the affirmative. Certain of their experiments, of which there were seven, were stricken; the remainder, however, were allowed to remain in the record. Defendant now contends that it was error to allow any of their testimony, primarily because it did not meet the necessary standards of such testimony, and secondly because it allowed the jury to speculate.

[7] The rule is well established that at the outset testimony as to experiments is primarily addressed to the discretion of the trial court. However, "it must appear that the conditions or circumstances were in general the same in the illustrative case and the case in hand * * * the determination whether the conditions were sufficiently similar to make the experiments of any value in aiding the jury is a matter resting in the sound discretion of the judge." *People v. Mondshine*, 132 Cal.App. 395, 397, 22 P.2d 779, 780. A like statement is found in *Ortega v. Pacific Greyhound Lines, Inc.*, 20 Cal.App.2d 596, at page 597, 67 P.2d 702, 703. "The conditions surrounding a test or experiment of this nature need not be identical with those existing at the time of the occurrence in question provided there is a substantial similarity. [Citing cases.]

The admission of such evidence is largely a matter of discretion with the trial court, and such a test is merely a circumstance to be considered in connection with other evidence in the case." Again, as the court noted in *People v. Levine*, 85 Cal. 39, 43, 22 P. 969, 24 P. 631, 633, "The proof of the result of experiments was equally as open to the defendant as the prosecution, and if other experiments would have shown a different result from that shown by the experiment proved by the prosecution, the defendant had ample opportunity to show the fact. The books are full of authorities sustaining the court in admitting evidence of the result of experiments * * *. [Their] result was not conclusive, but a mere circumstance to be considered in connection with the other evidence in the cause. [They were] both competent and admissible; [their] weight was for the jury to determine." A like statement is found in the frequently cited case of *County of Sonoma v. Stofen*, 125 Cal. 32 at page 38, 57 P. 681, at page 683. "Experimental evidence in corroboration or disproof depends for its value upon the fact that the experiment has been made when the conditions affecting the result are, as near as may be, identical with those existing at the time of and operating to produce the particular effect. An absolute identity is, of course, impossible; but a substantial identity must exist to give the evidence value."

[8] Here the experiments in question illustrated the effect of excessive voltage on what is termed a Kellogg arrestor which was attached to the pine board, the base of the telephone connections in the lodge. It obviously was tendered as an aid to and for the assistance of the court and jury in obtaining a clearer understanding of the extremely technical testimony which was introduced by both sides. Under all of the facts and circumstances presented by the record in this case, we cannot say that the court abused its discretion in receiving such demonstrative evidence.

[9] Defendant's next contention attacks the admission of certain evidence by the trial court. It is first contended that specified testimony given by the two experts,

Saunders and Pritchett, was improper since they were not qualified as experts on fire. Specifically, defendant attacks the testimony of these two witnesses relating to the insulation, relocation of transformers and adjustment of circuit breakers. When all of the testimony relative to these questions is read as a whole, it is quite apparent that all were a part of a series of hypothetical questions on the same subject. We do not understand defendant to contend that the field of electricity generally is of such a commonplace nature as not to warrant the use of experts, but rather that the two witnesses were not experts on fire, and that the particular questions were improper. Here the specific facts which were sought to be introduced by the plaintiffs related to whether or not certain arrestors would disintegrate and set a fire through the application of electricity; whether or not the insulation of power lines carrying 11,000 volts would reduce the fire hazard; if the relocation of a transformer, thereby reducing the 11,000 voltage on the tap line to 110 volts, would reduce the fire hazard; and if a different adjustment in the circuit breaker at the power house would reduce the fire hazard. It is evident that each of the basic questions involved related to the general question of the force of electricity of certain voltage when exerted upon other objects. We do not understand such general questions to fall within the category of arson or fire experts generally, but more properly came within the realm of expert testimony by those particularly trained in the field of electricity. Certainly electricity, with its many ramifications and unusual behavior and the ever present threat of fire, was a proper subject for such witnesses to give testimony on as experts.

[10] Defendant's next contention is likewise without merit; that the court in denying its motion for a judgment notwithstanding the verdict since no causation was proved between defendant's transmission line and the fire in plaintiffs' building, was therefore in error. It would seem unnecessary to labor this contention. Suffice it to

say that there was direct evidence that the circumstances described at length by both parties would have started the fire. The weight of such testimony was for the jury, not this court on appeal.

[11] The defendant further contends that the court erred in not striking the testimony of one Eckels who testified that he was awakened by sparks flying from a switch to which was attached an electric heater; that he was quite sure his telephone line was operating the day before the tree fell, and that it did not operate thereafter until repaired. Even assuming that such testimony was not shown to be connected with this case, in view of the great amount of like testimony by other witnesses to the same effect, it cannot be said that the admission of this particular testimony was so prejudicially erroneous as to warrant a reversal.

[12] Defendant's final contention is based upon the alleged error of the trial court in allowing a certain photograph, introduced by plaintiffs for identification only, to have been taken by the jury and viewed by it during its deliberation, and in denying defendant's motion for a new trial on this ground. It appears that at the hearing on defendant's motion for a new trial, plaintiffs presented affidavits by two workmen, residents of the vicinity, who averred that they knew the particular tree; that they were engaged to clean up the area where it had fallen; that the exhibit in question was a photograph of the same tree; and that certain exhibits of defendants, introduced in evidence, were views of the same tree. Again, assuming but not so deciding, that it was error to allow the jury to view the photograph, we cannot say it was such error and so prejudicial as would warrant this court in interfering with the determination made by the trial court. California Constitution, Article 6, § 4½.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J.,
concur.

134 Cal.App.2d 60

REID & SIBELL, Inc., a California corporation, and United States Fire Insurance Company, a New York corporation, Plaintiffs and Respondents,

v.

GILMORE & EDWARDS COMPANY, Inc., a California corporation, Defendant and Appellant.

Civ. 15102.

District Court of Appeal, First District,
Division 2, California.

June 24, 1955.

Rehearing Denied July 22, 1955.

Hearing Denied Aug. 17, 1955.

Action by owner of goods destroyed in fire and owner's insurer against defendant who did not create fire, but who allegedly negligently caused fire to spread to premises occupied by owner of goods. The Superior Court, City and County of San Francisco, Theresa Meikle, J., gave judgment for owner of goods and its insurer. Defendant appealed. The District Court of Appeal held that evidence was sufficient to support jury's finding that storage of large quantities of paint thinner by defendant in basement of building where plaintiff's goods were located was negligence and proximate cause of destruction of goods.

Judgment affirmed.

1. Appeal and Error ⇨989

Where appellant contended that verdict was not supported by sufficient evidence, function of District Court of Appeal was not to weigh the evidence but only to determine whether or not there was any substantial evidence which would support the verdict.

2. Landlord and Tenant ⇨169(7)

In action by owner of goods and its insurer against another tenant in building who did not create fire, but who allegedly negligently caused fire to spread to goods, evidence was sufficient to support jury's finding that storage by cotenant of large quantities of paint thinner in basement of building where goods were kept was negligence and a cause of the destruction of the goods.

3. Negligence ⇨61(1)

It is not necessary that defendant's negligence be the sole proximate cause of the plaintiff's injuries, but it is sufficient that it be one of the contributing causes thereof, for plaintiff to recover.

4. Negligence ⇨58

The happening of the very event the likelihood of which makes an actor's conduct negligent, and so subjects the actor to liability, cannot relieve him from liability.

5. Negligence ⇨59

Spread of fire by paint thinner stored in basement of building in case fire broke out was foreseeable by owner of paint thinner, and such storage was negligence.

6. Negligence ⇨56(1.3)

Although storage of paint thinner in basement of building was negligence, owner of paint thinner was not liable to owner of goods destroyed in fire unless negligence of storing of thinner was proximate cause of destruction of goods.

7. Nuisance ⇨1

A possessor of land is required to make a reasonable use of his premises which causes no unreasonable harm to those in the vicinity, either by reason of the character of the use itself or because of the manner in which it is conducted.

8. Nuisance ⇨1

Test of permissible use of one's land is whether the act or use is a reasonable exercise of the dominion which the owner of property has by virtue of his ownership, having regard to all interests affected, his own and those of his neighbors, and having in view public policy.

9. Nuisance ⇨5

A person may not use his own property even in and about a business in itself lawful if it be used in such a manner as it seriously interferes with another in the enjoyment of his right in the use of his property.

10. Negligence ⇨29

Nuisance ⇨7

Theories of nuisance, ultra-hazardous activity and negligence are closely related

as they apply to the right of a user of real property to be free from unreasonable invasion of or unreasonable risk to his use and enjoyment of his property, and the corresponding duty is to refrain from causing such invasion or risk.

11. Negligence Ⓒ21

The rule that reasonableness of use of land by an adjoining landowner must be determined according to the circumstances of each case is applicable to the creation of unreasonable fire risks.

12. Landlord and Tenant Ⓒ169(11)

In action by owner of goods destroyed in fire and its insurer against another tenant who stored paint thinner in basement of building, but who did not cause fire, question of whether owner of paint thinner was negligent in storing it in basement was for jury, and owner was not absolutely liable.

13. Estoppel Ⓒ90(1)

Where insurer covered two tenants in building damaged by fire against loss of their own goods by fire, clause in policy of tenant who stored paint thinner in basement of building providing that owner of thinner could maintain present and increased hazards, and keep all articles necessary for his business, did not estop insurance company from claiming from owner of paint thinner amount paid to other tenant for loss of its goods on ground that owner of thinner was negligent in storing it in building.

14. Trial Ⓒ252(1)

Instructions are not restricted to the pleadings, but are to cover the matters developed by the evidence although not disposed of by the pleadings. West's Ann. Code Civ.Proc. § 607a.

15. Appeal and Error Ⓒ1066

In action by owner of goods destroyed in fire and its insurer against another tenant who stored paint thinner in basement of building, where defendant's counsel in opening statement referred to "inflammable substances, whatever they were," and plaintiffs' counsel without objection re-

ferred to inflammable goods and inflammable liquids in his opening statement, court's instruction that charge of negligence was based on storage of excessive quantities of inflammable substance in basement was not reversible error.

16. Municipal Corporations Ⓒ112(3)

Fact that title of ordinance providing that before any benzine, gasoline or any product of petroleum or any hydrocarbon liquid that will flash or will make an inflammable vapor below certain temperatures, shall be stored in building a permit must be obtained, did not mention hydrocarbon liquids, did not render ordinance invalid.

17. Municipal Corporations Ⓒ111(1)

In ordinance providing that before any benzine, gasoline or any product of petroleum or any hydrocarbon liquid that will flash below a certain temperature could be stored in any premises in excess of five gallons, application for permit must be made to fire marshal, phrase "hydrocarbon liquid" describes liquids whose distinguishing characteristic is a hydrocarbon content, and has a sufficiently definite and established meaning, and ordinance is not invalid as for vagueness or uncertainty.

See publication Words and Phrases, for other judicial constructions and definitions of "Hydrocarbon Liquid".

18. Statutes Ⓒ47

To make a statute sufficiently certain to comply with constitutional requirements it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited, and a statute will not be held void for uncertainty if any reasonable and practical construction can be given to its language.

19. Landlord and Tenant Ⓒ166(9)

Owner of goods destroyed in fire which was spread by paint thinner stored in building by another tenant of building was within class which ordinance requiring permits for storage of any benzine, gasoline or any hydrocarbon liquid sought to protect.

20. Landlord and Tenant ⇨166(9)

Fact that ordinance requiring permit for storage of hydrocarbon liquids in any premises in excess of five gallons did not flatly prohibit storage of such liquids, but rather required a permit therefor, did not relieve tenant in building who stored more than five gallons in basement from liability to another tenant in building whose goods were destroyed by fire.

21. Negligence ⇨6

Where the purpose of requiring a permit is to protect against the event which has caused loss, violation of the ordinance constitutes negligence.

22. Explosives ⇨3

Purpose of ordinance requiring permit for storage of more than five gallons of hydrocarbon liquid in premises was to minimize spread of fire, and whether or not a violation of ordinance proximately contributed to an accident, is a question of fact.

23. Landlord and Tenant ⇨169(11)

In action by owner of goods destroyed in fire and its insurer against another tenant in building who stored paint thinner in basement of building, whether or not violation of ordinance requiring permit for such storage proximately contributed to loss of goods was for jury.

24. Appeal and Error ⇨1135

Where jury is fully and fairly instructed upon the issue of proximate cause, with particular reference to an ordinance, its verdict cannot be disturbed on appeal.

25. Evidence ⇨32

A court does not take judicial notice of a municipal ordinance, and it is necessary and proper that it be admitted into evidence.

26. Municipal Corporations ⇨120

Construction of an ordinance is for the court, not for the jury.

27. Evidence ⇨330

In action by owner of goods destroyed in fire and its insurer against another tenant in building who stored paint thinner in building, court properly admitted or-

dinance requiring permit for storage of more than five gallons of hydrocarbon liquids such as paint thinner.

Edward J. Rice, Jr., Oakland, Dana, Bledsoe & Smith, San Francisco, for appellant.

McKinstry, Haber & Coombes, San Francisco, for respondent Reid & Sibell, Inc.

Lillick, Geary, Olson, Adams & Charles, San Francisco, for respondent United States Fire Ins. Co.

PER CURIAM.

This is an action for the value of property lost when a fire, not originated through any act or omission of the defendant, allegedly was caused by its negligence to spread to the premises occupied by a plaintiff.

There are two plaintiffs. Reid & Sibell, Inc. (hereinafter called Reid) was the owner of the goods destroyed. United States Fire Insurance Company (hereinafter called insurer) insured a portion of Reid's property against loss by fire, paid the value of the property covered, and sues as subrogee for the amount paid. Reid sues for losses not covered by its policy.

Defendant Gilmore & Edwards Company, Inc. (hereinafter called Gilmore) was a tenant of the basement and first floor of the building at 1414 Van Ness Avenue, San Francisco. Reid occupied the second floor of this two-story building. Originally, the owner of the building and another tenant of the first floor and basement were joined as defendants, but nonsuit was granted as to them because they did not store any of the paint thinner which assertedly caused the spread of the fire.

The complaint contains two causes of action for each plaintiff. One is based on general negligence in the storing of large quantities of paint thinner. The other counts upon a section of the Fire Code of the City and County of San Francisco which provides:

"Before any benzine, gasoline, or any product of petroleum or any hydrocarbon

liquid that will flash or emit an inflammable vapor below a temperature of one hundred and ten (110) degrees Fahrenheit, shall be stored in, upon or about any premises in excess of five (5) gallons application for permit must be made to the Fire Marshal. Said permit will be granted by said officer, except where in the judgment of said officer, the use by the applicant in the manner proposed by him would endanger the safety of life and property." The complaint alleges violation of this ordinance in that the stored paint thinner was a hydrocarbon liquid of a flash point below 110 degrees. Admittedly, Gilmore never applied for a permit.

Both counts allege that because of the presence of the paint thinner, the fire spread from the portion of the building occupied by Gilmore to that occupied by Reid, causing the losses of Reid and insurer.

Jury verdict was for both plaintiffs. Defendant Gilmore appeals from judgment upon that verdict.

[1] Appellant contends that the evidence is insufficient to support the verdict. In this situation, our function is not to weigh the evidence, but only to determine "whether or not there is any substantial evidence which will support" the verdict. In *re* Guardianship of Kentera, 41 Cal.2d 639, 645, 262 P.2d 317, 320.

The fire occurred Saturday, May 15, 1948. All the businesses occupying the building were closed that day. A janitor working on the first floor smelled smoke, found that it came from the basement, and notified the fire department. The first battalion chief to arrive (this became a four-alarm fire) found a "very hot fire" on the basement floor. Because it appeared to be a volatile liquid burning, fog stream was used by the firemen.

The fire was brought under control and was nearly extinguished at least three times, but on each occasion was reignited by vapors of liquid on the floor. Each time the fire again ignited, "just in split seconds the entire floor of the basement was a mass of flame."

An employee of appellant told the fire chief that a number of drums of inflammable solvent or paint thinner were in the basement, and he warned the chief to wet it down. Firemen saw a number of 50-gallon drums ruptured and leaking liquid. Six to eight of the large drums, all broken, were removed by the fire department. Additionally, about 30 5-gallon containers and 60 to 80 one-gallon containers also were removed.

Appellant argues at length that only nine 50-gallon drums of thinner were stored in the basement, and that all these were removed, unbroken, on Monday following the fire. There is no question that nine drums were removed Monday, but there is substantial evidence that a much larger number of drums were there at the time of the fire, had been burst by the heat, and deposited inflammable liquid on the floor. The evidence permits the conclusion that 750 to 1000 gallons of highly inflammable paint thinner was stored in the basement on the day of the fire.

There is much testimony of firemen that the burning of this volatile liquid contributed strongly to the spread of the fire. The presence of this inflammable substance, and the danger of explosion of the liquid confined in the drums, made the basement too hazardous for the continued presence of firemen, thus minimizing the possibility of extinguishing the fire.

The building had been used as a garage for some years, and oil had soaked into its wooden floors.

[2] The evidence is ample to warrant the conclusion that the large quantity of paint thinner kept in the basement by Gilmore substantially increased the difficulty of fighting the fire; caused it to flare up again and again after being under control; and caused it to spread. Clearly there was evidence to warrant the inference that the presence of the thinner directly and proximately contributed to the destruction of Reid's goods on the second floor. Whether that inference is to be drawn is for the jury to determine. *Sanders v. MacFarlane's Candies*, 119 Cal.App.2d 497, 259 P.2d 1010.

Gilmore argues, however, that it cannot be held liable for merely contributing to the spread of a fire not caused, in the first instance, by its act or omission. It is true that the presence of the paint thinner would have caused no harm had there been no fire. There is no suggestion that Gilmore was in any way responsible for the starting of the fire.

[3] However, "It is not necessary that appellant's negligence be the sole proximate cause of respondents' injuries, but it is sufficient that it be one of the contributing causes thereof." *Finnegan v. Royal Realty Co.*, 35 Cal.2d 409, 419, 218 P.2d 17, 24; see also *Champion v. Bennetts*, 37 Cal. 2d 815, 821, 236 P.2d 155.

[4, 5] Obviously, the storage of materials which are highly inflammable but not self-igniting will cause harm only upon the occurrence of a fire. But "(t)he happening of the very event the likelihood of which makes the actor's conduct negligent and so subjects the actor to liability, cannot relieve him from liability." Rest., Torts, sec. 449, comment a. This rule is recognized and applied in California. *McEvoy v. American Pool Corp.*, 32 Cal.2d 295, 299, 195 P.2d 783; *Hession v. City and County of San Francisco*, 122 Cal.App. 2d 592, 603, 265 P.2d 542. Just as in *McEvoy v. American Pool Corp.*, supra, harm to a passenger from chemicals carried in a vehicle was foreseeable in the event the vehicle was involved in a collision, so was the spread of fire by the paint thinner foreseeable here.

[6] Of course, Gilmore is liable only if its negligence in storing the thinner was a proximate cause of Reid's loss. But this issue was submitted to the jury on full and proper instructions, and was decided against Gilmore.

There remain the questions whether the storage was negligent as creating an unreasonable risk to the other occupant of the building, and whether Gilmore was under a duty to Reid to avoid creating such risk.

[7] We find no California decision directly in point. The general rule is stated as follows: "A possessor of land is re-

quired to make reasonable use of his premises which causes no unreasonable harm to those in the vicinity, either by reason of the character of the use itself or because of the manner in which it is conducted." *Prosser on Torts*, p. 601.

[8] The test of permissible use of one's own land is: "was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also public policy." 1 Am.Jur. 506.

[9] In *Vowinkel v. N. Clark & Sons*, 216 Cal. 156, 13 P.2d 733, operation of kilns and furnaces was ordered enjoined as a nuisance, in part because they were an extraordinary fire hazard. The court said, 216 Cal. at page 164, 13 P.2d at page 737: "'A person may not use his own property, even in and about a business in itself lawful, if it be used in such a manner as to seriously interfere with another in the enjoyment of his right in the use of his property.'"

[10] This decision, dealing with abatement of a nuisance, is not directly in point here. But the theories of nuisance, ultra-hazardous activity and negligence are closely related as they apply to the right of a user of real property to be free from unreasonable invasion of, or unreasonable risk to, his use and enjoyment of his property. The corresponding duty is to refrain from causing such invasion or risk.

There seems no sound reason to restrict this right and its corresponding duty to acts which contribute to the origin of a fire, as distinguished from its spread. In other jurisdictions, the rule, particularly in the later cases, appears to follow the view that one is liable for acts or omissions which cause the spread of fire of whatever origin.

"(I)f the owner of premises allows them to remain in such a condition as to constitute a danger to other property in case of fire, this negligence will make him liable for damages done to such other property by an accidental fire starting on his premises, although he has no connection with its origin." 22 Am.Jur. 603, and cases cited therein.

While the cases cited for this statement do not specifically involve the storage of inflammables in good containers for normal business use, they do indicate a definite trend of decision. In any event, they make clear that starting of the fire by some agency other than the defendant does not exempt him from liability.

Two decisions seem particularly applicable here. In *Anderson v. Miller*, 96 Tenn. 35, 33 S.W. 615, 31 L.R.A. 604, a lessee was held liable to the owner for loss by fire of a house in which defendant lessee had stored cotton. The fire originated on a neighbor's land. In *Standard Oil Co. of New Jersey v. Midgett*, 4 Cir., 116 F.2d 562, the oil company was held liable for spread to plaintiff's premises of a fire which originated in the warehouse of the company. The court pointed out that gasoline and oil had been spilled upon the wooden floor of the warehouse, and that it was not safe for the storage of oil and gasoline even in sealed drums and containers.

[11] Upon general rules of liability for negligence, we are satisfied that the rule that "the reasonableness of the use of land by an adjoining landowner must be determined according to the circumstances of each case", 1 Am.Jur., 1954 Supp., p. 53, is applicable to creation of unreasonable fire risks.

Here Gilmore stored large quantities of highly inflammable liquids in the basement of the building, separated from the Reid premises only by wooden floors which had become oil-soaked in a period of use of the building as a garage.

[12] Certainly we cannot say that, as a matter of law, Gilmore was not negligent. Damage to Reid was reasonably foreseeable, and it was for the jury, under proper instructions, to determine whether Gilmore was, under all the circumstances, negligent.

We emphasize that this conclusion is not based upon any theory of absolute liability. Rather, it is grounded wholly in the theory of negligence. We hold that the facts pleaded and proved raised a question for the jury as to whether Gilmore's conduct in storing and handling the paint thinner,

under all the circumstances of this case, constituted due care.

Appellant Gilmore urges that it was under no duty to discover the dangerous characteristics of the paint thinner. But here it had actual knowledge. Its employees testified that the drums were marked with red labels bearing the word "inflammable". It was an employee of Gilmore who warned the firemen of the danger from the paint thinner.

[13] Gilmore also contends that insurer is estopped to assert any claim. Insurer covered both Gilmore and Reid against loss of their own goods by fire. The Gilmore policy contained the usual exclusion of liability "unless otherwise provided", "while the hazard be materially increased by any means within the control of the insured" or while specified explosives and inflammables, above a fixed quantity, were on the premises. A "permits and privileges" endorsement was added to the policy. It read "Anything in the printed conditions of the policy to the contrary notwithstanding permission is hereby granted * * * (e) to maintain present and increased hazards; * * * (i) * * * to keep and use all articles or materials usual and/or incidental to said business in such quantities as the exigencies of the business require. * * *"

Gilmore argues that insurer, by this endorsement, had given "consent, acquiescence and approval" to the storage of the paint thinner and thus, if the storage were negligent, had become "a joint tortfeasor" and is estopped.

The contention is without merit. The endorsement does no more than provide that the "permitted" acts will not exclude liability of the insurer to Gilmore on the Gilmore policy. Insurer recognized this meaning of the clause by paying the damage caused to Gilmore's goods in the same fire. The policy does not cover liability of Gilmore to third parties.

Appellant Gilmore asserts error in the opening instruction. This instruction, stating in very general terms the contentions of the parties, said that the charge

of negligence was based on the claim that appellant "stored excessive quantities of inflammable substance in the basement." Gilmore points out that the complaint referred only to "large quantities of paint thinner". But the specific instructions later given dealt with paint thinner in detail. On the instructions as a whole, we do not believe that the jury was led to think that the issues were broadened by this opening summary of the issues in the instruction.

[14, 15] In any case, the rule is clear that instructions are not restricted to the pleadings, but are to cover matters developed by the evidence although not disclosed by the pleadings. Code Civ.Proc., sec. 607a; *Blanton v. Curry*, 36 Cal.App. 2d 575, 98 P.2d 221. Similarly, where a case is tried upon the theory that the pleadings were sufficient to raise certain issues, and no objection to evidence upon those issues was made at trial, the point that they are outside the pleadings cannot be raised for the first time on appeal (see cases cited in 24 Cal.Jur. 981). Here the opening statement of respondents referred, without objection, to "inflammable goods" and "inflammable liquids" other than paint thinner, and appellant's opening statement referred to "inflammable substances, whatever they were". Witnesses were questioned, without objection, as to thinner "or other inflammable substance", and appellant's motions for nonsuit referred to thinner "or other inflammable substance". In the light of this conduct at trial, the present objection to the innocuous reference in the court's preface to its instructions is not reversible error.

Gilmore's other objections to instructions, save for those dealing with the ordinance, have been carefully reviewed and found to be without substance.

The jury was fully instructed upon the ordinance (Fire Code, sec. 144, quoted above) and upon the effect of its violation, if found by the jury. Gilmore attacks these instructions, contending that the ordinance should not have been considered by the jury.

[16] First, it is contended that the ordinance is invalid because contrary to provisions of the city and county charter which require that the subject of the ordinance shall be expressed in its title. The argument is that the title fails to mention "hydrocarbon liquids".

But the title makes amply clear that the provisions of the Fire Code cover generally substances of this type. The rule cannot be carried to the absurdity of making the title as long as the Fire Code itself. *Tarpey v. McClure*, 190 Cal. 593, 598, 213 P. 983. Under the rule of that decision and of *Keech v. Joplin*, 157 Cal. 1, 8, 106 P. 222, the title of this ordinance is sufficient.

Gilmore also urges that the phrase "hydrocarbon liquid" has no established or definite meaning, and that therefore the ordinance is invalid because too vague and uncertain to be enforced.

"Hydrocarbon" is "A chemical compound of hydrogen and carbon", *The Oxford English Dictionary*, corrected re-issue 1933. *Webster's New International Dictionary* (2d ed.), defines hydrocarbon as "Chem. A compound containing only hydrogen and carbon." The reference to "compound" is to the term as used in chemistry. Thus the word "only" refers merely to the technical term "compound", which in chemistry describes a particular union of elements, constant and unvarying in composition.

[17] In the phrase "hydrocarbon liquid" the word "hydrocarbon" clearly, if ungrammatically, is used as an adjective. The phrase obviously describes liquids whose distinguishing characteristic is their hydrocarbon content.

Qualified chemists testified that a hydrocarbon is a chemical compound of hydrogen and carbon, and that only if another element chemically combines with those elements does the compound cease to be a hydrocarbon. The paint thinners involved in this case were liquids each containing more than 50% hydrocarbons. The other contents were physically mixed, but not

chemically combined, with the hydrocarbons.

Appellant Gilmore urges that a liquid containing anything except hydrocarbons cannot be a "hydrocarbon liquid". But this stilted view cannot be sustained. A liquid whose distinguishing characteristic is hydrocarbon clearly, in any normal use of language, is a "hydrocarbon liquid". Where more than 50% of its content is hydrocarbon, with the remainder consisting of several substances, each a much lesser fraction of the whole, its identification as hydrocarbon liquid is in no way vague, uncertain or indefinite.

If appellant's argument were accepted, normal usage would have neither place nor meaning in the statutes. "Alcoholic beverage" would apply only to a liquid which is 100% (200 proof) alcohol. The "additives" now common in gasoline would take that motor fuel outside appellant's definition of gasoline. "Water" would refer only to a chemical compound of hydrogen and oxygen, and the mineral and other substances in the liquid delivered from our household faucets would cause it to cease to be "water". We cannot accept this view.

[18] "To make a statute sufficiently certain to comply with constitutional requirements it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited." *People v. Smith*, 36 Cal.App.Supp.2d 748, 752, 92 P.2d 1039, 1042.

"A statute cannot be held void for uncertainty, if any reasonable and practical construction can be given to its language." *County of Tulare v. City of Dinuba*, 188 Cal. 664, 677, 206 P. 983, 988. See also *People v. Deibert*, 117 Cal.App.2d 410, 256 P.2d 355; *Lockheed Aircraft Corp. v. Superior Court*, 28 Cal.2d 481, 171 P.2d 21, 166 A.L.R. 701; *People v. Darby*, 114 Cal.App.2d 412, 250 P.2d 743.

Some of the decisions suggest that the test of statutory certainty is that the language be sufficient to enable those persons affected by it to understand its applicability to them. (For general discussion of the

test of certainty see 41 Cal.L.Rev. 523.) Under this rule, the Fire Code provision is even more clearly proof against the claim of uncertainty. The section applies to "benzine, gasoline, or any product of petroleum or any hydrocarbon liquid that will flash below a temperature of * * * 110 degrees Fahrenheit." The evidence is that each of the paint thinners here involved was composed in substantial part of petroleum derivatives, that each had a flash point of 40 degrees Fahrenheit, that each drum was marked with a red label "inflammable", and that Gilmore's employees knew their dangerous propensities and, at the fire, warned firemen of their presence in the basement. Also, these thinners were kept in and handled by the paint department of this established supply firm. The experienced operators and employees of that department cannot be expected to be ignorant of the composition and characteristics of the products they dealt with daily.

The ordinance section here involved is not void for vagueness or uncertainty.

[19] There is the further question whether Reid is within the class to which a duty was owed under the ordinance. *Satterlee v. Orange Glenn School Dist.*, 29 Cal.2d 581, 177 P.2d 279; *Hagen v. Laurson*, 121 Cal.App.2d 379, 263 P.2d 489.

Here there can be no question that the Fire Code was designed to prevent the spread of fire. It specifies its purpose to protect persons and property. It is implicit that it was designed to limit fire losses by protecting those to whose property any given fire might spread. Reid was within this protected class. *Alechoff v. Los Angeles Gas & Electric Corp.*, 84 Cal.App. 33, 257 P. 569.

[20, 21] The fact that the ordinance did not flatly prohibit storage of inflammable liquids, but rather required a permit therefor, does not relieve Gilmore from liability. Where the purpose of requiring a permit is to protect against the event which has caused loss, violation of the ordinance constitutes negligence. *Cragg v. Los Angeles Trust Co.*, 154 Cal. 663, 98 P. 1063; *Beau-*

vais v. Springfield Institution for Sav., 303 Mass. 136, 20 N.E.2d 957, 124 A.L.R. 611; Hudson v Craft, 33 Cal.2d 654, 204 P.2d 1, 7 A.L.R.2d 696.

There is the further question whether violation of the ordinance was a proximate cause of Reid's injury. There are instances where, as a matter of law, the violation cannot be held to be a proximate cause. Moon v. Payne, 97 Cal.App.2d 717, 218 P.2d 550; Green v. Menveg Properties, Inc., 126 Cal.App.2d 1, 271 P.2d 544. However, those were cases where prevention of the injury sued upon was not at all within the purview of the ordinance, and no possible causal connection existed between ordinance violation and injury.

[22, 23] Here the obvious purpose of the ordinance was to minimize the danger of spread of fire. Thus the issue of proximate cause was for the jury. Whether or not a violation of a statute or ordinance proximately contributed to an accident is a question of fact. Scaf v. Eicher, 11 Cal. App.2d 44, 54, 53 P.2d 368; Satterlee v. Orange Glenn School Dist., supra, 29 Cal. 2d 581, 590, 177 P.2d 279.

[24] Here the jury was fully and fairly instructed upon the issue of proximate cause, with particular reference to the ordinance. Its verdict cannot be disturbed upon appeal.

[25-27] Gilmore asserts error in the admission of the ordinance in evidence. A court does not take judicial notice of a municipal ordinance. Marysville Woolen Mills v. Smith, 178 Cal. 786, 791, 175 P. 13. Thus it is proper and necessary that it be admitted in evidence. Eigner v. Race, 54 Cal.App.2d 506, 129 P.2d 444. Of course, the construction of the ordinance is for the court, and not the jury. Here the jury was fully and correctly instructed as to the construction and effect of the ordinance.

Appellant's assignments of error in the admission of evidence have been reviewed in detail. We find no substance in any of them.

The judgment is affirmed.

Erle Roger PIANKA, by and through his guardian ad litem Walter Planka,
Plaintiff and Appellant,
v.

STATE of California and National Guard
of the State of California, Defendants and Respondents.
Civ. 16423.

District Court of Appeal, First District,
Division 2, California.

June 28, 1955.

Hearing Granted Aug. 17, 1955.*

Guardian's action against State and State's National Guard for injuries received by minor from explosion of a dud shell left on firing range after national guard exhibition. The Superior Court, City and County of San Francisco, Herman A. van der Zee, J., entered judgment dismissing complaint and guardian appealed. The District Court of Appeal, Kaufman, J., held that where State demurred to complaint and moved to dismiss and in support of motion filed affidavit of Adjutant General stating that exhibition was solely for purpose of gaining recruits for National Guard and there was no admission charged, and guardian did not file any affidavit in opposition thereto, the fact that exhibition was for governmental purpose was uncontradicted and defense of sovereign immunity was established.

Affirmed.

Dooling, J., dissented in part.

1. Pleading $\Rightarrow$ 205(2)

A general demurrer may not introduce into the controversy any factual matter that is not already there.

2. Pleading $\Rightarrow$ 355

Defects in a complaint may be exposed by motion to dismiss as well as by general demurrer.

3. States $\Rightarrow$ 200

A defense of sovereign immunity raises a jurisdictional question.

* Opinion vacated 293 P.2d 458.

4. Dismissal and Nonsuit $\hookrightarrow$ 55

Upon a showing of the court's lack of jurisdiction an action will be dismissed.

5. Pleading $\hookrightarrow$ 360(3)

An affidavit may be used in support of a motion to dismiss. West's Ann.Code Civ. Proc. § 2009.

6. Pleading $\hookrightarrow$ 360(1)

Statutes providing for situations in which dismissals may be had on motion of defendant, do not cover every possible use of motion to dismiss. West's Ann.Code Civ.Proc. §§ 581, 583.

7. Pleading $\hookrightarrow$ 354(4, 9, 11)

Motion to dismiss may be used to raise defense of court's lack of jurisdiction, and in certain cases to raise defense of res judicata, and where complaint is sham and frivolous. West's Ann.Code Civ.Proc. §§ 581, 581b, 583.

8. Pleading $\hookrightarrow$ 360(3)

Where guardian brought action against State and State's National Guard for injuries received by minor from explosion of a dud shell used at National Guard exhibition and state moved to dismiss action and in support of motion filed an affidavit by Adjutant General stating that exhibition was solely for purpose of gaining recruits for National Guard and there was no admission charge, uncontradicted affidavit showed that court lacked jurisdiction because of defense of sovereign immunity from suit for negligence involving purely governmental activity. Military and Veterans Code, § 176.

9. Pleading $\hookrightarrow$ 360(3)

An order granting State's motion to dismiss for lack of jurisdiction could be founded upon an uncontradicted affidavit which was filed in support of motion and which stated facts establishing the defense of sovereign immunity.

10. Militia $\hookrightarrow$ 3

The basic purpose of the National Guard is to preserve the public peace and to protect the state and nation. Military and Veterans Code, § 176.

11. States $\hookrightarrow$ 112

In holding a free public exhibition for purpose of securing recruits, the California

National Guard was performing a purely governmental function and was not liable for injury resulting from alleged negligence in method of conducting exhibition.

12. States $\hookrightarrow$ 112

When acting in a governmental capacity the sovereign may not be sued for negligence, except where that doctrine has been changed by statutory or constitutional law.

13. States $\hookrightarrow$ 191(1,12)

Statute providing for filing of claims against State for negligence is procedural only and not a waiver of sovereign immunity. West's Ann.Government Code, § 16041.

14. Pleading $\hookrightarrow$ 360(3)

In guardian's action against State and National Guard for injuries received by minor from explosion of a dud shell left after National Guard exhibition where in support of motion to dismiss state filed an affidavit stating that exhibition was solely for purpose of gaining recruits for National Guard, if guardian had filed a counter-affidavit or by oral testimony raised an issue as to sovereign immunity, motion to dismiss would have been denied because guardian could not be denied a trial on the merits on this issue.

15. Pleading $\hookrightarrow$ 354(14)

In guardian's action against State and National Guard for minor's injuries received from explosion of a dud shell left on firing range after National Guard exhibition, guardian's complaint alleging that demonstration was held "for the entertainment and education of the public", was subject to motion to strike as a sham and mere conclusion.

Hoberg & Finger, San Francisco, for appellant.

Bronson, Bronson & McKinnon, San Francisco, Edmund G. Brown, Atty. Gen., John E. Fourt, Deputy Atty. Gen., for respondents.

KAUFMAN, Justice.

This is an appeal from a judgment of dismissal in a tort action against the State

of California and the National Guard of this state.

The complaint herein alleged that Eric Pianka, a minor, was injured as the result of the explosion of a dud shell which had been negligently left on a public firing range by members of the National Guard of the State of California, and which appellant carried away from the range on the day following the demonstration. There was an allegation to the effect that the firing demonstration was held for the entertainment and education of the public generally, was widely advertised, and members of the public were invited to attend. This, appellant asserts, is an allegation that the activity was proprietary. Respondents demurred generally and upon the grounds that the court had no jurisdiction of either the subject matter or of the respondents. Respondents also filed a motion to dismiss based on the same grounds as the demurrer, and supported said motion with an affidavit of the Adjutant General of the State of California setting forth that the firing demonstration was conducted solely for the purpose of gaining recruits for the National Guard and that there was no charge for admission. After hearing, the trial court granted the motion to dismiss.

[1,2] Appellant contends that the affidavit in support of respondents' motion to dismiss was inadmissible and should not have been considered by the trial court. The effect of admitting the affidavit, appellant says was to determine the fact question of whether or not the National Guard was acting in a governmental, rather than a proprietary capacity, at the demurrer stage. A general demurrer may not introduce into the controversy any factual matter that is not already there. *Mackay v. Clark Rig Bldg. Co.*, 5 Cal.App.2d 44, 55, 42 P.2d 341; *Kleiner v. Garrison*, 82 Cal.App.2d 442, 187 P.2d 57. Appellant, admits however that defects in a complaint may be exposed by motion to dismiss as well as by general demurrer, *Monahan v. Blossom*, 88 Cal.App.2d 951, 952, 199 P.2d 738, but argues that in either instance the court is not warranted in con-

sidering factual matter stated in an affidavit.

[3] Respondents agree that a demurrer attacking the sufficiency of the complaint cannot be supported by affidavit, but point out that the affidavit herein was not in support of the demurrer, but in support of the motion to dismiss. There is no doubt but that the defense of sovereign immunity raises a jurisdictional question. *People v. Superior Court*, 29 Cal.2d 754, 756, 178 P.2d 1.

[4,5] It is well established that upon a showing of the court's lack of jurisdiction an action will be dismissed. *Gallagher v. McGraw*, 132 Cal. 601, 64 P. 1080; *In re Estate of Palmieri*, 120 Cal.App. 698, 700, 8 P.2d 152. An affidavit may be used in support of a motion to dismiss. Section 2009, Code of Civ.Proc.; *Cunha v. Anglo California Nat. Bank*, 34 Cal.App.2d 383, 93 P.2d 572.

[6-9] While sections 581 and 583 provide for situations in which dismissals may be had on motion of the defendant, there is considerable authority that those sections do not cover every possible use of the motion to dismiss. In *Cunha v. Anglo California Nat. Bank*, supra, 34 Cal.App.2d at pages 388-389, 93 P.2d at page 575, it was said that the motion to dismiss in that case was not made pursuant to the provisions of sections 581-581b of the Code of Civ.Proc., but that, "as to the power to dismiss, those sections are not exclusive." The court stated further that "The power to dismiss was formerly exercised by courts of chancery and later it was exercised in the law courts. * * * The same rules apply to a dismissal at law or in equity under code procedure unless modified by statute. * * * As the court had the jurisdiction to entertain the motion the defendants had the right to support their motion with affidavits." The granting of a motion to dismiss has been upheld in cases where it has been used to raise the defense of the court's lack of jurisdiction. *Gould v. Executive Power of the State*, 112 Cal.App.2d 890, 247 P.2d 424. Such motion may also be used to dismiss an action in certain cases involving

the defense of *res judicata* and where the complaint is sham and frivolous. *McKenna v. Elliott & Horne Co.*, 118 Cal.App. 2d 551, 258 P.2d 528; *Stafford v. Yerge*, 129 Cal.App.2d 165, 276 P.2d 649; *Best v. Fitzgerald*, 81 Cal.App.2d 965, 185 P.2d 377; *Olwell v. Hopkins*, 28 Cal.2d 147, 168 P.2d 972, and, see, 36 Cal.Law Rev. 465, 467; 40 Cal.Law Rev. 192, 197-198. Therefore, if the affidavit here used in support of the motion showed that the court lacked jurisdiction because of the defense of sovereign immunity for a purely governmental activity, then the trial court's action in granting the dismissal was proper.

[10, 11] Appellant earnestly contends that the complaint shows that the National Guard was acting in a proprietary capacity in carrying on the firing demonstration for the education and entertainment of the public. However, appellant filed no counter-affidavit to the affidavit of the Adjutant General which shows that this was a free demonstration given for the purpose of gaining recruits for a certain unit of the National Guard. We must therefore accept the uncontradicted fact that the purpose was purely governmental and in line with the usual activities and purposes of a military organization. It is provided by statute that such demonstrations and exhibitions made with the aid of National Guard personnel are to be entirely paid for from State funds. Section 176, California Military and Veterans Code. The basic purpose of this organization is to preserve the public peace and protect the State and Nation. Section 146, California Military and Veterans Code. The complaint made no allegation that the public was charged admission to this demonstration, and there is no denial of the statement in the affidavit that it was free to the public. Clearly, the purpose of the demonstration was in harmony with the purpose for which the National Guard exists, a purpose that is purely governmental—the security of the state. In *Newiadony v. State*, 276 App.Div. 59, 93 N.Y.S.2d 24, 26, a case involving the National Guard of that state, it was said, "There are some kinds of activities in which no private citizen engages which are functions char-

acteristic of a sovereign. No private citizen undertakes to suppress an insurrection or defend the State against invasion, break up riots, and restore public order." In *Dembrod v. State*, 185 Misc. 1061, 58 N.Y. S.2d 490, plaintiff was injured when shot by a live shell negligently fired from a machine gun while he was watching a weapons demonstration by the New York state guard. In spite of the fact that New York has a statute expressly waiving sovereign immunity from torts caused by negligence of state officers and employees, it was held that the action was properly dismissed, that the militia was acting in a governmental capacity, that the waiver statute did not apply, and that to render the state liable for acts of the militia, a statute would have to be passed with such an intent clearly expressed. See, also, *Goldstein v. State*, 281 N.Y. 396, 24 N.E.2d 97, 129 A.L.R. 905; *Farina v. State*, 197 Misc. 319, 94 N.Y.S.2d 614. There is no California case in point involving the National Guard, but the New York cases are persuasive authority. The function of the National Guard is the same in California as in New York. Those cases are based on the general principle stated in *Winthrop's Military Law and Precedents*, Second Edition, pages 1382-1383, "that the Government is not legally liable for unauthorized wrongs or injurious acts done by its officers or soldiers to or against civilians, though occurring while engaged in the discharge of their official duties."

[12, 13] Appellant bases his argument that a proprietary activity is involved upon the decision in *Guidi v. State*, 41 Cal.2d 623, 625, 262 P.2d 325, wherein it was held that the State was acting in a proprietary capacity when its Department of Agriculture conducted a horse show for the amusement and entertainment of the public. The court laid down the rule that governmental immunity "turns on the nature of the particular activity that leads to the plaintiff's injury, not on the identity of the governmental subdivision or agency carrying on the activity, or on the fact that the facility in question may also be used for governmental purposes." The court went on to state that it was "not concerned with

the possible immunity of the state from liability for negligence in connection with agricultural and educational activities at the state fair, but only with its claim of immunity for negligence in the course of setting off fireworks and maintaining the horse arena." It is true that this case holds that the test is the nature of the particular activity engaged in, and that this is not determined simply by determining the usual purposes of such governmental agency. However, it does not change the rule that when acting in a governmental capacity a sovereign may not be sued, except where that doctrine has been changed by statutory or constitutional law. Section 16041, Government Code, providing for the filing of claims against the state for negligence, has been held to be procedural only, and not a waiver of sovereign immunity. *Betten-court v. State*, 123 Cal.App.2d 60, 65, 266 P.2d 201.

In view of the fact that appellant did not deny the averments in the affidavits which clearly showed that the activity of defendant which resulted in appellant's injury, was purely governmental, the defense of sovereign immunity was established, and the court had no jurisdiction to hear the matter and properly dismissed it.

[14] Had appellant raised an issue on the motion to dismiss as to sovereign immunity either by counter-affidavit or by oral testimony, then the motion to dismiss must of necessity have been denied because appellant could not be denied a trial on the merits on this issue.

[15] Respondents also contend that the complaint on its face showed that the activity was governmental, even if the af-

fidavit had not been filed. They argue that the allegation that the demonstration was held "for the entertainment and education of the public" is sham and a mere conclusion of the pleader. With this contention we agree. The undisputed facts before the trial court were that the firing demonstration to which appellant attributes his injury was conducted by the California National Guard for the sole purpose of gaining recruits, was free of charge to those attending, and was in the pursuit of a governmental activity.

In view of the foregoing, the judgment of dismissal finds support in the record before us.

Judgment affirmed.

NOURSE, P. J., concurs.

DOOLING, Justice (dissenting in part).

I cannot agree with the clear implication of the majority opinion that a complaint which states a good cause of action may be dismissed because an affidavit has been filed which contradicts one of its essential allegations. Either the complaint states a cause of action or it does not. If it does state a cause of action it is a revolutionary idea, which I cannot accept, that it can be attacked by a "speaking motion" which contradicts one of its allegations. This court by its apparent holding that this can be done muddies the waters of procedure and unsettles a rule that I had believed too well settled for argument, that the allegations of a complaint which states a cause of action are invulnerable to attack except by answer and trial of the issues tendered in the ordinary way.

44 Cal.2d 816

Harry C. STEINMETZ, Petitioner,

v.

CALIFORNIA STATE BOARD OF EDUCATION, Roy E. Simpson, as State Director of Education, California State Personnel Board, Respondents.

Sac. 6530.

Supreme Court of California.

In Bank.

July 5, 1955.

Proceeding for mandamus to compel reinstatement of petitioner to position of associate professor at state college. The Supreme Court, Gibson, C. J., held that statute providing for discharge of public employee upon his failure to answer questions as to his knowing membership in Communist Party refers to employee's knowledge of membership, rather than to his knowledge of character of organization, and teacher could properly be discharged for failing to answer question as to knowing membership unless qualified by inquiry into his knowledge of character of organization.

Writ denied.

Carter, J., dissented.

Opinion, 271 P.2d 614, vacated

1. Schools and School Districts ⇨141(4)

Statute providing for discharge of public employee upon his failure to answer questions as to his knowing membership in Communist Party refers to employee's knowledge of membership, rather than to his knowledge of character of organization, and teacher could properly be discharged for failing to answer question as to knowing membership unless qualified by inquiry into his knowledge of character of organization. West's Ann.Gov.Code, § 1028.1.

2. Officers ⇨18

A governmental body may make reasonable inquiries into matters pertaining to fitness of its employees, and may inquire about employee's associates and conduct in determining his loyalty.

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3. Officers ⇨66

Where statutes provide merely for public employees' disclosure of information, on pain of discharge, it is not necessary that employee have knowledge of nature of organizations, membership in which is investigated.

4. Witnesses ⇨305(1)

Where public employee who was questioned under statute requiring disclosure of membership in subversive organizations or Communist Party did not base his refusal to answer on claim of privilege against self-incrimination, he was precluded from thereafter relying on this constitutional privilege. U.S.C.A.Const. Amend. 5; West's Ann.Const. art. 1, § 13.

5. Witnesses ⇨305(1)

A witness is required to claim the personal privilege against self-incrimination, and he waives it unless it is invoked.

6. Criminal Law ⇨393(1)**Officers** ⇨18, 66

A person may properly be required to disclose information relevant to fitness and loyalty as a reasonable condition for obtaining or retaining public employment, even though disclosure, under some circumstances, may amount to self-incrimination.

7. Officers ⇨66**Witnesses** ⇨297

A public employee cannot be forced to give an answer which may tend to incriminate him, but he may be required to choose between disclosing information and losing his employment.

8. Statutes ⇨76(4)

No general law could have been made applicable to authorize inquiry as to public employees' membership in Communist Party, and statute requiring public employees to answer questions as to knowing membership in Party was not in violation of constitutional provision prohibiting passage of special laws where a general law can be made applicable. West's Ann.Gov. Code, §§ 1028.1, 3103; West's Ann.Const. art. 4, § 25, subds. 1-33, 11.

Wirin, Rissman & Okrand, A. L. Wirin and Fred Okrand, Los Angeles, for petitioner.

Edmund G. Brown, Atty. Gen., and Richard L. Mayers, Deputy Atty. Gen., for respondents.

GIBSON, Chief Justice.

Petitioner was dismissed from his position as an associate professor at San Diego State College because of his refusal, at a hearing before the State Board of Education, to answer two questions as to whether he was or had been a member of the Communist Party, and he seeks a writ of mandate to compel his reinstatement.

The state board acted pursuant to section 1028.1 of the Government Code, which is part of a statute commonly known as the Luckel Act. Section 1028.1 provides that it shall be the duty of any public employee, when ordered to do so, to appear before the governing body of the state or local agency by which he is employed and to answer under oath questions relating to:

"(a) Present personal advocacy by the employee of the forceful or violent overthrow of the Government of the United States or of any state.

"(b) Present knowing membership in any organization now advocating the forceful or violent overthrow of the Government of the United States or of any state.

"(c) Past knowing membership at any time since September 10, 1948, in any organization which, to the knowledge of such employee, during the time of the employee's membership advocated the forceful or violent overthrow of the Government of the United States or of any state.

"(d) Questions as to present knowing membership of such employee in the Communist Party or as to past knowing membership in the Communist Party at any time since September 10, 1948."

The section further provides that "Any employee who fails or refuses to appear or to answer under oath on any ground whatsoever any such questions so pro-

pounded shall be guilty of insubordination and guilty of violating this section and shall be suspended and dismissed from his employment in the manner provided by law."

At the hearing petitioner was examined by William Blair, president of the State Board of Education, as follows:

"Mr. Blair: * * * Are you knowingly a member of the Communist Party?

"Dr. Steinmetz: Mr. Chairman. I am sorry, but I find it necessary to refuse to answer this question as I would if you asked me if I were a member of any other party because I do not believe that there is authority in the act under which you are proceeding for asking such a question.

"Mr. Blair: * * * Have you at any time since September 10, 1948, knowingly been a member of the Communist Party?

"Dr. Steinmetz: In all good conscience I must give you exactly the same answer now that I gave you a moment ago, sir.

"Mr. Blair: That is, that you decline to answer.

"Dr. Steinmetz: Yes, sir.

"Mr. Blair: * * * Do you know whether or not the Communist Party advocates the forceful or violent overthrow of the government of the United States or of any state?

* * * * *

"Dr. Steinmetz: Mr. Blair, I have no such knowledge.

* * * * *

"Mr. Blair: Have you at any time since September 10, 1948, to and including today, knowingly been a member of the Communist Party when, to your knowledge, it advocated the forceful or violent overthrow of the government of the United States or of any state?

"Dr. Steinmetz: Mr. Blair. I have in part answered this question when I disclaimed knowledge. I should like further to answer it by saying that I

have never in my life, now, in the past, and so long as I would be a state employee, would never belong to an organization that advocated force and violence against the United States, this state, or any subdivision thereof. I took an oath, the Levering Act oath, and signed it honestly, * * *. [Here petitioner recited in substance, the Levering oath, Gov.Code, § 3103.]

"Mr. Blair: That was intended to be an answer to the question 'Have you at any time since September 10, 1948, to and including today, knowingly been a member of the Communist Party when to your knowledge it advocated the forceful or violent overthrow of the government of the United States or of any state?' What would be your answer directly to that question, Dr. Steinmetz?"

"Dr. Steinmetz: Mr. Blair, in part I answered that when I disclaimed knowledge, and in further part I have just answered it by reaffirming the Levering Act oath.

"Mr. Blair: I have repeated the question and I would feel obliged to direct you to answer it 'yes' or 'no' or 'I refuse to answer.' After that you may explain your answer, if you have not already explained it.

* * * * *

"Dr. Steinmetz: May I say that I have answered a question with regard to membership by saying that I would not answer any question with regard to membership, and that was very straightforward, and I have answered a question with regard to knowledge by disclaiming that I had the knowledge, and I have answered a question with regard to advocacy with an emphatic 'No.'

"Mr. Blair: Your 'no' applies to what part of the question?"

"Dr. Steinmetz: To my advocacy, and to my knowledge, and to membership with knowledge.

"Mr. Blair: These questions were all framed in the belief that they could be in all fairness answered 'yes' or 'no.'

"Dr. Steinmetz: You consider a question like that fair, Mr. Blair?"

"Mr. Blair: It seems that it simply wishes to inquire whether you have knowingly been a member of the Communist Party when to your knowledge it advocated the forceful and violent overthrow of the government. Now can you answer that by—you can answer that by 'yes' or 'no' or by refusal to answer it. If you take objection to the form of it you can refuse to answer.

"Dr. Steinmetz: Under protest in principle on account of my belief with my attorney that this is a duplicitous question, pressed as I feel I am, I answer it then 'no.'

"Mr. Blair: * * * Do you presently advocate the forceful or violent overthrow of the government of the United States or of the government of any state of the United States?"

"Dr. Steinmetz: Mr. Blair, as a teacher and a free American, I trust, who distinguishes between incitement and advocacy, I like no question pertaining to advocacy, but I have already answered it 'no,' and therefore, of course, answer it the same way now.

"Mr. Blair: * * * Are you knowingly a member of any organization which to your knowledge now advocates the forceful or violent overthrow of the government of the United States or of the government of any state of the United States?"

"Dr. Steinmetz: No, sir. * * *

* * * * *

"Mr. Blair: Have you at any time since September 10, 1948, knowingly been a member of any organization which to your then knowledge advocated during the time of your membership the forceful or violent overthrow of the government of the United States or of the government of any state of the United States?"

* * * * *

"Dr. Steinmetz: * * * I should like to answer the last question with a very decided 'no' * * *.

The foregoing shows that, although petitioner answered questions asked under subdivisions (a), (b) and (c) of section 1028.1 relating to his personal advocacy of violent overthrow of the government and his membership in organizations advocating violent overthrow of the government, he refused to answer two questions asked under subdivision (d), namely, (1) "Are you knowingly a member of the Communist Party?" and (2) "Have you at any time since September 10, 1948, knowingly been a member of the Communist Party?" His discharge was based upon this refusal.

Petitioner argues that, in effect, he answered the questions as to whether he was knowingly a member of the Communist Party when, at a later point in the examination, he replied to the inquiry as to knowing membership in the party with knowledge of its objectives. However, he refused to answer inquiries which omitted the qualification of knowledge of the nature of the organization and were directed only to knowledge of membership. The word "knowingly" as used in the questions which he declined to answer did not refer to knowledge of the aims of the party but merely to whether he knew that he was a member, and it is clear from the record that he so understood the word at the time he refused to answer. In a memorandum submitted to the board at the beginning of the hearing, petitioner stated, "The use of the phrase 'knowing membership in the Communist Party' does not vitiate the vice of the statute. This is so because the Legislature has made it clear that the 'knowing' refers to knowing one is a member of the Party rather than as to the knowledge of the one being questioned as to the subversive nature of the Party * * *. In other words, the statute plainly states that knowledge of the improper nature of the Communist Party is not an ingredient." Petitioner also showed that he so understood the questions when he said, "I have answered a question with regard to membership by saying that I would not answer any question with regard to membership * * * and I answered a question with regard to knowledge by disclaiming that I had the knowledge * * *."

[1] Section 1028.1, considered as a whole, shows on its face that the Legislature, in using the words "knowing membership," was referring to a person's knowledge of his membership, rather than to his knowledge of the character of the organization. In subdivision (c), when the Legislature intended to specify knowledge of the nature of the organization, as well as knowledge of the fact of membership, it explicitly referred to "knowing membership" in an organization which "to the knowledge of such employee * * * advocated" violent overthrow of the government. In the next subdivision, on the other hand, when the Legislature spoke of "knowing membership" without mention of knowledge of advocacy, it obviously was referring only to the fact of membership and not to knowledge of the nature of the organization. The choice of language was clearly deliberate, and in both subdivisions the words "knowing membership" were used in the same sense of knowledge of the fact of membership. It thus was proper, under the terms of subdivision (d), to question petitioner as to the fact of membership without reference to his knowledge of the character of the organization, and the questions on this point which he refused to answer were not covered by his denials that he was knowingly a member with knowledge of the nature of the party.

[2] The statute under which petitioner was dismissed is not rendered invalid by the fact that it requires an employee to answer questions as to his membership in the Communist Party without regard to his knowledge of the nature of the party. Petitioner's discharge was not because of membership in a proscribed organization but because of his refusal to answer questions as to whether or not he held membership in the Communist Party. A governmental body may, of course, make reasonable inquiries into matters pertaining to the fitness of its employees. Loyalty on the part of those in public employment is important to orderly and dependable government and is, therefore, relevant to fitness for such employment. *Pockman v. Leonard*, 39 Cal.2d 676, 687, 249 P.2d 267. An employee's associates, as well as his

conduct, are factors which may be considered by a state agency in determining his loyalty, and information on that subject may properly be elicited from him. *Adler v. Board of Education*, 342 U.S. 485, 492-493, 72 S.Ct. 380, 385, 96 L.Ed. 517; *Pockman v. Leonard*, 39 Cal.2d 676, 685-687, 249 P.2d 267.¹ In this connection, it has been held that a public employer may constitutionally require its employees to disclose any past or present membership in the Communist Party. *Garner v. Board of Public Works*, 341 U.S. 716, 720, 71 S.Ct. 909, 912, 95 L.Ed. 1317.²

[3] Statutes, such as the one involved here, which compel disclosure of information concerning a public employee's membership in proscribed organizations, must be distinguished from those which provide for discharge or disqualification because of membership or refusal to take an oath denying membership. Under the latter type of statute, knowledge of the character of the organizations has been held essential, *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216, and the legislation has been sustained only when it expressly or impliedly required such knowledge, *Adler v. Board of Education*, 342 U.S. 485, 494, 72 S.Ct. 380, 96 L.Ed. 517; *Garner v. Board of Public Works*, 341 U.S. 716, 723-724, 71 S.Ct. 909, 95 L.Ed. 1317; *Gerende v. Board of Supervisors*, 341 U.S. 56, 57, 71 S.Ct. 565, 95 L.Ed. 745; *Pockman v. Leonard*, 39 Cal.2d 676, 685, 249 P.2d 267; *Hirschman v. County of Los Angeles*, 39 Cal.2d 698, 702, 249 P.2d 287, 250 P.2d 145. On the

other hand, where the statutes provide merely for the disclosure of information, a requirement that the employee have knowledge of the nature of the organizations is not necessary. See *Garner v. Board of Public Works*, 341 U.S. 716, 719-720, 71 S.Ct. 909, 95 L.Ed. 1317; *Adler v. Board of Education*, 342 U.S. 485, 492-493, 72 S.Ct. 380, 96 L.Ed. 517.

[4-7] Petitioner's refusal to answer was not based upon a claim of privilege against self-incrimination under the Fifth Amendment to the federal Constitution or section 13 of article I of the state Constitution, and, accordingly, he is precluded from relying on these constitutional provisions. It is settled that a witness is required to claim this privilege, that it is a purely personal privilege, solely for the benefit of the witness and that it is deemed waived unless invoked. *Rogers v. United States*, 340 U.S. 367, 370-371, 71 S.Ct. 438, 95 L.Ed. 344. Moreover, a person may properly be required to disclose information relevant to fitness and loyalty as a reasonable condition for obtaining or retaining public employment, even though the disclosure, under some circumstances, may amount to self-incrimination. *Pockman v. Leonard*, 39 Cal.2d 676, 687, 249 P.2d 267; *Christal v. Police Commission*, 33 Cal.App.2d 564, 567 et seq., 92 P.2d 416; Cf. *Garner v. Board of Public Works*, 341 U.S. 716, 719-720, 71 S.Ct. 909, 95 L.Ed. 1317; *Adler v. Board of Education*, 342 U.S. 485, 492-493, 72 S.Ct. 380, 96 L.Ed. 517. A public employee, of course, cannot be forced to give an answer which may tend

1. In the *Adler* case it was said: "One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate."

2. In the *Garner* case, after stating that the issue was whether a city "is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party", it was said: "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment."

to incriminate him, but he may be required to choose between disclosing information and losing his employment.

[8] Section 1028.1 does not violate the provision of the California Constitution which prohibits the passage of special laws in certain enumerated cases and "in all other cases where a general law can be made applicable." (See Cal.Const. art. IV, § 25, subds. 1-33.) This section does not fall within any of the enumerated categories, and, insofar as any of its provisions are specific, no general law could have been made applicable. The Legislature, desiring to authorize inquiry as to membership in the Communist Party, could do so only by naming it. The designation of that organization was not arbitrary, but was reasonably related to the purpose of the legislation, since, as we have seen, information as to membership in the party is pertinent to fitness for public employment. The case of *Communist Party of United States v. Peek*, 20 Cal.2d 536, 127 P.2d 889, is readily distinguishable. The statute there held invalid denied the Communist Party a place on the ballot, and regulation of elections is listed in the Constitution as one of the areas where a special law is prohibited. Cal.Const. art. IV, § 25, subd. 11. The basis of the decision in that case was that, in the absence of evidence, the court would be required to take judicial notice of the subversive character of the Communist Party in order to uphold the statute as reasonable and that judicial notice to that effect could not be taken under the conditions then existing.

We need not determine whether there is any merit in petitioner's attack upon another section of the Luckel Act which provides that it shall be sufficient cause for dismissal when a public employee advocates, or is knowingly a member of the Communist Party or of an organization which during the time of his membership he knows advocates, the overthrow of the government by force or violence. Gov.Code, § 1028. As we have seen, petitioner was not dismissed because of membership in any organization but because of his refusal to answer questions concerning matters which were relevant to his fitness for public employment.

The writ is denied.

SHENK, EDMONDS, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

It is my considered opinion that section 1028.1 of the Government Code of California is unconstitutional because it denies to public employees the fundamental rights and liberties guaranteed to them by the Fifth Amendment to the Constitution of the United States and article I, section 13, of the Constitution of California. Even if one should be so caught up in the hysteria of our times that he fails to perceive the intrinsic unconstitutionality of this statute, he still must recognize the fact that the decision of the majority of this court in this case is erroneous under the rules announced in many recent cases decided by this court and by the Supreme Court of the United States.

In my opinion Dr. Steinmetz was wrongfully discharged and is therefore entitled to be reinstated. This conclusion may be reached by either of two lines of reasoning: (1) That Dr. Steinmetz answered all of the questions asked of him by the board, and therefore did not violate the provisions of Government Code section 1028.1; or, (2) that Dr. Steinmetz refused to answer two of the questions put to him, but the board had no authority to ask those questions because the statute under which they acted was unconstitutional. *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216; *Pockman v. Leonard*, 39 Cal.2d 676, 249 P.2d 267; *Hirschman v. County of Los Angeles*, 39 Cal.2d 698, 249 P.2d 287, 250 P.2d 145.

The arguments opposed to the majority decision in this case are like a Roman gladiator's trident. The central point is that the statute is an abridgement of the constitutionally guaranteed privilege not to testify against oneself. The two auxiliary points are: (1) That there was no violation of the statute, or (2) that the statute is an arbitrary deprivation of due process, and is, therefore, unconstitutional under the holding in the *Wieman*, *Pockman* and *Hirschman* cases. In reaching its erroneous conclusion the majority has neces-

sarily impaled itself on one or more of these points.

The first contention made by Dr. Steinmetz in his petition for a writ of mandate is that he did not violate Government Code section 1028.1, and that his discharge for an alleged violation of that section was therefore unlawful. No contention is made that Dr. Steinmetz refused to answer any of the questions put to him except these two:

(1) "Are you knowingly a member of the Communist Party?"

(2) "Have you at any time since September 10, 1948, knowingly been a member of the Communist Party?"

The record shows that Dr. Steinmetz answered, "No" when asked: "Have you at any time since September 10, 1948, to and including today, knowingly been a member of the Communist Party when, to your knowledge, it advocated the forceful or violent overthrow of the Government of the United States?"

Dr. Steinmetz contends that the answer to this question constituted an answer to the two former questions.

It is clear either that the answer to the latter question did constitute an answer to the former questions, and that the majority opinion is incorrect in upholding his discharge; or that the State Board of Education had no authority to ask the two former questions because the statute authorizing those questions is unconstitutional. *Wieman v. Updegraff*, supra, 344 U.S. 183, 73 S.Ct. 215; *Pockman v. Leonard*, supra, 39 Cal.2d 676, 249 P.2d 267; *Hirschman v. County of Los Angeles*, supra, 39 Cal.2d 698, 249 P.2d 287, 250 P.2d 145.

The controversy centers around the meaning of the word "knowingly" as used in the statute and as used in the questions asked of Dr. Steinmetz. The majority opinion states that the word "knowingly," as used in the questions which Dr. Steinmetz purportedly refused to answer, "* * did not refer to knowledge of the aims of the party but merely to whether he knew that he was a member * * *."

Dr. Steinmetz contends that the word "knowingly" referred to knowledge of the

pernicious nature of the Communist party, and that he did, finally, answer (in the negative) the question as to membership in the party with knowledge of its nature.

In *Wieman v. Updegraff*, supra, 344 U.S. 138, 73 S.Ct. 215, the Supreme Court of the United States, by a unanimous decision held that the due process clause of the Constitution of the United States was violated by inquiries as to the membership of state employees in certain organizations, *unless such inquiries referred to membership with knowledge of the activities and purposes of the organizations to which the employees belonged*. Classification of innocent membership with knowing membership was held to be arbitrary, unreasonable and unconstitutional.

Conversely, the United States Supreme Court has held (though not unanimously) that inquiry as to membership of an employee in the Communist party, or in named subversive organizations, is permissible where expressly or assumedly the inquiry is as to membership with knowledge of the nature and purpose of the organization. *Gerende v. Board of Supervisors of Elections*, 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745; *Garner v. Board of Public Works of Los Angeles*, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317; *Adler v. Board of Education*, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517.

In ruling on the constitutionality of California's Levering Act Loyalty Oath, Govt. Code, §§ 3100-3109, this court stated: "It should be noted at the outset that the oath provisions relating to membership can reasonably be construed as referring only to affiliation with organizations *known* by the employee to belong to the proscribed class, and each clause of the oath must be interpreted as requiring knowledge of the character of any group as to which a declaration is required." *Pockman v. Leonard*, supra, 39 Cal.2d 676, 685, 249 P.2d 267, 272.

In *Hirschman v. County of Los Angeles*, supra, 39 Cal.2d 698, 249 P.2d 287, 289, 250 P.2d 145, this court held that county employees could be required to disclose membership only in those organizations "which they knew advocated overthrow of the government by force, or which to their

knowledge had been held by a court to advocate such action."

The Wieman, Gerende, Garner, Adler, Pockman and Hirschman cases were all decided and published before the passage by the California Legislature of the Luckel Act (in which is included Government Code section 1028.1). The Legislature must be assumed to have had those cases before it, and to have considered them in drafting Government Code section 1028.1. The word "knowing" as used in the statute, clearly must have been intended to mean "with knowledge of the nature and purposes of the Communist Party." If the word did bear this connotation, then Dr. Steinmetz clearly answered the disputed questions in the negative when he stated that he had not "* * *" at any time since September 10, 1948, to and including today, knowingly been a member of the Communist Party when, to [his] knowledge, it advocated the forceful or violent overthrow of the government of the United States or of any state." It follows that the majority opinion, holding that Dr. Steinmetz did not answer the two questions, is erroneous.

If the word "knowing" as used in the statute and in the questions asked of Dr. Steinmetz, and as construed by the majority opinion in this case, meant only "with knowledge that he was a member," then (1) the statute is clearly unconstitutional, *Wieman v. Updegraff*, supra, 344 U.S. 183, 73 S.Ct. 215; *Pockman v. Leonard*, supra, 39 Cal.2d 676, 249 P.2d 267; *Hirschman v. County of Los Angeles*, supra, 39 Cal.2d 698, 249 P.2d 287, 250 P.2d 145; (2) the State Board of Education had no authority to ask the questions; (3) Dr. Steinmetz was perfectly within his constitutional rights in refusing to answer the questions; and (4) the discharge of Dr. Steinmetz was wrongful.

The majority opinion concedes that knowledge of the character of the organization is essential in statutes "* * *" which provide for discharge or disqualification because of membership or refusal to take an oath denying membership." Unlike the majority, I can find no substantial distinction between those statutes and the statute here considered. For refusal under

oath to deny membership, the victim must be discharged under the terms of Government Code section 1028.1. If he does answer, and his answers indicate membership in a proscribed organization, he may be discharged under the terms of the companion section, 1028.

My position on the right of the state to inquire into the private affairs of its citizens was made clear by my dissenting opinions in *Pockman v. Leonard*, supra, 39 Cal.2d 676, 249 P.2d 267; *Hirschman v. County of Los Angeles*, supra, 39 Cal.2d 698, 249 P.2d 287, 250 P.2d 145; *Tolman v. Underhill*, 39 Cal.2d 708, 249 P.2d 280; *Bowen v. County of Los Angeles*, 39 Cal.2d 714, 249 P.2d 285; and *Fraser v. Regents of University of California*, 39 Cal.2d 717, 249 P.2d 283. I did not, at that time, believe that those cases were properly decided. I still believe that they are wrong. But right or wrong, those cases at least recognized a limit beyond which governmental inquiry into a citizen's associations and beliefs would be unreasonable. I believe that the limit set by that line of cases encroached on basic constitutional rights of the citizenry. The majority opinion in this case disregards even that limit, and broadens the trespass into constitutionally protected territory.

In the adoption of this statute, as well as the loyalty oath statute, I have no doubt as to the good intentions of the Legislature, "* * *" and I do not consider it the function of the judicial branch of the government to pass upon the wisdom of such proposals. The "* * *" question before the courts is whether the enactments contravene some provision of the fundamental law—the Constitution. This is true even though a very grave question of public policy may be involved. It is for the Legislature and not the courts to declare the public policy of the state, *providing such declaration is not in conflict with the Constitution.*" Emphasis added; *Pockman v. Leonard*, 39 Cal.2d 676, 690, 249 P.2d 267, 275, dissenting opinion. But Government Code section 1028.1 meets an even broader constitutional objection than did the loyalty oath statute considered in the *Pockman* case. Without passing upon the wisdom of

the public policy behind Government Code section 1028.1, I believe that this section is clearly a legislative abridgement of the provisions of the Fifth Amendment to the Constitution of the United States and of article I, section 13, of the Constitution of California. The section makes of the public employee a second-class citizen by denying to him, under penalty of exclusion from his means of livelihood, the right to refuse to answer questions which might tend to incriminate him—a right guaranteed to every citizen by the Constitutions of the United States and of California.

In the arguments before this court counsel for Dr. Steinmetz did not emphasize the privilege against self-incrimination. I believe, however, that the Fifth Amendment argument is implicit in this case. Even though Dr. Steinmetz's answers would not have been directly incriminating, he was entitled to rely on the protection of the Fifth Amendment, and its California counterpart, " * * * to avoid a trap for perjury set by those with sufficient influence to have him summoned. * * * " That he did invoke that privilege at the hearing, is clearly shown in the portion of his testimony which is quoted later in this opinion.

The Fifth Amendment to the Constitution of the United States provides in part that "No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * * ." This amendment was adopted in 1791. In California, at the present time, our Constitution provides, art. I, § 13, in part that "No person shall * * * be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; * * * "

The proper application of these constitutional provisions to a modern legislative enactment can best be understood by viewing them in the background of their historical development. Beginning in about the year 1236 A. D. in England, there were ecclesiastical courts which took upon themselves much of the burden of settling various disputes. It was the practice of these

courts to submit persons called before them to an "oath ex officio." If the persons summoned to appear did not do so, they were excommunicated; if they did appear they were forced to give testimony, under oath, of not only the private sins of themselves, but of others. To lawyers schooled in the common law, a system which required a person to furnish his own indictment from his own lips under oath, was repugnant to the law of the land. About 1640, the accused began to claim, and the judges to concede, that a man on trial could not be compelled to answer questions which would disclose his guilt. However, the privilege was not absolute. When a prisoner was arraigned, he was required to identify himself by holding up his right hand or by expressly admitting that he was the person charged. Then he was asked how he would plead. If he refused to plead, the penalty depended upon the grade of the offense with which he was charged. If treason or a misdemeanor, he was treated as if he had pleaded guilty; if a felony, he was confined to prison with a meager allowance of bread and water. Later, in addition to the bread and water diet, he was subjected to torture, which either killed him or induced him within a period of an hour or so, to plead either guilty or not guilty. This horrible and barbaric practice was not discontinued until 1772. At that time a statute was enacted which provided that if a person stood mute on his arraignment of piracy or felony, he should be convicted and the court should award judgment and execution as if he had been convicted by verdict or confession. In 1827, however, standing mute in any criminal case was by statute (7 & 8 Geo., IV) made the equivalent of a plea of not guilty.

This, then, was the background in brief, which led our forefathers to the firm conviction that no man should be compelled to testify against himself.

If one is asked questions about something, the logical way of looking at his refusal to answer is that he surely must know something about it or else why would he refuse to answer? In other words, it is said that the refusal to answer gives rise

to an inference of guilt of something. But the only thing which is sure is that the witness has refused to answer. There are no less than three inferences which may be drawn from such a refusal to testify: (1) That the witness is guilty; (2) that he knows something, or some fact, which might tend to incriminate him; and (3) that he refused to answer because he feels that the inquisitor has no right, or business, to ask him such questions. If we go back to the common law as it finally developed, we find that standing mute, in legal effect, pleads not guilty. How can standing mute be made the cause for punishment of a public servant when it is the legal equivalent of a plea of not guilty? A canon of our law is that it is to be interpreted reasonably in view of accepted common law procedure. We have the old common law which says, in effect, that standing mute is in legal effect a plea of not guilty. We have the present day common assumption that if the witness does not answer, he must have something to hide. And we have the constitutional provisions which say, positively, that no man shall be compelled to be a witness against himself. If he refuses to answer, is he, in effect, pleading guilty to an offense of some sort with the consequent stigma attaching? Or, is he merely standing on his constitutional right which has been guaranteed to him, and if so, should he not be relieved of any and all penalties for having claimed that right?

The privilege against self-incrimination has been characterized by Judge Cardozo, *Matter of Doyle*, 257 N.Y. 244, 177 N.E. 489, 491, 87 A.L.R. 418, as "a barrier interposed between the individual and the power of the government, a barrier interposed by the sovereign people of the state" which "neither legislators nor judges are free to overleap * * *." In the light of this definition, let us consider the inquiry authorized by the California Legislature in Government Code section 1028.1.

The section applies to all public employees. It imposes on each such employee the duty to appear and answer under oath certain questions which may be asked of him when subpoenaed by the governmental agency by which he is employed or by a

committee of the Congress of the United States or of the Legislature of California, or by any subcommittee thereof. If he refuses to answer under oath *on any ground whatsoever* any questions of the specified group, he shall be suspended and dismissed from his employment. On the other hand, if he does answer, and his answers indicate that he is a Communist or a member of other proscribed groups, he is subject to dismissal.

A public employee, who is a loyal American citizen, called before such a committee and asked questions pertaining to his membership, past or present, in the Communist party or in any organization which to his knowledge advocates or advocated during his membership the violent overthrow of the government, might refuse to answer such questions for any one of several reasons: He might have, in the past, joined many different organizations, and has since found that such organizations have been labelled subversive, or have been used as evidence in prosecutions under the Smith Act, or have been the basis of dismissals as "security risks," or have been labelled "pink" by some pseudo-patriot. While he knows that he is innocent of any wrongdoing, he fears that his former membership in various liberal movements, clubs, charities, etc., may be used against him in some way, and would therefore rather keep such information to himself. Although he may be willing to tell the investigators anything about his own participation in these organizations, he feels a sense of loyalty to his friends who had joined with him, and whom he feels are equally innocent of any wrongdoing. He does not want them to be subjected to the public censure which he has encountered because of being called before an investigating body. If he told all that he would be willing to tell about himself, he would have waived the claim of the Fifth Amendment, and could not refuse to answer other questions about his friends. It may also be true that the witness has no first-hand knowledge of the Communist party or of any other organizations which are of the proscribed type, that he has never joined any organizations of any type, that he is a completely loyal

American who believes that the recent rash of security investigations, loyalty oaths, suspicion and distrust has overstepped the boundary of individual liberty and personal security established by the framers of our state and national Constitutions. From his studies of United States history and of the Constitution, he knows that the government has no right to inquire into his private beliefs and associations unless they constitute a clear and present danger to the safety of the nation, which his beliefs and associations obviously do not. He knows that his right to freedom of speech, thought, religion and assembly may not be abridged by the Congress or by the state Legislature. He knows that he may not arbitrarily be deprived of life, liberty or property. He feels that the investigation in which he is involved is not in accord with the spirit which permeates the Constitution, and that to meekly state his innocence would be, in effect, cooperating with those who would destroy or impair the effectiveness of the Constitution and the Bill of Rights. He feels also, that if he, an obviously innocent person, opposes this invasion into his liberties, that the unconstitutional nature of the investigation and of the authority under which it is conducted will be forcefully brought home to the public, and that it will provide the courts with a clear opportunity to rule on the constitutionality of the statute on which the investigation is based. What a rude awakening it must be when this last witness finds even the courts of his state caught up in the hysteria of the times, to the extent that the statute is held constitutional, and no harm is seen in the dismissal of a loyal public servant with the implication that he is a Communist or that he has been teaching Communist doctrine in his classroom!

Since the statute requires the dismissal of any public employee who refuses to answer the stated questions, on any ground whatsoever, it is too clear to require further discussion that this statute is a legislative attempt to circumvent the Fifth Amendment to the Constitution of the United States and article I, section 13, of the Constitution of California. Since its penalty falls on the innocent as well as

the guilty, without even the formality of hearing evidence against the victim, this statute is clearly a deprivation of due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

Unhappily, there is a tendency on the part of many unthinking members of the public to believe that a witness who invokes a constitutional ground in refusing to testify, is disloyal, or is guilty of some misdoing which the investigators were trying to uncover. "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when 'each man begins to eye his neighbor as a possible enemy.' * * *

To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. * * *

Wieman v. Updegraff, supra, 344 U.S. 183, 190, 73 S.Ct. 215, 218. I believe that two statements made under oath by Dr. Steinmetz at the same hearing where he purportedly refused to answer two of the questions of the investigating board, should help those who read this opinion to determine whether Dr. Steinmetz is or is not a loyal American, and why he at first refused to answer the disputed questions.

Dr. Steinmetz first stated under oath: " * * * I should like publicly to reaffirm that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; and that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely without any mental reservation or purpose of evasion; and that I will and have well and faithfully discharged my duties. Allow me, please, to further affirm * * * that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the government of the United States or of the State

of California by force or violence or other unlawful means; that within the five years * * * preceding the present moment I have not been a member of any party or organization, political or otherwise, that advocated the overthrow of the government of the United States or of the State of California by force or violence or other unlawful means. Also, as I said, I will not advocate nor become a member of any party or organization, political or otherwise, that advocates the overthrow of the government of the United States or of the State of California. * * *

Later in the hearing, Dr. Steinmetz explained his reason for at first not answering the questions asked by the board, in these words: "I should like * * * to say that with regard to this whole business I wish to disclaim any intent at insubordination. I really deny the constitutionality of the act upon which you are depending because it seems to me to threaten my citizenship in a manner in which none of us can or should be subordinate to each other. The legislation that you have invoked is permissive and not mandatory. You have singled me out for reasons known only to yourselves as if you were exercising a bill of attainder."

"I have been a loyal employee of California since 1930. * * *

"In commenting on your authority I am * * * indebted * * * to certain political science professors at the University of California who taught a course in the United States Constitution that became required by the State Legislature of all pedagogical trainees upon the demand, I believe it was, of the American Legion in 1923. Perhaps I have an unfair advantage in this approach to the problem."

"Mr. Blair, it appears in the legislation that you and the Board are applying to me that Mr. Luckel and Mr. Dilworth have sought to provide that every public employee in California may be required individually or collectively to drop his work and appear at the summons of his superior * * * regardless of existing legal limitations on the responsibility of the superior and the duties of the employee, and to ask

the questions at any time and as often as demanded, and requiring me to answer questions regarding not acts but personal advocacies and political memberships, whether these have been clearly outlawed or not. These questions to be, according to the law, as to or pertaining to such, in the wisdom and the relevance of the occupational superior, the questions and answers to be asked and given publicly or privately as the employer wishes, regardless of charges or of no charges having been made and regardless of oaths already given, duties and responsibilities satisfactorily performed and qualifications and tenure rights. The penalty for not answering or for answering in any but one way being dismissal, even if the employee, seeking to avoid a trap for perjury set by those with sufficient influence to have him summoned in the first place, seeks to use the Bill of Rights.

"Now, ladies and gentlemen, I believe that no legislation is valid that incorporates such a transparent attempt to circumvent the Constitution. Behavior allowed by the U. S. Constitution cannot be declared illegal by a state on the grounds that it is insubordinate, particularly when the behavior is admittedly irrelevant to the duties of a subordinate. * * *

"* * * I have been summoned to interrogation of a judicial type because I am a public educator but not for anything that I have done as either an educator or a public employee. Indeed, there being no charge against me the situation is utterly paradoxical, so it should not be taking advantage if I were to demand or attempt an explanation. However, since you find none necessary I find it sufficient at the moment simply to point out this fact. * * * I am sure that all of you members believe in a government of law and not of men, and a government with a clear separation of powers as provided by the Constitution, and I am sure you have probably sworn an oath necessitating such convictions. You must then recognize that the assumption or assignment of judicial powers by or to a legislative committee, or executive agency, or policy commission such as yours is unconstitutional and, if I may add, I think in my opinion subversive to the Bill of Rights."

"The California Legislature has mistakenly authorized you to ask questions that are accusing in effect especially when directed to an individual; questions permitting of but one answer such as usually characterized police state questions; questions that as in my case are totally unnecessary if they are legal because their proper answer is already known so their only point would seem to be to coerce or entrap; questions which have already been answered; and questions which can certainly tempt the unscrupulous to destroy rather than to compete with political opposition by identifying honest dissent with disloyalty in a manner utterly intolerable to free men. Please recognize that I am attributing no motive to you save perhaps the experimental use of a new law.

"I am really questioning not your authority so much as the authority of the Legislature. Not from the standpoint of distrust in our institutions but obviously with a profound trust in our judiciary and electorate. My viewpoint is less radical than very conservative as befits the descendant of the American Revolution fully acquainted with our national traditions, I hope, and very proud of them. The present is the only part of history for which the individual may be responsible and I feel a profound responsibility for the precedent that I must set in the situation in which you have placed me. I believe that freedom from the political inquisition demeaning public confession and patronizing absolutism is necessary for general education, a free press, an instructive and inspiring literature in art, and every other manifestation of culture in America. In these days of vaunted political regard for freedom in the Western World I contend that property rights as well as civil rights are jeopardized by its sacrifice. If I can be arbitrarily summoned for public humiliation and told by the act under which you are proceeding that I cannot use the Bill of Rights to avoid jeopardy from political enemies then no man is safe from those in temporary power, indeed then no secret will be safe and political power may cease to be temporary and become totalitarian.

No self-respecting citizen can find satisfaction in work for any employer, public or private, who can hold him under constant threat for political dissent. Public employment ceases to be either right or privilege or duty an obligation under such circumstances. * * * [I]t is really the vicious permissiveness of the law that threatens. And I oppose that in principle and shall continue to oppose it if it is necessary until the Supreme Court passes upon it. * * *

One must be indeed naive if he cannot see the parallel between the situation of Dr. Steinmetz before this investigating board, and the witness called before the ecclesiastical court or Star Chamber in England in the 15th, 16th or 17th centuries. The very evils which prompted an early Congress to add to our Constitution the protection of the Bill of Rights are now being revisited upon us by a statute which purports to protect our constitutional form of government.

Other arguments which are raised by Dr. Steinmetz in his petition, and which I believe are meritorious, are (1) that the Luckel Act, Govt. Code, §§ 1027.5, 1028 and 1028.1, is special legislation which contravenes article I, section 11, and article IV, section 25(33), of the California Constitution; the Fourteenth Amendment to the United States Constitution; and this court's opinion in *Communist Party of United States v. Peek*, 20 Cal.2d 536, 127 P.2d 889, see, also, *In re Campbell*, 64 Cal.App. 300, 221 P. 952; (2) that the Luckel Act is, in essence, a bill of attainder, *Garner v. Board of Public Works of Los Angeles*, supra, 341 U.S. 716, 722, 71 S.Ct. 909; *Cummings v. State of Missouri*, 4 Wall. 277, 18 L.Ed. 356; *Ex parte Garland*, 4 Wall. 333, 18 L.Ed. 366; (3) that the Luckel Act offends against the principle of separation of powers, art. III, § 1, and art. VI, § 1, of the California Constitution.

In the recent case of *Daniman et al. (Slochower) v. Board of Higher Education of City of New York* reported at 306 N.Y. 532, 119 N.E.2d 373, the New York Court of Appeals held constitutional a New York City Charter section which in some respects

is very similar to the statute being considered in this case. The New York City Charter section (903) directed dismissal of any city employee who should refuse to testify in any authorized hearing or inquiry concerning city affairs or official conduct of officers or employees of the city. Appellant Slochower, a college professor, was dismissed under the authority of this charter section when he refused to state, when asked by a Senate investigating committee, whether he had been a member of the Communist party. A majority of the highest court of the State of New York in that case, just like the majority of this court in this case, saw no infringement of the public employee's constitutional rights in the charter provision or in its application. In the Slochower case the Supreme Court of the United States has noted probable jurisdiction. 348 U.S. 935, 75 S.Ct. 356. I am confident that the Supreme Court of the United States will reverse the state court decision in the Slochower case. I feel even more strongly that the Supreme Court of the United States should reverse the erroneous decision of the majority of this court in the present case.

In summary, I dissent from the holding of the majority here because I believe (1) that Government Code section 1028.1 is an attempt by the Legislature to abridge the rights of certain citizens, guaranteed to them by the Fifth Amendment to the Constitution of the United States and by article I, section 13, of the Constitution of California; (2) that Government Code section 1028.1 as it has been construed by the majority in this case, is unconstitutional under the views expressed in the Wieman, Gerende, Garner, Adler, Pockman and Hirschman cases; and finally, (3) that if Government Code section 1028.1 should be considered constitutional, then clearly Dr. Steinmetz has not violated its provisions, since he substantially answered all of the questions asked of him by the investigating board.

I am of the opinion that the requested writ of mandate should issue, and that Dr. Steinmetz should be reinstated to his former position.

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Walter GROSS, Defendant and Appellant.
L.A. 23663.

Supreme Court of California, in Bank.

July 8, 1955.

Sexual psychopathy proceedings. The Superior Court of Los Angeles County, Harold W. Schweitzer, J., entered order denying defendant's motion to correct and amend transcript which was to be used on his appeal from order that he was still a sexual psychopath. Defendant appealed. The Supreme Court, Gibson, C. J., held that such order was not appealable.

Appeal dismissed.

1. Mental Health $\S$ 444

Sexual psychopathy proceedings are not criminal actions but special proceedings of a civil nature. Welfare and Institutions Code, $\S$ 5500 et seq., 5519.

2. Mental Health $\S$ 449

Original order of commitment as sexual psychopath is appealable as final judgment in special statutory proceeding and subsequent orders redetermining condition are appealable as special orders after final judgment. Welfare and Institutions Code, $\S$ 5500 et seq., 5519; West's Ann.Code Civ. Proc. $\S$ 963, subd. 2.

3. Appeal and Error $\S$ 82(1)

Orders after final judgment are not appealable unless they affect the judgment in some manner or bear some relation to its enforcement. West's Ann.Code Civ. Proc., $\S$ 963, subd. 2.

4. Mental Health $\S$ 449

Where Superior Court found that defendant was still a sexual psychopath and ordered him to be returned to a state mental hospital and defendant appealed from that order which was still pending and subsequently defendant's motion to correct and amend the transcript on appeal was denied, no appeal could be taken from

order denying such motion. Welfare and Institutions Code, §§ 5500 et seq., 5519; West's Ann.Code Civ.Proc. § 963, subd. 2.

5. Mental Health ☞449

If record on appeal from order determining that defendant was still a sexual psychopath was deficient in any respect, defendant could apply to District Court of Appeal for augmentation. West's Ann. Rules on Appeal, rules 8, 12; Welfare and Institutions Code, §§ 5500 et seq., 5519.

Walter Gross, in pro. per., and Harry C. Cogen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

The People have moved to dismiss defendant's appeal from an order denying his motion to correct and amend a clerk's transcript.

Defendant was adjudged a sexual psychopath in 1948 in proceedings brought under section 5500 et seq. of the Welfare and Institutions Code. He applied to the superior court for redetermination of his condition pursuant to section 5519, and on December 15, 1952, in accord with the reports of medical experts, the court found that he was still a sexual psychopath and ordered him to be returned to a state mental hospital.¹ Defendant appealed from that order, and his appeal is still pending in the District Court of Appeal. We ordered transcripts to be furnished at public expense for use on that appeal. Gross v. Superior Court, 42 Cal.2d 816, 270 P.2d 1025. After a record was prepared, defendant made a motion in the trial court to correct and amend the transcript by striking out certain statements and substituting others. The present appeal is from an order denying that motion.

1. Section 5519 of the Welfare and Institutions Code provides in effect that when a person has been confined in a state hospital as a sexual psychopath for at least six months the court, on its own motion or on motion by or on behalf of the person committed, may require

[1-5] The principal question is whether an appeal lies from the order refusing to correct and amend the transcript. Sexual psychopathy proceedings are not criminal actions but special proceedings of a civil nature. An original order of commitment as a sexual psychopath is appealable as a final judgment in a special proceeding under section 963 of the Code of Civil Procedure, and subsequent orders redetermining his condition made under section 5519 are appealable under subdivision 2 of section 963 as special orders after final judgment. Gross v. Superior Court, 42 Cal.2d 816, 820-821, 270 P.2d 1025; see People v. Bachman, 130 Cal.App.2d 445, 279 P.2d 77. However, an order after final judgment is not appealable unless it affects the judgment in some manner or bears some relation to its enforcement. Imperial Beverage Co. v. Superior Court, 24 Cal.2d 627, 632, 150 P.2d 881; Williams v. Superior Court, 14 Cal.2d 656, 666, 96 P.2d 334; McCord Co. v. Plotnick, 104 Cal.App.2d 495, 496, 231 P.2d 880. The trial court, in rejecting the proposed corrections, apparently treated the motion as a request for correction of the transcript under rule 8 of the Rules on Appeal. In an analogous situation, where the trial court denied a motion to amend a reporter's transcript by striking out certain words in the answer of a witness and inserting others, it was held that the order was not appealable as a special order after final judgment since it did not affect the judgment or its enforcement. McCord v. Plotnick, 104 Cal. App.2d 495, 496, 231 P.2d 880. Similarly, in Cross v. Tustin, 37 Cal.2d 821, 825-826, 236 P.2d 142, orders denying motions to vacate and amend a settled statement of oral proceedings were held nonappealable. It is clear that no appeal lies from the order under consideration here. If, however, the record is deficient in any respect, defendant may apply to the District Court of Appeal

the hospital superintendent to forward a report and recommendation concerning such person, and the court may order the person returned for a hearing, and after a hearing, if such person has not recovered, he may be recommitted.

for augmentation under rule 12 of the Rules on Appeal.

The appeal is dismissed.

SHENK, CARTER, TRAYNOR, and SCHAUER, JJ., concur.



44 Cal.2d 853

PACIFIC FINANCE CORPORATION,
Plaintiff and Respondent,
v.

Alvis Harrison FOUST, Charles A. Huffman, and Alvis Harrison Foust, Charles A. Huffman and William J. Fulwiler dba Universal Motors, a copartnership, Defendants and Appellants.

L. A. 23273.

Supreme Court of California, in Bank.
July 8, 1955.

Action by finance company against record owners of certain automobiles to quiet title, as between the parties only, to the automobiles, which had been left by record owners with used car dealer for sale to third parties under conditional sales agreements, but for which dealer had not, after making sales financed by finance company remitted to record owners agreed amount and, therefore, had not received the certificates of ownership for such automobiles. The Superior Court, Ventura County, Walter J. Fourt, J., entered judgment for finance company, and record owners appealed. The Supreme Court, Spence, J., held that loss would have to fall upon record owners, rather than finance company, despite Vehicle Code provisions regulating transfer of ownership of automobiles, in view of fact that record owners were negligent in their dealings with dealer.

Judgment affirmed.

Opinion, 279 P.2d 1030, vacated.

1. Factors ⚡66

In action by finance company against record owners of certain automobiles to

quiet title, as between the parties only, to the automobile, which had been left by record owners with used car dealer for sale to third parties under conditional sale agreements, but for which dealer had not, after making sales finance by finance company, remitted to record owners amount agreed upon and therefore had not received the certificates of ownership for such automobile, evidence established that dealer was record owners' factor. West's Ann.Civ. Code, §§ 2026, 2369.

2. Factors ⚡1, 53

Used car dealer is a "factor" within definition contained in the Civil Code when automobile owner puts automobile in dealer's possession to be sold, and, as such, dealer has ostensible authority to deal in the property of his principal as his own in transactions with persons not having notice of the actual ownership. West's Ann.Civ. Code, §§ 2026, 2369.

See publication Words and Phrases, for other judicial constructions and definitions of "Factor".

3. Factors ⚡53

In absence of restrictions, factor, who sells goods entrusted to his possession for that purpose, has implied power to receive payment and to give a receipt in discharge to the purchaser, and payment to the factor is binding upon principal, even though factor misappropriates the funds. West's Ann. Civ.Code, §§ 2026, 2369.

4. Factors ⚡53

Where finance company dealt with used car dealer as ostensible owner of certain automobiles and paid dealer for such automobiles without any notice of interest of record owners of such automobiles or any facts which would put finance company on inquiry, such payment was binding upon record owners, since dealer was record owners' factor. West's Ann.Civ.Code, §§ 2026, 2369.

5. Estoppel ⚡107, 110, 114

Ordinarily, an estoppel should be pleaded.

6. Pleading ⚡428(7)

Where evidence upon which court based its findings on the estoppel theory was admitted without objection, and such issue

was fully litigated by parties, any defect in pleading estoppel was waived.

7. Factors ⇐53

Where record owners of certain automobiles left the automobiles with used car dealer for sale to third parties under conditional sales agreements, but dealer, who thereafter became insolvent, failed, after making sales financed by finance company, to remit to record owners amount agreed upon, loss would have to fall upon record owners, rather than finance company, despite Vehicle Code provisions regulating transfer of ownership of automobiles, in view of fact that record owners were negligent in their dealings with dealer. Vehicle Code, § 186; West's Ann.Civ.Code, § 3543.

William T. Selby and Glenn C. Garman, Ventura, for appellants.

Hugh M. Foster, Jr., Ivan C. Tagert, Mansfield A. Mills, Los Angeles, William A. Reppy and F. Gile Tiffany, Jr., Oxnard, for respondent.

SPENCE, Justice.

Plaintiff sought to quiet its title to ten used automobiles. The cars had been delivered by defendants to a used car dealer for sale. The basic questions were whether said dealer was a factor in the transaction, and whether an estoppel operated in plaintiff's favor. The trial court found for plaintiff on both issues. From the judgment accordingly entered, defendants appeal, contending in the main that the evidence does not sustain the findings. However, viewing the record in the light most favorable to plaintiff, and indulging every inference in its favor in determining whether there is substantial evidence in support of the challenged findings, 4 Cal.Jur.2d § 606, p. 485; Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183; Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689, defendants cannot prevail.

Defendant Universal Motors, a copartnership composed of defendants Foust, Huffman, and Fulwiler, delivered the ten used cars to a used car dealer, Lonnie's Used Cars. The cars were to be placed on Lonnie's lot and displayed for sale. It was

agreed that when the cars were sold, Lonnie's was to remit to Universal a certain amount for each car, and any sum in excess of that amount was Lonnie's profit. When Lonnie's took delivery of each car, it signed a memorandum identifying the car by number and also providing, in part, as follows: "It is understood and agreed that the title of ownership does not pass to me (Lonnie's) until the final cash payment is made." This, however, was not the entire agreement. The trial court found that the agreement, partly oral and partly in writing, also included the understanding that Lonnie's could sell the automobiles consigned to it in the regular course of business on credit pursuant to conditional sales contracts and could assign the contracts. Universal retained the certificates of ownership (the pink slips) on the ten cars.

Lonnie's sold the ten cars but did not pay Universal for them, and finally became insolvent. Each car had been sold to an individual buyer on a conditional sales contract, naming Lonnie's as seller. Lonnie's then assigned the contracts to plaintiff, Pacific Finance Company, and the latter paid to Lonnie's that part of the purchase price which the buyer had borrowed, less a time-price differential. At the same time, Lonnie's executed a document called "In Lieu of Pink," whereby Lonnie's agreed to furnish the pink slip for each car, showing ownership in plaintiff, when issued by the Department of Motor Vehicles. It appears that this was customary practice in the used car business because it usually took three or three and one-half months to get pink slips through the Department. Neither the individual buyers nor plaintiff, the finance company, then knew of Universal's interest in the cars.

When Pacific Finance learned that Universal claimed ownership of the cars, it brought this action to quiet title. At the trial it was stipulated that this action was not intended to affect the interests of the individual buyers of the cars; and that the controversy was between Universal and Pacific Finance only. The trial court found, among other things, that it was the intention of the agreement between Universal and Lonnie's to create a consignment or factorage with respect to the cars in ques-

tion; that Universal gave to Lonnie's authority to sell the cars on conditional sales contracts and to assign those contracts to financing agencies like Pacific; and that in addition to these ten cars, Universal and Lonnie's for a number of months had followed the same method of selling and financing other cars through conditional sales contracts assigned to Pacific. It was further found that prior to making its arrangements with Lonnie's, Pacific Finance had investigated Lonnie's financial status and inspected the cars then at Lonnie's lot for sale, and from time to time Pacific received and checked supplementary inventories of the cars to be sold by Lonnie's; that having established a "line of business" with Lonnie's, Pacific was entitled to rely on the customs of the trade whereby the used car dealer attended to re-issuance of the certificates of ownership showing the conditional buyer as the registered owner and the financing agency as the legal owner of the car; that Universal made no check on the disposition of the cars given to Lonnie's to sell, nor did Universal instruct Lonnie's to disclose Universal's interest in the cars; that Pacific used reasonable care in its dealings with Lonnie's, but Universal was negligent in its arrangements with Lonnie's insofar as making possible any loss suffered with respect to the cars. Judgment therefore was entered for plaintiff, Pacific Finance, and defendants were directed to deliver to plaintiff the certificates of ownership on the cars in question for re-issuance by the Department of Motor Vehicles so as to show Pacific Finance as legal owner.

[1] There can be no doubt as to the sufficiency of the evidence to support the findings on the factorship issue. It was stipulated at the trial that Lonnie's sold the cars in question in its regular course of business. Defendant Foust, one of Universal's partners, testified as to the business arrangements between Universal and Lonnie's: that Lonnie's was free to sell the cars in its own name as desired—for cash or credit, or finance credit sales; that Universal was not interested in how the cars were sold so long as Universal received the agreed amount from Lonnie's; that Universal would retain the pink slip

until Lonnie's paid the stipulated amount, when it would be delivered to Lonnie's for re-registration with the Department of Motor Vehicles; and that a number of cars, perhaps eighty or one hundred, had been sold by Lonnie's for Universal in that fashion. In short, Universal consigned the cars to Lonnie's and Lonnie's held them for sale, with authority to procure financing for the individual buyer through a financing agency. Plaintiff's manager testified that the first knowledge plaintiff had of Universal's interest was through a telephone conversation he had with defendant Foust in August, 1952, some three months following the time when the first conditional sales contract on these ten cars was assigned to plaintiff; that Foust at that time asked "Did you know we (Universal) had 10 cars consigned with Lonnie's and that you folks (plaintiff) have the contracts on them, but we have never been paid off"; and that he, plaintiff's manager, answered that he had previously had no such information.

[2-4] A dealer in used cars is a factor within the definition of Civil Code, section 2026, when the owner of the car puts it in the dealer's possession to be sold. *Siegel v. Bayless*, 113 Cal.App.2d 661, 663, 248 P.2d 968. As such he has "ostensible authority to deal with the property of his principal as his own, in transactions with persons not having notice of the actual ownership." Civ.Code, § 2369. From the evidence above reviewed, it could readily be inferred that Universal intended Lonnie's to be its factor, with authority to arrange for the financing of credit sales. In the absence of restrictions, a factor who sells goods entrusted to his possession for that purpose has implied power to receive payment, and to give a receipt and discharge to the purchaser, and a payment to the factor is binding on the principal, although the factor misappropriates the funds. 35 C.J.S., Factors, § 12, p. 407. Such principles were applied in *Kenny v. Christianson*, 200 Cal. 419, 253 P. 715, 50 A.L.R. 1297, and *Siegel v. Bayless*, supra, 113 Cal.App.2d 661, 248 P.2d 968, in each of which cases the purchaser paid the factor, who absconded with the money, and

the original owner unavailingly sought to recover possession of the automobile from the purchaser. The same principle should apply here, for plaintiff, though a finance company dealing with Lonnie's as the ostensible owner of the cars, paid Lonnie's without any notice of Universal's interest or of any facts which would put plaintiff on inquiry.

Defendants contend that title to the cars was in Universal until divested in some manner, and that by the terms of the Vehicle Code the only way in which title could have been transferred was by endorsement and delivery of the pink slips. § 186. To this point, defendants argue that plaintiff, before it paid Lonnie's, should have insisted on Lonnie's producing the pink slips evidencing ownership of the cars; that if such inquiry had been made, Universal's interest would have been revealed; and that plaintiff should therefore bear the loss which its own negligence produced. But under the particular circumstances here involved, Universal is estopped to rely on the registration requirements of the Vehicle Code. Universal's conduct in turning over the cars to Lonnie's, letting them remain on Lonnie's lot for sale in Lonnie's regular course of business, and with no restriction as to any arrangements Lonnie's might make with a finance agency such as plaintiff, justifies an inference of negligence on Universal's part. It is likewise inferable from the evidence that in its continued course of dealing with Lonnie's, Universal knew of Lonnie's practice to sell the cars entrusted to it under conditional sales contracts and to assign such contracts for financing, and that Universal approved such procedure. In short, Universal created the situation upon which plaintiff relied and acted.

Moreover, defendant Foust admitted that Universal made no check of Lonnie's practices to see whether the cars were sold through any credit financing or whether Lonnie's had received the purchase price and had failed to remit to Universal. On the other hand, it is undisputed that plaintiff had no knowledge of Universal's interest at the time it took the conditional sales contracts on the cars in question. Nor

does it appear that plaintiff was required to make inquiry of Lonnie's for the pink slips on the cars before paying the purchase price, for plaintiff was entitled to rely on the trade custom whereby there would be a delay of three to three and one-half months in the re-issuance of pink slips by the Department of Motor Vehicles. Universal knew of this trade custom, and that a financing agency such as plaintiff might rely on that custom. Accordingly, plaintiff accepted the "in lieu of pink" document from Lonnie's on each of the cars involved, awaiting the re-issuance of the pink slip. Plaintiff's manager testified that plaintiff had set up a check system which would bring attention to the file of a particular transaction within approximately three months from the date of assignment of the conditional sales contract by a used car dealer such as Lonnie's; and that, in fact, with respect to the cars here involved, the first "check period" on the pink slips would have been due a few days *after* defendant Foust had notified plaintiff's manager of Universal's interest.

[5-7] From this set of circumstances the trial court found that Universal was negligent in its dealings with Lonnie's; that Lonnie's at no time exceeded its authority in selling the cars upon conditional sales contracts and arranging for financing through such contracts; and that plaintiff was not negligent but used reasonable care in its dealings with Lonnie's. These were all essentially questions of fact, which were resolved in plaintiff's favor upon substantial evidence. Defendants argue that plaintiff cannot rely on any element of estoppel because of its failure to plead such facts. *State Credit Corporation v. Ranger*, 101 Cal.App. 310, 314, 281 P. 663. Although it is true that an estoppel ordinarily should be pleaded, the evidence on which the court based its findings on the estoppel theory was admitted without objection, the issue was fully litigated by the parties, and any defect in pleading such matter was therefore waived. 18 Cal.Jur.2d § 13, pp. 411-412; *Foster v. Fisher*, 44 Cal. App.2d 33, 37, 111 P.2d 935. The situation here makes applicable the maxim that "Where one of two innocent persons must

suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." Civ.Code, § 3543. The loss must therefore fall upon Universal, and the trial court was justified in so concluding despite the provisions of the Vehicle Code regulating the transfer of ownership. See *Wargin v. Wargin*, 29 Cal.2d 843, 845-846, 180 P.2d 349.

The judgment is affirmed.

GIBSON, C. J., SHENK, TRAYNOR and SCHAUER, JJ., and MUSSELL, J. pro tem.



44 Cal.2d 715

The PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA
(a Corporation) et al., Appellants,
v.

F. Britton McCONNELL, as Insurance Commissioner, etc., et al., Respondents.

L. A. 23261.

Supreme Court of California, in Bank,
June 27, 1955.

Rehearing Denied July 27, 1955.

Mandamus proceeding by old insurance company and certain of its stockholders to review action of insurance commissioner approving a plan of mutualization of a new insurance company, which had been organized by commissioner as part of rehabilitation of old company. The Superior Court, Los Angeles County, Paul Nourse, J., upheld the action of the commissioner, and the plaintiffs appealed. The Supreme Court, Gibson, C. J., held that even if rehabilitation agreement entered into by insurance commissioner and court order approving agreement, authorized mutualization of new insurance company under wrong statutes, order was res judicata when there was nothing to prevent question concerning validity of rehabilitation agreement from

being litigated in proceedings which led to order approving agreement.

Judgment affirmed.

Traynor, Carter and Schauer, JJ., dissented.

Opinion, 270 P.2d 584, vacated.

1. Insurance ⇨32

Where old insolvent insurance company was taken over by insurance commissioner, who organized new insurance company as part of rehabilitation of old company, mutualization of new company, which was solvent and nondelinquent, pursuant to statutes relating to voluntary mutualization of a solvent insurer, was proper. Insurance Code, §§ 1010 et seq., 1043 et seq., 1045, 1046 et seq., 11525 et seq.

2. Insurance ⇨46

Where old insurance company was in a hazardous and insolvent condition, insurance commissioner, who had taken over business and assets of old company, had power to create a new corporation in order to preserve the business of the seized company. Insurance Code, §§ 1011, 1013.

3. Insurance ⇨32

Fact that commissioner of insurance, as sole holder of stock of new insurance company, which he had organized as part of rehabilitation of old insolvent company, consented in advance to plan of mutualization did not disqualify commissioner from passing upon fairness of mutualization plan which was promulgated. Insurance Code, § 11526(b, c).

4. Judgment ⇨646

Where rehabilitation agreement, which provided for voluntary mutualization of new insurance company, which insurance commissioner had organized as part of rehabilitation of old insolvent insurance company, had been approved by order of the superior court, validity of rehabilitation agreement was res judicata. Insurance Code, §§ 1043, 11525 et seq.

5. Judgment ⇨725(1)

Even though causes of action be different, prior determination of an issue is con-

clusive in subsequent suit between same parties as to that issue and every matter which might have been urged to sustain or defeat its determination.

6. Judgment ⇨660

A final judgment or order is *res judicata* even though contrary to statute when court has jurisdiction of the subject matter and the parties.

7. Judgment ⇨660

Even if rehabilitation agreement entered into by insurance commissioner, who organized new insurance company as part of rehabilitation of old insolvent company, and court order approving agreement, authorized mutualization of new insurance company under wrong statutes, order was nevertheless *res judicata* when there was nothing to prevent question concerning validity of rehabilitation agreement from being litigated in proceedings which led to order approving the agreement. Insurance Code, §§ 1011, 1013, 1043, 11525 et seq.

8. Insurance ⇨32

Fact that approval of shareholders to plan of mutualization of new insurance company, which was organized by insurance commissioner as part of rehabilitation of old insolvent company, was given in rehabilitation agreement by commissioner as sole stockholder of new company, did not render mutualization plan improper. Insurance Code, §§ 1037, 1043, 11525 et seq.

9. Insurance ⇨32

In absence of statutory provision to the contrary, stockholders of a solvent company can contract to consent to a future plan of voluntary mutualization.

10. Insurance ⇨10

Where approval by insurance commission of mutualization of new insurance company did not involve any deprivation of property rights or vested rights, function of superior court, in reviewing action of commissioner, was to determine whether action taken by commissioner was arbitrary or constituted an abuse of discretion, and in

upholding action of commissioner, superior court properly refused to conduct a trial *de novo*.

Joseph L. Lewinson, Frank B. Belcher, Los Angeles, C. Ray Robinson, San Francisco, Henry W. Low, Hollywood, and William B. Boone, Merced, for appellants.

C. Ray Robinson, San Francisco, and William B. Boone, Merced, as *amici curiae* on behalf of appellants.

O'Melveny & Myers, Paul Fussell, Homer I. Mitchell, James E. Cross, George B. Gose, Frank P. Doherty, Guy Knupp and Peery Price, Los Angeles, for respondents.

Lloyd W. Dinkelspiel and Heller, Ehrman, White & McAuliffe, San Francisco, as *amici curiae* on behalf of respondents.

GIBSON, Chief Justice.

The Pacific Mutual Life Insurance Company of California (hereinafter referred to as the "old company") and certain of its stockholders brought this mandamus proceeding in the superior court to review the action of the Insurance Commissioner in approving a plan for mutualization of a second corporation, Pacific Mutual Life Insurance Company (hereinafter called the "new company"), which had been organized by the commissioner as part of the rehabilitation of the old company. The court upheld the action of the commissioner, and plaintiffs have appealed from the judgment.

In 1936 the old company was in a hazardous and insolvent condition within the meaning of the Insurance Code, and its business and assets were taken over by the Insurance Commissioner,¹ as authorized by statute. Ins. Code, §§ 1011, 1013. Pursuant to section 1043 of the code, a rehabilitation agreement was entered into between the new company and Commissioner Carpenter, as conservator of the old company, whereby most of its assets were transferred to the new company in exchange for all the new company's capital stock. The stock was to be held by the commissioner as conservator for the benefit of the creditors, policyholders and stockholders of the old

1. Six successive commissioners, Messrs. Carpenter, Goodcell, Caminetti, Garrison, Downey and Maloney, have passed upon

matters relating to the insolvency of the old company.

company. The new company assumed substantially all the obligations of the old company, including a limited obligation with respect to non-cancellable accident and health policies (referred to herein as "non-can policies"), and agreed to set up a special fund for restoration of benefits to holders of those policies.

In December 1936, after a hearing, the superior court approved the rehabilitation agreement and authorized the commissioner to perform all the obligations required on his part. This order was affirmed in *Carpenter v. Pacific Mut. Life Ins. Co.*, 10 Cal. 2d 307, 74 P.2d 761. Affirmed in *Neblett v. Carpenter*, 305 U.S. 297, 59 S.Ct. 170, 83 L.Ed. 182. In February 1937 an order was made providing for the liquidation of the old company and appointing the commissioner as liquidator. It was upheld in *Carpenter v. Pacific Mut. Life Ins. Co.*, 13 Cal.2d 306, 89 P.2d 637. In 1938 the commissioner transferred the stock of the new company to five trustees who were given legal title to the stock with power to vote it in accordance with the purposes of the rehabilitation agreement. The order approving the transfer was affirmed in *Caminetti v. Pacific Mut. Life Ins. Co.*, 22 Cal. 2d 344, 139 P.2d 908.

The rehabilitation agreement set forth the method by which a plan for mutualization of the new company could be formulated. It provided that ten per cent of the participating life policyholders could request the new company to create an appointing committee consisting of the president of the Life Insurance Association of America, the president of Stanford University and the provost of the University of California at Los Angeles. The appointing committee was directed to select a price determination committee composed of persons skilled in matters of insurance company valuation. If the price determination committee concluded that voluntary mutualization could be practicably accomplished, it was to propose a plan of mutualization in accordance with the laws of this state. By the terms of the agreement the commissioner, as sole shareholder of the new company, consented in ad-

vance to the plan of mutualization to be formulated.

A price determination committee was appointed, consisting of Alva J. McAndless, president of the Lincoln National Life Insurance Company of Fort Wayne, Indiana; Horace R. Bassford, vice president and chief actuary of the Metropolitan Life Insurance Company of New York; Ray D. Murphy, vice president and chief actuary of the Equitable Life Assurance Society of New York; and Albert J. Hettinger, a partner in Lazard Freres & Company, a firm engaged in investment banking. After three years of study the committee proposed a plan of mutualization, which provides that, upon the occurrence of certain conditions, the new company shall buy all of its own capital stock for \$3,000,000, plus interest from December 31, 1948, the price to be augmented should the restoration of benefits under the non-can policies be completed before 1973.

The proposed plan of mutualization was adopted by the directors of the new company on May 5, 1950. On September 22, 1950, after a hearing, Commissioner Downey approved the plan, finding that it would be fair and equitable in its operation, and thereafter it was approved by the policyholders of the new company. This proceeding in mandamus was then brought to review the action of the commissioner, and the trial court concluded that there was substantial evidence to support his findings and that he had not exceeded his jurisdiction or abused his discretion in approving the plan.

Plaintiffs attack the judgment upon numerous grounds, and, although many of their contentions may be disposed of by application of principles of *res judicata*, we believe that the problems may be more clearly presented by first discussing the propriety of the determination of the various points without regard to the binding effect of prior adjudications.

[1] The first problem which we must consider is whether the proper statutes were followed in the formulation and approval of the mutualization plan. As contem-

plated by the rehabilitation agreement, all steps in connection with the adoption of the plan were taken pursuant to sections 11525 et seq. of the Insurance Code, which relate to voluntary mutualization of a solvent insurer.² Plaintiffs assert that the applicable statutes for mutualization of the new company are sections 1043 et seq., which govern involuntary mutualization of an insolvent insurer.³ The essential differences in procedure are that under the sections relating to voluntary mutualization of a solvent company the plan is adopted by the directors, subject to approval by the stockholders and the commissioner, and no court proceedings are necessary; whereas under the provisions for involuntary mutualization of a seized insurer the plan is formulated by the commissioner as conservator without consent of the stockholders or directors, and it must be approved by the court.

[2] The new company is solvent and nondelinquent, and there is no sound reason why it should be mutualized under the statutes relating to insolvent insurers. The commissioner had power to create the new corporation in order to preserve the busi-

ness of the seized insurer. Section 1043, which authorizes the commissioner to enter into rehabilitation agreements, contains no express limitation on what may be included in them, and section 1037 provides that the enumeration of the powers of the commissioner shall not be construed as a limitation upon him or upon his right to do such other acts as he may deem necessary in connection with the handling of the affairs of an insolvent company.⁴ When salvaging the business of a seized insurer the greatest possible protection should be given to creditors and other interested parties, and in the present instance the commissioner evidently concluded that this objective could best be accomplished through the formation of a new company divorced as far as possible from the control of those who were in charge of the old company when it experienced financial difficulties.

The new company is a separate and distinct entity, and when the business was transferred it ceased to be the business of the old company and became the business of the new company. In *Garrison v. Pacific Mut. Life Ins. Co.*, 83 Cal.App.2d 1, 9-10,

2. Section 11525 of the Insurance Code provides: "A solvent domestic incorporated insurer having a paid-in capital represented by outstanding shares of capital stock and issuing, on a reserve basis, nonassessable policies of life insurance or of both life and disability insurance, may convert itself into an incorporated mutual life insurer, or life and disability insurer, issuing nonassessable policies on a reserve basis. To that end it may provide and carry out a plan for the acquisition of the outstanding shares of its capital stock for the benefit of its policyholders, or any class or classes of its policyholders, by complying with the requirements of this chapter."

Sections 11526-11533 contain detailed provisions relating to procedure for adoption and execution of the plan of mutualization.

3. Section 1043 of the Insurance Code provides in part: "In any proceeding under this article, the commissioner, as conservator or as liquidator, may, subject to the approval of said court, and subject to such liens as may be necessary mutualize or reinsure the business of

such person, or enter into rehabilitation agreements." The words "such person" include an insolvent insurer as referred to in sections 1010 et seq. of the Insurance Code dealing with insolvency and delinquency.

Section 1045 provides: "If at any time after the issuance of an order under section 1011 * * * it shall appear to the commissioner that the purposes of section 1011 can be best attained by the mutualization of such life insurer, the commissioner may formulate a plan for the mutualization of such insurer." Sections 1046 et seq. set for the necessary procedural steps.

4. Section 1037 of the Insurance Code provides in part: "The enumeration, in this article, of the duties, powers and authority of the commissioner in proceedings under this article shall not be construed as a limitation upon the commissioner, nor shall it exclude in any manner his right to perform and to do such other acts not herein specifically enumerated, or otherwise provided for, which he may deem necessary or expedient for the accomplishment or in aid of the purpose of such proceedings."

187 P.2d 893, 899, it was held that the identity of the new company "is utterly distinct from that of old company," that it "cannot be fairly said that it is a continuance of old company", and that the new company "is a separate entity that came into being after old company's insolvency was declared * * *." The fact that the new company may for some purposes have served as an agent or instrumentality of the commissioner does not destroy its identity as a separate company. Accordingly, as contemplated by the rehabilitation agreement, the applicable statutory provisions for mutualization of the new company are those found in sections 11525 et seq., which govern voluntary mutualization of solvent nondelinquent insurers.

[3] Plaintiffs nevertheless contend that it was improper to follow the procedure set up in the code for mutualization of a solvent company because, they assert, the commissioner in doing so was forced to act in a dual capacity with conflicting interests. Section 11526, which prescribes the method to be followed in mutualizing a solvent insurer, provides that the plan shall be: " * * * (b) Approved by the vote of the holders of at least a majority of the outstanding shares at a special meeting of shareholders called for that purpose, or by the written consent of such shareholders. (c) Submitted to the commissioner and approved by him in writing." Commissioner Carpenter as the sole holder of the stock of the new company consented in advance to the plan of mutualization, and Commissioner Downey approved it after holding a hearing to ascertain if the plan would be fair and equitable in its operation. Plaintiffs claim that the responsibilities of the commissioner under subdivision (c) are different from and may conflict with his duties under subdivision (b). Even if there might be such a conflict under some circumstances, it would not follow that it was improper to adopt the statutory procedure set forth for the mutualization of a solvent company. The legislative scheme for the mutualization of solvent nondelinquent insurers would in some instances be defeated if the commissioner were disqualified for the reasons urged by plaintiffs, and it must

be assumed that the Legislature realized that the commissioner might be required to pass upon the fairness of a plan in a case where he, acting as conservator, had previously consented to mutualization on behalf of the stockholders. In numerous cases where the action of an administrative officer was necessary to prevent defeat of the statutory scheme, his participation has been upheld although the grounds for disqualification were much more serious than those raised here. For example, see *Thompson v. City of Long Beach*, 41 Cal.2d 235, 243-244, 259 P.2d 649; *Caminetti v. Pacific Mut. Life Ins. Co.*, 22 Cal.2d 344, 365-366, 139 P.2d 908; *Federal Construction Co. v. Curd*, 179 Cal. 489, 493-495, 177 P. 469, 2 A.L.R. 1202; *Scannell v. Wolff*, 86 Cal.App.2d 489, 492-493, 195 P.2d 536; *Nider v. Homan*, 32 Cal.App.2d 11, 13, 89 P.2d 136. The fact that Commissioner Carpenter gave advance consent on behalf of the stockholders to a plan of mutualization did not disqualify Commissioner Downey from passing upon the fairness of the mutualization plan which was promulgated.

[4] An alternative reason for rejecting plaintiffs' claim that it was improper to follow the procedure set forth in sections 11525 et seq. in the mutualization of the new company is that the validity of the rehabilitation agreement, which provided for voluntary mutualization, is now *res judicata*. A copy of the agreement was attached to and made a part of the petition which sought approval of the agreement. The petition was filed pursuant to section 1043, which provides that rehabilitation agreements entered into by the commissioner are subject to the approval of the superior court. The validity of all the provisions of the agreement was put in issue by the petition and determined by the court. The order of December 4, 1936, approved the agreement "and each and all of the terms and conditions thereof, and the plan therein embodied," reciting that all interested parties had been given a reasonable opportunity to be heard on "the question of fairness, justice, equity, feasibility, and propriety" of the agreement and the plan. All parties were forever enjoined from making any complaint with respect to the

agreement or any provisions thereof. This order was affirmed in *Carpenter v. Pacific Mut. Life Ins. Co.*, 10 Cal.2d 307, 74 P.2d 761. See also *Carpenter v. Pacific Mut. Life Ins. Co.*, 13 Cal.2d 306, 314-316, 89 P.2d 637; *Caminetti v. Pacific Mut. Life Ins. Co.*, 22 Cal.2d 344, 351-352, 139 P.2d 908.

[5] While different causes of action were involved in the present proceeding and the one leading to the order approving the rehabilitation agreement, the parties were the same, and it is settled that even though the causes of action be different, the prior determination of an issue is conclusive in a subsequent suit between the same parties as to that issue and every matter which might have been urged to sustain or defeat its determination. *Shore v. Shore*, 43 Cal. 2d 677, 277 P.2d 4; *Krier v. Krier*, 28 Cal. 2d 841, 843, 172 P.2d 681; *De Hart v. Allen*, 26 Cal.2d 829, 831, 161 P.2d 453; *In re Estate of Keet*, 15 Cal.2d 328, 334, 100 P.2d 1045; *Sutphin v. Speik*, 15 Cal.2d 195, 201 et seq., 99 P.2d 652, 101 P.2d 497; *Caminetti v. Board of Trustees*, 1 Cal.2d 354, 356, 34 P.2d 1021; *Price v. Sixth District Agricultural Ass'n*, 201 Cal. 502, 510 et seq., 258 P. 387. Inconsistent language found in certain opinions of the District Court of Appeal must be disapproved. *Green v. Green*, 66 Cal.App.2d 50, 59, 151 P.2d 679; *Babcock v. Babcock*, 63 Cal.App. 2d 94, 97, 146 P.2d 279; *Bank of America Nat. Trust & Savings Ass'n v. McLaughlin*, 22 Cal.App.2d 411, 417, 71 P.2d 291, 72 P.2d 554. The basic issue before the court when the agreement was submitted for approval was the propriety of each of its provisions, and the determination of that issue is conclusive as to every matter which might have been urged to sustain or defeat its determination.

It is contended that the order approving the rehabilitation agreement may be collaterally attacked upon the theory that the mutualization procedure provided for in the agreement followed the wrong statutory provisions and that therefore the order is void. For the purpose of passing upon this question we shall assume, contrary to what we have just decided, that the wrong

statutes were used in the mutualization of the new company.

[6] It is the general rule that a final judgment or order is *res judicata* even though contrary to statute where the court has jurisdiction in the fundamental sense, i. e., of the subject matter and the parties. In the consideration of problems arising in this field it should be kept in mind that there is a difference between lack of jurisdiction in the fundamental sense, which is ordinarily essential for collateral attack, and the broader meaning of the term "lack of jurisdiction" when used in determining the availability of prohibition or certiorari to review an order or judgment. Some cases involving collateral attack have unfortunately failed to recognize this distinction. For discussion of the distinction, see *Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 287-291, 109 P.2d 942, 132 A. L.R. 715; *Tide Water Assoc. Oil Co. v. Superior Court*, 43 Cal.2d 815, 279 P.2d 35.

In some instances the requirements of a statute may relate to subject matter jurisdiction, and disregard of the statute may render a judgment void and subject to collateral attack. See, for example, *Grannis v. Superior Court*, 146 Cal. 245, 254-255, 79 P. 891; cf. *Rogers v. Cady*, 104 Cal. 288, 291-292, 38 P. 81 (constitutional provision). In the present case, however, it is clear that the court which approved the rehabilitation agreement had jurisdiction of the subject matter and the parties, and, unless the case comes within some exception, collateral attack cannot be based on the ground that the court authorized mutualization to proceed under the wrong statute.

Closely analogous to the problem involved here are cases holding that probate decrees are *res judicata*, although they direct distribution pursuant to wills which are contrary to statute, since the court sitting in probate, like a court passing upon a rehabilitation agreement, is under a duty to determine the validity of the instrument before it. *In re Estate of Loring*, 29 Cal. 2d 423, 427 et seq., 175 P.2d 524; *Crew v. Pratt*, 119 Cal. 139, 147 et seq., 51 P. 38; *In re Estate of Gardiner*, 45 Cal.App.

2d 559, 562 et seq., 114 P.2d 643; *McGavin v. San Francisco P.O.A. Soc.*, 34 Cal.App. 168, 170 et seq., 167 P. 182. Similarly analogous are cases holding that an order settling a trustee's account is res judicata as to the propriety of the purchase of investment certificates which were issued contrary to statute. *Willson v. Security-First Nat. Bank*, 21 Cal.2d 705, 134 P.2d 800; *In re Estate of Crane*, 73 Cal. App.2d 93, 165 P.2d 940; cf. *Fergodo v. Donohue*, 40 Cal.App. 670, 181 P. 819. *In re Estate of Rowe*, 66 Cal.App.2d 594, 152 P.2d 765, which is contrary to the cases cited above, is disapproved.

The principle of res judicata has also been applied as a basis for holding that judgments enforcing contracts are a bar to the defense of illegality in subsequent litigation. *Andrews v. Reidy*, 7 Cal.2d 366, 60 P.2d 832; *De Hart v. Allen*, 49 Cal.App. 2d 639, 646, 122 P.2d 273, approved in *De Hart v. Allen*, 26 Cal.2d 829, 830-831, 161 P.2d 453; cf. *Short v. Short*, 106 Cal.App. 210, 215, 288 P. 1111. Another instance in which the doctrine was applied is *San Diego Trust & Sav. Bank v. Young*, 19 Cal.2d 98, 119 P.2d 133, where the prior judgment reduced the time for redemption contrary to statute. The *San Diego* case impliedly overruled *Anthony v. Janssen*, 183 Cal. 329, 191 P. 538, and *Tonningsen v. Odd Fellows' Cem. Ass'n*, 60 Cal.App. 568, 213 P. 710. It has also been held that a judgment, which was contrary to the Constitution because it was based upon a statute later held invalid, was nevertheless res judicata in a subsequent suit, the court stating that objections to the statute should have been raised in the prior proceeding. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376, 378, 60 S.Ct. 317, 319-320, 84 L.Ed. 329. The *Chicot* case is quoted with approval in *Mueller v. Elba Oil Co.*, 21 Cal.2d 188, 205-206, 130 P.2d 961, and was cited in *Rescue Army v. Municipal Court*, 28 Cal.2d 460, 463-464, 171 P.2d 8.

[7] There are some recognized exceptions to the general rule that collateral attack will not be allowed where there is fundamental jurisdiction even though the judgment is contrary to statute. For ex-

ample, a judgment may be collaterally attacked where unusual circumstances were present which prevented an earlier and more appropriate attack. See 1 Witkin, *California Procedure* (1954) 411-412. In *Burnett v. King*, 33 Cal.2d 805, 205 P.2d 657, 12 A.L.R.2d 333, collateral attack was permitted against a default divorce decree which awarded all the community property to the plaintiff in the absence of a prayer therefor in the complaint, contrary to the provision in section 580 of the Code of Civil Procedure that relief in a default case cannot exceed that demanded in the complaint. The defendant in the divorce action had no notice or warning that the property would be affected by a default judgment, and the opinion points out that the decision would sanction a trap if it held that his property rights had been disposed of since he would properly have assumed from the complaint that his rights to the property were not to be litigated at that time. 33 Cal.2d at page 811, 205 P.2d at page 660. The present case is readily distinguishable, since there was nothing to prevent the questions which are raised with regard to the validity of the rehabilitation agreement from being litigated in the proceedings which led to the order approving the agreement.

Proceedings to prohibit or annul judgments of contempt for violation of injunctions and other equitable orders made contrary to statute may constitute another exception to the general rule. *Harlan v. Superior Court*, 94 Cal.App.2d 902, 904-905, 211 P.2d 942; *Hunter v. Superior Court*, 36 Cal.App.2d 100, 97 P.2d 492; cf. *Fortenbury v. Superior Court*, 16 Cal.2d 405, 407-408, 106 P.2d 411 (violation of Constitution). The decisions do not use the term, but the attack in such cases might be considered to be collateral, and the proceedings apparently fall in a special category because they are penal in nature.

From the foregoing discussion it follows that, even if we assume that the rehabilitation agreement and the order approving it authorized mutualization of the new company under the wrong statutes, the order is nevertheless res judicata.

[8] The next problem is whether there was sufficient compliance with the statutory requirements for voluntary mutualization of solvent insurers. Sections 11525 et seq. provide that the plan of mutualization shall be adopted by the directors and approved by the shareholders, the commissioner and the policyholders. Plaintiffs contend that the actions taken to meet these requirements were in certain respects defective and unauthorized.

[9] The approval of the shareholders to the plan of mutualization was given in the rehabilitation agreement by Commissioner Carpenter as sole stockholder of the new company. As we have seen, the agreement provided for the formulation of a plan of mutualization by the price determination committee, and plaintiffs claim that the commissioner, acting for the shareholders of the new company, was without authority to give advance consent to such a plan. In the absence of statutory provision to the contrary, the stockholders of a solvent company can contract to consent to a future plan of voluntary mutualization, cf. *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 586-587, 42 P. 225, and no sound reason appears why such an agreement is improper merely because the shares are held by the commissioner as conservator of a seized insurer. The commissioner apparently concluded that a plan for mutualization which could not be destroyed by future action or non-action of the shareholders was necessary as a means of inducing both former and prospective policyholders to deal with the new company and thus permit its continued existence. The powers vested in the commissioner by sections 1037 and 1043 are sufficiently broad to authorize him, as sole stockholder, to give advance consent to the plan of mutualization. Moreover, the validity of all portions of the rehabilitation agreement, including the provision for advance consent, is *res judicata*.

The directors adopted the mutualization plan, but it is claimed that the action taken was ineffective because they assertedly did not obtain sufficient information to enable them to properly evaluate the desirability of the plan. They had the benefit of the report of the price determination commit-

tee and the opinions of experts, including actuaries and officers of the company, and it seems obvious that, as a practical matter, directors must ordinarily act on the advice of corporate officers and other persons who have expert knowledge. See *Ballantine & Sterling, California Corporation Laws* (1949), p. 110.

[10] After the directors adopted the plan as formulated by the price determination committee, Commissioner Downey held a hearing which lasted nearly three weeks. Oral and documentary evidence was received, and all interested parties had an opportunity to participate. The commissioner approved the plan after finding that the rights and interests of the new company, its policyholders and shareholders were protected and that the plan would be fair and equitable in its operation. Plaintiffs contend that the findings are not supported by the evidence and that there was a lack of procedural due process at the hearing. In passing upon these contentions, we shall first give consideration to plaintiffs' claim that the trial court, in reviewing the action of the commissioner, should have held a trial *de novo*. The approval of the mutualization plan by the commissioner did not involve any deprivation of property rights or vested rights; it was in essence a permit or license authorizing the new company to purchase its own stock. Under these circumstances the function of the superior court was to determine whether the action taken by the commission was arbitrary or constituted an abuse of discretion, and in upholding the action of the commissioner, it properly refused to conduct a trial *de novo*. *Southern California Jockey Club v. California Horse Racing Bd.*, 36 Cal.2d 167, 174-175, 223 P.2d 1; *McDonough v. Goodcell*, 13 Cal.2d 741, 746-749, 91 P.2d 1035, 123 A.L.R. 1205; see *Thomas v. California Emp. Stab. Comm.*, 39 Cal.2d 501, 504, 247 P.2d 561; *Andrews v. State Board of Registration*, 123 Cal.App.2d 685, 694-695, 267 P.2d 352.

There is no merit in plaintiffs' claim that the record before the commissioner does not support his approval of the plan. The price determination committee consisted of men highly skilled in matters of insurance

company valuation, and they were assisted in the formulation of the plan by Joseph Christman, associate actuary of the Metropolitan Life Insurance Company of New York, two Fellows of the Society of Actuaries and numerous trained supervisory and clerical employees. Experts testified that the price fixed for the purchase of the stock was fair, that the provisions relating to the time and manner of payment were necessary for the safety and stability of the new company, that the proposed plan gave due regard and protection to the rights of all persons interested in the new company and would be fair in its operation.

Plaintiffs' contention that there was a denial of procedural due process is based on their claim that the commissioner accepted the conclusions of the price determination committee without having before him all the facts on which those conclusions were based and that the committee itself relied on statistics furnished by its actuary without reviewing all the supporting data. Two members of the price determination committee testified in detail as to how the committee arrived at its determinations, and the actuary testified regarding his report which was introduced in evidence. Thus two of the four members of the committee who were responsible for its report, as well as the actuary who procured most of the data relied on by the committee, were available for cross-examination. These men, as we have seen, were experts in the insurance and investment fields, and the fact that the other members of the committee and the persons who assisted the actuary were not called as witnesses is immaterial, at least in the absence of a showing that plaintiffs sought to obtain their testimony. *City of Pasadena v. City of Alhambra*, 33 Cal.2d 908, 919, 207 P.2d 17. At the hearing an offer was made to furnish the documents and testimony necessary to explain every detail of the committee's work. No claim is made that any request for data was refused, and plaintiffs have no valid basis for complaint if they failed to make such a request.

The judgment is affirmed.

SHENK and SPENCE, JJ., and FRED B. WOOD, J. pro tem., concur.

TRAYNOR, Justice.

I dissent.

Although the Legislature has provided detailed statutory provisions for the mutualization of the business of an insolvent insurer, Ins. Code, § 1045 et seq., the majority opinion holds in effect that these provisions may be completely nullified by the execution of a rehabilitation agreement under section 1043 of the Insurance Code, if such agreement provides for the voluntary mutualization of a new insurer created for the purpose of carrying on the business of the old. The commissioner has broad powers in executing rehabilitation agreements, and it may be both proper and desirable for him to make use of a new corporate entity to salvage the business of an insolvent insurer. It does not follow, however, that if the end product of a rehabilitation agreement is to be the mutualization of the business of an insolvent insurer, the statutory provisions with respect to such mutualization may be ignored. To hold that they may be not only renders the provisions with respect to involuntary mutualization superfluous but deprives the interested parties of their right to the protection of court scrutiny of the plan of mutualization. See, Ins. Code, § 1051.

The importance to the shareholders of the old company of having the court independently pass upon the fairness of the plan of mutualization is demonstrated by the facts of this case. The trial court clearly indicated that had the decision been his, the plan would not have been approved; if the shareholders were entitled to his independent judgment, their rights have been prejudiced by his failure to exercise it. This case is not one involving only the mutualization of a solvent insurer, since if it were, the shareholders would have the power to protect their interests by withholding their consent to the plan of mutualization. Ins. Code, § 11526 (b). In fact, the business of an insolvent insurer is being mutualized pursuant to a rehabilitation agreement that has deprived the shareholders of the old company of the veto power they otherwise would have, and under the holding of the majority opinion they must look to the commissioner rather

than to the court for the protection of their interests. Ins. Code, §§ 11526 (c), 11527. Although the Legislature recognized that approval by the commissioner is sufficient when all of the interested parties are in a position to protect their own interests, it also provided that court approval is essential when they are not. Ins. Code, § 1051.

Despite the force of the foregoing considerations, if in fact the trial court in 1936 approved a rehabilitation agreement that not only provided for mutualization contrary to the statutory provisions but also restricted the power of that court to control the ultimate disposition of the assets in the hands of the commissioner as conservator or liquidator, I would reluctantly concur in the judgment on the ground that the validity of the agreement and order is *res judicata*. In my opinion, however, the court in 1936 did not exhaust its power to control the disposition of assets in the hands of the commissioner as conservator or liquidator, see Ins. Code, § 1037 (d), and that therefore the commissioner cannot carry out the terms of the mutualization agreement until as liquidator he has secured the permission of the court in the insolvency proceedings. Accordingly, until he secures that approval he cannot approve the plan presented by the price determination committee as "fair and equitable in its operation", Ins. Code, § 11527, for it cannot be known whether it will become operative at all until it is approved by the court in the insolvency proceedings.

Subdivision (d) of section 1037 provides "that no transaction involving real or personal property shall be made where the market value of the property involved exceeds the sum of one thousand dollars without first obtaining permission of * * * [the court in the insolvency proceedings], and then only in accordance with such terms as said court may prescribe." The stock of the new company subject to the plan of mutualization is personal property worth more than \$1,000, and that plan is clearly a transaction involving such property. This section has not been complied with unless the court in approving the rehabilitation agreement granted permission

to the commissioner to dispose of the stock under the terms of any mutualization agreement that might be proposed by the price determination committee 10 years or more in the future.

The order approving the rehabilitation agreement is ambiguous. Paragraph 15 provides:

"That the Insurance Commissioner of the State of California as Conservator of respondent corporation, or, if he should hereafter be appointed Liquidator of said corporation, as such Liquidator, be and is hereby authorized, without further order of this court, fully and faithfully to perform, carry out, and discharge each and all of the obligations, terms, conditions, and covenants on his part required to be performed under the terms of said Rehabilitation and Reinsurance Agreement; and, either with or without further order of this court, to make, do, execute, and deliver any and all such further or other acts, deeds, and things by him deemed reasonably necessary or desirable to effectuate the intents and purposes of said Rehabilitation and Reinsurance Agreement, and to assure and to confirm to Pacific Mutual Life Insurance Company, or its successors, all and singular the properties hereinbefore directed to be conveyed and released to said corporation, and to enable said corporation from and after the date hereof to conduct and continue to conduct a life and disability insurance business, as contemplated by said agreement."

Paragraph 16 provides:

"That this court, without relinquishing by these specific provisions any jurisdiction by it retained as a matter of law, do, and and it does hereby, specifically retain and reserve jurisdiction of the within proceedings (for the purpose of authorizing or approving any act of the Insurance Commissioner of the State of California done, or to be done pursuant to or in accordance with this order, and) for the purpose of making or entering, upon application of the Insurance Commissioner of the State of California or of Pacific Mutual Life Insurance Company, any order, decree, judgment, or ruling required, permitted, or

requested to be done, made, or entered in connection with or pursuant to the terms of said agreement, or for the effectuation of the purposes thereof."

Since the contemplated plan of mutualization was not to be formulated for at least ten years, the court could obviously not approve that plan at the time it entered its order approving the rehabilitation agreement. Moreover, it did not expressly approve in advance the carrying out of any mutualization plan that might be presented by the price determination committee. Although standing alone the language permitting the commissioner to carry out the rehabilitation agreement "without further order of this court" might be interpreted as exhausting the court's jurisdiction over mutualization, it may not reasonably be so interpreted in the light of the express reservation of jurisdiction "for the purpose of making * * * any order * * * required * * * in connection with or pursuant to the terms of said agreement." It is significant that in *Carpenter v. Pacific Mut. Life Ins. Co.*, 10 Cal.2d 307, 322, 74 P.2d 761, 771, this court was careful to note: "The plan also provides that the commissioner, either as conservator or liquidator, shall continue to hold all the stock of the new company as a protection to all old company policyholders. Ultimate mutualization, in the event the policyholders so elect, is also provided for. The trial court reserves jurisdiction over the entire proceeding." Paragraphs 15 and 16 may be reconciled by interpreting them as authorizing the commissioner without further order of the court to carry out the rehabilitation agreement to the extent that its provisions represented a completed plan for rehabilitation and reinsurance, and at the same time reserving to the court jurisdiction to approve or disapprove plans to be developed in the future for mutualization or other disposal of the stock in the hands of the commissioner. Such an interpretation of the order subserves the primary purpose of section 1037 (d) and the statutes governing involuntary mutualization by securing to all interested parties their right to court scrutiny of all steps in the proceedings that substantially affect their rights,

and since the order is reasonably susceptible of that interpretation it should be adopted. Although the validity of the rehabilitation agreement and the order approving it are *res judicata*, the interpretation of the order is not *res judicata*, and it should not be interpreted to sanction further departures from the statutory provisions than *res judicata* compels. See, *Watson v. Lawson*, 166 Cal. 235, 242, 135 P. 961; *Treece v. Treece*, 125 Cal.App. 726, 728, 14 P.2d 95.

The judgment should be reversed.

SCHAUER, J., concurs.

CARTER, Justice.

I dissent.

The majority opinion is a masterpiece of legal legerdemain. It approves a transaction whereby the policyholders of old company are deprived of between \$18,000,000 and \$24,000,000 to which they are entitled under any concept of law and justice. It also deprives the stockholders of old company of whatever value their stock in old company may be worth in view of the fact that the assets of old company which were transferred to new company at the time of its creation were valued in excess of over \$200,000,000. The majority concedes that new company was created in an insolvency proceeding and has always been used in said proceeding as an agency of the insurance commissioner for the purpose of rehabilitating an insolvent insurance company, and that such proceeding is still pending because rehabilitation has not been completed. It nevertheless holds that "the new company is solvent and nondelinquent," even though it owes and is obligated to pay the policyholders of old company between \$18,000,000 and \$24,000,000 which it admittedly is not financially able to pay. In approving this transaction the majority disregards express statutory provisions of this state and deprives the stockholders and policyholders of old company of their right to a judicial review of the administrative proceeding whereby they were deprived of their property, thus denying them due process of law to which they are entitled under both state and federal constitutional provisions.

The Undeniable Facts

On July 22, 1936, some 3,000 stockholders and 300,000 policyholders of The Pacific Mutual Life Insurance Company of California, hereinafter known as old company, were stunned by the news that the insurance commissioner had taken charge of the company, alleging it to be insolvent. This development was all the more shocking because of its suddenness and also because only a short time before, the regular, verified, annual statement of the company showed it to be in sound financial condition, as had similar previous statements from year to year consistently shown throughout its lifetime of over 68 years. The business and assets of old company were then taken over by the insurance commissioner of this state pursuant to the provisions of sections 1011 and 1013 of the Insurance Code. Thereafter, The Pacific Mutual Life Insurance Company was organized as part of a plan of rehabilitation of old company by the commissioner who purchased its entire capital stock with assets of old company. Pursuant to section 1043 of the Insurance Code, a "Rehabilitation and Reinsurance" agreement was entered into between the new company and the then insurance commissioner, as conservator of old company. The rehabilitation plan provided for the organization of a new corporation with a capital of \$1,000,000 which consisted of 10,000 shares at a par value of \$100 each. The commissioner was to purchase all the outstanding stock of the new company with \$3,000,000 in cash belonging to the old company (which gave new company an initial surplus of \$2,000,000). The commissioner was then to transfer all the other assets of old company (with the exception of the stock of new company which, of course, was owned by old company) to new company, and new company was to assume all policies and obligations of the old company to the extent provided for in the plan. The plan provided that new company would assume all the obligations of the old company under existing policies with the exception of the non-can policies which obligations were assumed on a reduced benefit schedule at the old premium rates. It was

agreed that further benefits would be restored out of certain designated income of new company. *All of new company's stock was purchased with \$3,000,000 out of old company's funds.* In addition, all the other assets of old company (over \$200,000,000 assets in addition to going agency organization and concern, good will, etc., "worth several millions of dollars", *Carpenter v. Pacific Mut. Life Ins. Co.*, 10 Cal.2d 307, 325, 74 P.2d 761, 772, were transferred to new company. Therefore, new company owes its creation and existence to old company. The confiscatory nature of this entire proceeding, including the present majority holding, is at once apparent when we see that old company's stockholders will ultimately only receive \$3,000,000 for their stock which, when old company was taken over, was supported by that amount in cash *plus* over \$200,000,000 in various assets plus the value of good will, going business organization, etc., worth several more millions of dollars! The agreement thus provided for a transfer to new company of the assets of old company (with certain exceptions not relevant here) and the assumption by new company of the obligations of old company, excluding certain noncancellable policies. With regard to these policies, known as the "non-can" policies, new company assumed a limited obligation and agreed to set up a special fund for the restoration of benefits thereunder. This obligation is still unpaid and outstanding. The capital stock of new company was to be held by the commissioner, as conservator, or liquidator, for the benefit of the creditors, policyholders, and stockholders of old company. On December 4, 1936, the agreement was approved by the trial court. In *Carpenter v. Pacific Mut. Life Ins. Co.*, 10 Cal.2d 307, 332, 334, 74 P.2d 761, affirmed *Neblett v. Carpenter*, 305 U.S. 297, 59 S.Ct. 170, 83 L.Ed. 182, it was held that the organization of new company, as part of a plan to rehabilitate the business of old company was proper. It is pointed out, 10 Cal.2d at page 322, 74 P.2d at page 771, that "Ultimate mutualization, in the event the policyholders so elect, is also provided for."

On February 2, 1937, an order was made providing for the liquidation of the old company and appointing the insurance commissioner as liquidator. This order was upheld on appeal, *Carpenter v. Pacific Mut. L. Ins. Co.*, 13 Cal.2d 306, 89 P.2d 637, although old company has never been dissolved. On April 4, 1938, the commissioner, as liquidator, transferred title to the capital stock of new company to voting trustees. This transfer was upheld on appeal. *Caminetti v. Pac. Mutual L. Ins. Co.*, 22 Cal.2d 344, 139 P.2d 908. Other aspects of this case have been decided by this court in *Caminetti v. Pacific Mut. Life Ins. Co.*, 22 Cal.2d 77, 136 P.2d 779; *Caminetti v. Pacific Mutual L. Ins. Co.*, 22 Cal.2d 386, 139 P.2d 930; *Caminetti v. Pacific Mut. Life Ins. Co.*, 23 Cal.2d 94, 142 P.2d 741; *Neblett v. Pacific Mutual L. Ins. Co.*, 22 Cal.2d 393, 139 P.2d 934; *Carpenter v. Pacific Mut. Life Ins. Co.*, 14 Cal.2d 704, 96 P.2d 796; and by the appellate courts in *Sanborn v. Pacific Mut. Life Ins. Co.*, 42 Cal. App.2d 99, 108 P.2d 458; *Garrison v. Pacific Mutual Life Ins. Co.*, 83 Cal.App.2d 1, 187 P.2d 893.

New company now seeks to acquire its stock (see later discussion) through the device of mutualization under section 20(a) of the rehabilitation agreement. The mutualization plan provides that the price to be paid for new company's stock is \$3,000,000, with simple interest. If non-can benefits are fully restored prior to January 1, 1973, the purchase price is to be increased by an additional sum of \$250,000 for each full year by which the date of completion of restoration precedes December, 1973. The purchase price is not absolutely payable, but is to be paid only "when and if" all the following conditions are met: (1) Non-can restoration is completed; (2) the funds in a special surplus fund (to be created pursuant to the plan) plus the capital and surplus of new company, equal or exceed the purchase price of the stock; (3) the *financial condition* of the *new company* is such that, after paying for and cancelling the stock, it would still have admitted assets in excess of all its liabilities amounting to the sum of 4% of all admitted assets plus 25% of the premi-

ums collected during the preceding calendar year on all group insurance written on a one-year term basis and on all accident and health insurance.

This résumé shows that the new company was brought into existence as a creature of the state to rehabilitate old company and to carry on its business for that purpose. It also shows the grievous injustice being perpetuated by the majority in approving the plan of mutualization used here—that of *voluntary* mutualization of an *insolvent* corporation. This type of voluntary mutualization is as voluntary as a confession given under force, duress, and threats of bodily injury. Non-can benefits have not been fully restored; even under the mutualization plan it is contemplated they will not be fully restored (if partial benefit payments can be considered "full" restoration) until 1973. Until such time as they are restored, new company cannot be considered as a solvent concern since it still owes a debt to the policyholders and stockholders of old company, which it admittedly *cannot now pay*. The amount of this debt is conceded to be between \$18,000,000 and \$24,000,000. How can it then be said, with any degree of honesty whatsoever, that new company is solvent and may avail itself of the statutory provisions relating to mutualization? I defy anyone to give an affirmative answer to this question.

Present Proceeding

Purporting to act under Paragraph 20(a) of the rehabilitation and reinsurance agreement, a plan of mutualization was formulated by the committee and, on September 22, 1950, the insurance commissioner found that the plan protected the rights and interests of new company, its policyholders and shareholders and that he was satisfied that the plan would be fair and equitable in its operation.

Paragraph 20(a) of the rehabilitation and reinsurance agreement provides:

"Mutualization and Disposition of Stock of New Company

"(2) Neither the Conservator, nor, if one be appointed, the Liquidator, of the Old Company, shall dispose of any of the stock of the New Company except as follows:

"(a) At any time between July 1, 1946 and January 1, 1948, and thereafter so long as the Conservator or a Liquidator of the Old Company may continue to hold any or all of said stock, ten percent (10%) of the holders of participating policies of life insurance entitled to vote at a policy holders' election on a proposal for *voluntary* mutualization of the New Company, whether those re-insured hereunder or those issued by the New Company (each policy holder for this purpose being regarded as one person regardless of the number of policies owned or amount of insurance held) may request the New Company to create an Appointing Committee as hereinafter provided to exercise the duties and functions hereinafter specified in respect of a proposed *voluntary* mutualization of the New Company, in accordance with the laws of the State of California in effect at the time of said request, or, if said laws then so permit, of any one or more departments thereof. Such request shall specify the department or departments of the New Company desired to be mutualized.

"Upon the receipt of such request the New Company shall create an Appointing Committee consisting of the then President of the Association of Life Insurance Presidents, the President of Leland Stanford Jr. University, and the Provost of the University of California at Los Angeles, or persons occupying similar positions if their or any of their titles shall have been changed. In the event any one or more of such persons shall refuse or be unable to act, the remaining member or members shall fill the vacancy or vacancies thereby created by their appointment in writing of another person or persons of similar position and standing. If all of said persons refuse or are unable to act, the Court or any Judge thereof shall, on the application of the Commissioner, designate an Appointing Committee consisting of three (3) persons of similar position and standing. Said Appointing Committee, acting through not less than a majority of its members, shall designate a Price Determination Committee

of not less than three and not more than five (5) persons skilled in matters of insurance company valuation, which committee, acting through not less than a majority thereof, shall determine whether in their opinion the proposed *voluntary* mutualization of the New Company, or of the department or departments thereof specified in said request can then be practicably accomplished *having due regard to the interests of all persons interested in the New Company*.¹ If it can be determined that such mutualization is not then practicable no further steps shall be taken in connection with a possible mutualization of the New Company under the provisions of this subparagraph until at least six months after the date of such determination. If in the opinion of a majority of the members of the committee such mutualization is then practicable, the committee shall determine the proper price to be paid upon such mutualization and appropriate terms of payments thereof; said determination shall not be made, however, prior to January 1, 1947.

"If, at the date of the appointment of such committee the New Company shall have in force Participating Life Insurance written subsequent to the effective date of this agreement in an amount in excess of its Non-Participating Life Insurance written during the same period, one-half ($\frac{1}{2}$) of such excess shall, for the purpose of fixing the proper price to be paid (but for no other purpose) be deemed to be, and shall be valued as, Non-Participating Life Insurance. If at the time of such appointment, there shall have been transferred from the Participating Department in accordance with the provisions of subparagraph (d) of paragraph 6 hereof, less than ten per cent (10%) of the then accrued earnings described therein, or if there shall have been transferred to the Participating Department any working capital pursuant to the provisions of subparagraph (c) of said paragraph 6, any unpaid balance thereof shall, for the purpose of fixing the proper price to be paid (but for no other purpose) be deemed to be a debt then due and matured. Said Committee shall in its report

1. The statutory scheme relating to insolvent companies is concerned with the

protection of those interested in the *insolvent* company.

to the New Company include a plan of mutualization of the New Company, or of the department or departments thereof specified in said request of the policy holders. Such plan shall specify, in addition to any other relevant matters, the price to be paid, the terms of payment, and the persons by whom and the manner in which the right to vote the stock of the New Company is to be exercised pending complete payment of the purchase price. In this connection the said Committee, if it deem it advisable, may provide in the plan for the creation of a voting trust, designate the initial trustees, and make provision for the appointment of their successors. Unless the benefits under Non-Can policies have theretofore been fully restored and claims against the Liquidator fully paid, such plan shall further provide that such mutualization shall not affect the provisions of paragraph 17 or of paragraph 14 hereof or the right of holders of Non-Can Policies to the restoration of benefits from the sources and in the manner therein provided.

"The New Company agrees that within sixty (60) days after the making of such report (unless said report shall be to the effect that mutualization is not then practicable) it will mail copies thereof to all of its policy holders entitled to vote upon such plan or plans of mutualization if submitted according to law. If within one hundred twenty (120) days after the mailing of such notice, ten percent. (10%) of the policy holders entitled to vote upon any such plan or plans (each policy holder being for this purpose regarded as one person regardless of the number of policies owned or amount of insurance held) shall request in writing the submission thereof, the New Company will promptly submit the same in accordance with the laws of the State of California then in effect. The Conservator for himself and for any successors in the ownership of said stock claiming under him in any manner other than through a sale of said stock pursuant to the provisions of subparagraph (d) hereof agrees to consent and hereby consents as the holder and owner of the stock of the New Company to such plan of mutualization. In the event said mutualization plan is adopted, the Conserv-

ator, or a Liquidator as aforesaid, shall dispose of such stock in accordance with such plan. The expenses of the foregoing proceedings including costs, fees and expenses of the Price Determination Committee, shall be borne by the New Company, and unless the proposed plan of mutualization is consummated, shall be charged to the Participating Department thereof.

"In the event the Price Determination Committee has been appointed as herein provided prior to January 1, 1948, said Committee shall have the power to extend the time within which mutualization may be effected hereunder for such period or periods of time as it may deem necessary for the orderly completion of mutualization proceedings as herein ordered." (Emphasis added.)

Mutualization

The Insurance Code provides for mutualization of insurance companies in two different ways. Division 1, Part 2, Chapter 1, Article 14, sections 1010-1062, entitled "Proceedings in Cases of Insolvency and Delinquency" provides in section 1043 for "Mutualization," reinsurance and rehabilitation." Division 2, Part 2, Chapter 13, Articles 1, 2, sections 11525-11533, entitled "Voluntary Mutualization of Incorporated Life and Life and Disability Insurers Having a Capital Stock and Issuing Nonassessable Policies on a Reserve Basis" provides in sections 11525 and 11526 the "Authorization to mutualize" and the "Method of mutualization."

There is no dispute concerning the method actually used in this proceeding. The rehabilitation plan provided for "voluntary" mutualization and the matter proceeded under sections 11525 and 11526. There is complete disagreement as to which method should have been used. Appellants correctly contend that the procedure outlined for "involuntary" mutualization of an "insolvent" insurer is the only proper method.

As stated in *Carpenter v. Pacific Mut. Life Ins. Co.*, 10 Cal.2d 307, 328, 74 P.2d 761, 774, "* * * the proceedings here under review were taken under sections 1010 to 1061 of the Insurance Code, adopted

in 1935." (The other cases heretofore cited have reiterated this statement.) The original seizure of old company was accomplished under section 1011, subdivision (d). Section 1045 provides "*Mutualization of life insurer issuing nonassessable policies on a reserve basis: Formation of plan. If at any time after the issuance of an order under section 1011 affecting a life insurer issuing nonassessable policies on a reserve basis and organized with a capital stock evidenced by shares thereof it shall appear to the commissioner that the purposes of section 1011 can be best attained by the mutualization of such life insurer, the commissioner may formulate a plan for the mutualization of such insurer.*" (Emphasis added.)

All proceedings heretofore had in this litigation have been as provided for in Article 14 relating to insolvent and delinquent insurers. The rehabilitation agreement provides for mutualization under the statutory scheme set up for solvent insurers. The majority opinion states "The new company is solvent and nondelinquent, and there is no sound reason why it should be mutualized under the statutes relating to insolvent insurers. * * * Section 1043 [which relates to insolvents], which authorizes the commissioner to enter into rehabilitation agreements, contains no express limitation on what may be included in them, and section 1037 [which also relates to insolvents] provides that the enumeration of the powers of the commissioner shall not be construed as a limitation upon him or upon his right to do such other acts as he may deem necessary in connection with the handling of the affairs of an *insolvent company.*" (Emphasis added.) Thus the majority opinion admits the procedure relating to insolvents was the one used and impliedly admits that it is the correct procedure. However, in using the code sections relating to insolvents, the author then argues that these sections place no limitation upon the commissioner. Section 1037 provides that the powers and authority of the commissioner in proceedings "*under this article*" (which relates to insolvents) shall not be construed as a limitation on his right to act or to do that

"which he may deem necessary or expedient for the accomplishment or in aid of the purpose of *such proceedings.*" Then, citing section 1043 (relating again to insolvents), we are told that the new company was properly organized by the commissioner who "evidently concluded" that the protection of creditors and "other interested parties" could best be accomplished through the formation of a new company "divorced as far as possible from the control of those who were in charge of the old company when it experienced financial difficulties." Then we are told that the new company is a separate and distinct entity. We are told this without any discussion of the character of new company, and with only the unreasoned and unsupported dictum in *Garrison v. Pacific Mutual Life Ins. Co.*, 83 Cal.App.2d 1, 9-10, 187 P.2d 893, as authority therefor.

Section 11525 (the procedure followed here) provides for "*Authorization to mutualize. A solvent domestic incorporated insurer having a paid-in capital represented by outstanding shares of capital stock and issuing, on a reserve basis, nonassessable policies of life insurance or of both life and disability insurance, may convert itself into an incorporated mutual life insurer, or life and disability insurer, issuing nonassessable policies on a reserve basis. To that end it may provide and carry out a plan for the acquisition of the outstanding shares of its capital stock for the benefit of its policyholders, or any class or classes of its policyholders, by complying with the requirements of this chapter.*" (Emphasis added.)

The question is thus directly posed as to whether new company falls within the classification of a "solvent" domestic incorporated insurer which "may convert itself into an incorporated mutual life insurer" which "may provide and carry out a plan for the acquisition of the outstanding shares of its capital stock for the benefit of its policyholders."

Character of New Company

New company was organized by the insurance commissioner "with a name similar to that of the old company as a corporate

agent to assist him in carrying on the business of the old company." *Carpenter v. Pacific Mut. Life Ins. Co.*, 10 Cal.2d 307, 324, 325, 74 P.2d 761, 772. It was also said there, 10 Cal.2d at page 327, 74 P.2d at page 773, that "The proceeding was had under sections 1010 to 1061 of the Insurance Code which specially deal with the rehabilitation and liquidation of insurance companies. Those sections set up a comprehensive statutory scheme to accomplish those results. The proceeding is not one in which another party is prosecuting another party at all. It is simply a proceeding in which the state is invoking its power over a corporate entity permitted by the state to engage in a business vitally affected with the public interest upon condition of continuing compliance with the requirements provided by the state. It is not a controversy between private parties but a proceeding by the state in the interest of the public." See, also, *Caminetti v. Pacific Mut. Life Ins. Co.*, 22 Cal.2d 77, 82, 136 P.2d 779, 782, where it was held that "*The new company was the corporate agency of the insurance commissioner as conservator for the purpose of continuing and preserving the business of the old company.*" (Emphasis added.)

The commissioner held, either as conservator or later as liquidator, the entire capital stock of new company until 1938 when it was transferred to voting trustees, *Caminetti v. Pacific Mutual L. Ins. Co.*, 22 Cal.2d 344, 356, 139 P.2d 908, 914. It was there said that "The affairs of the new company are placed in charge of a board of directors to whom the agreement expressly confides a large measure of discretion. *Supervisory powers, however, are reserved to the commissioner*, independent of and in addition to his statutory powers over delinquent insurance companies. For example, no investment or reinvestment of the assets of the old company may be made without written approval of the commissioner. Payments to the restoration fund for non-can policies are subject to the approval of the commissioner who, in addition, may require further payments thereto. The determination by the board of directors of the apportionment of expenses and the exchange of assets among the several de-

partments of the new company is subject to adjustment by the commissioner. Reserves against policies of the old company subject to assumption of reinsurance under the agreement were to be established by the new company *with the approval of and in accordance with the requirements of the commissioner*. While as holder of the stock the commissioner possessed the voting rights incident thereto, the agreement contains no express provision with respect to the exercise of the voting power. * * *

"The trustees are given legal title to the stock of the new company with the power to exercise all the rights of ownership. *The commissioner, however, retains the entire beneficial interest for the benefit of creditors of the old company and others interested. The voting trust undertakes to transfer to the trustees only administrative duties relating to the stock, principally the right to vote the same.* * * *" (Emphasis added.)

New company does not possess the characteristics of a solvent company as that term is generally understood. First, it was organized as the *agent of the commissioner to rehabilitate the business of the old company*. It may be, as was said in the *Garrison* case, that it is a distinct entity without detracting in the least from the fact that it is still an agent for the purpose of rehabilitating the old company. An agent, or servant, is usually a distinct entity, but the duties and activities of such agent or servant, are carried out to serve the purposes of the principal. In other words, the agent acts for the principal, not for himself, or itself. Does the insurance commissioner ordinarily, and customarily, hold all the stock of a solvent insurance company? Does the insurance commissioner ordinarily, and customarily, have reserved to himself supervisory powers, "independent of and in addition to his statutory powers" where a solvent company is concerned? Does an insurance commissioner ordinarily, and customarily, give his written approval of the investment or reinvestment of funds of a solvent insurance company? Does the insurance commissioner ordinarily, and customarily, tell the board of directors of a solvent company when and how

they must apportion expenses and exchange assets among its several departments? In the case of new company, the commissioner does all of those things. See Chief Justice Gibson's opinion in *Caminetti v. Pacific Mutual Life Ins. Co.*, 22 Cal.2d 344, 356, 139 P.2d 908.

New company would have no existence had it not been for the technical insolvency of old company. No new money constituted the assets of new company which was organized with the assets of old company. If new company were a solvent, independent and distinct corporation, the insurance commissioner would not be holding its stock for the policyholders of old company. The stockholders of new company would be holding their own stock supported by assets in the hands of the officers and directors of the company. Section 11525 provides that "A solvent domestic incorporated insurer [is one] having a paid-in capital represented by outstanding shares of capital stock and issuing, on a reserve basis, non-assessable policies of life insurance or of both life and disability insurance * * *." Surely in the normal case, "outstanding shares of capital stock" refers to stock held by stockholders, *not* by the commissioner!

Mr. Justice TRAYNOR has pointed out how the use of the solvent mutualization procedure has deprived the members of old company of their right to the protection of court scrutiny of the plan of mutualization. He shows how the procedure used here cannot apply to the facts of the case because in the ordinary case of a voluntary mutualization, the shareholders would have the power to protect their interests by withholding their consent to the plan of mutualization. The sections of the code which relate to mutualization of insolvent companies were clearly intended by the Legislature to protect the interests of the interested parties by providing for court approval.

In the present case by the use of the procedure provided for in the case of a solvent company, the commissioner approves a plan to be formulated in the future. When that plan is formulated, as holder of all the

stock, he votes for the plan. Then, as commissioner, he approves the plan as fair and equitable. We are told by the majority opinion that "it must be assumed that the Legislature realized that the commissioner might be required to pass upon the fairness of a plan in a case where he, acting as conservator, had previously consented to mutualization on behalf of the stockholders." Nothing of the kind must be assumed. It is obvious from even a casual reading of the code provisions relating to insolvent companies (1043 et seq.) and those relating to solvent companies (11525 et seq.) that the Legislature had not the faintest thought that the two would be so commingled as they are in this case, or that the commissioner would be placed in a position where he was forced to approve a plan to be formulated some ten years in the future, then, when the plan was formulated forced to vote an approval of it as a sole stockholder, and still later, to give his approval of something he had theretofore twice before approved.

Ever since the inception² of the receivership proceedings and the organization of new company all the parties and proceedings concerned in the rehabilitation matter have been subject to the continuing jurisdiction and supervision of the court. It has been pointed out in various phases of this litigation that new company was organized by the commissioner as his *corporate agent* to rehabilitate the business of old company. Without the original proceeding under section 1011(d) of the Insurance Code, new company would not have come into being.

It is necessary, next, to note the difference in methods provided for in the two divisions of the Insurance Code for mutualization of insolvent and solvent companies.

Section 1046 provides that "Said mutualization plan [called involuntary mutualization for insolvent companies and follows the section (1045) which provides: "If at any time after the issuance of an order under section 1011" the "commissioner" shall formulate a plan of mutualization] shall include provisions for:

2. (With the exception of the present proceeding to be hereinafter discussed.)

"(a) (Acquisition of capital stock.) The acquisition by such insurer of all outstanding shares of its capital stock at a price and upon terms and conditions to be fixed as hereinafter provided.

"(b) (Retirement of capital stock.) The retirement of said shares of stock when acquired by such insurer.

"(c) (Amendment of charter.) The amendment of the charter of such insurer so as to enable it to transact its business as a mutual insurer issuing nonassessable policies on a reserve basis.

"(d) (Payment of claims.) The manner in which and the time within which, after mutualization is effected, matured and maturing claims against such insurer shall be paid to the lawful holders thereof.

"(e) (Submission of plan to policyholders.) The submission of said mutualization plan to the policyholders of such insurer under such procedure as shall be set forth in the plan or prescribed by said court, for their approval or rejection.

"(f) (Notice to shareholders.) Notice to the shareholders of such insurer, in such manner and at such time after the approval of said mutualization plan by said policyholders, as the court may direct."

Section 1048 provides that after the formulation of the mutualization plan, the commissioner shall submit it to the court for its order directing the submission thereof to the policyholders named in subdivision (e), of section 1046.

Section 11526 (relating to *solvent* insurers) provides that "Such plan shall include appropriate proceedings for amending the insurer's articles of incorporation to give effect to the acquisition, by said insurer, for the benefit of its policyholders or any class or classes thereof, of the outstanding shares of its capital stock and the conversion of the insurer from a stock corporation into a nonstock corporation for the benefit of its members. The members of such nonstock corporation shall be the policyholders from time to time of the class or classes for whose benefit the stock of the insurer was acquired, and no other persons. Such plan shall be:

"(a) Adopted by a vote of a majority of the directors. [As distinguished from the formation thereof by the commissioner as provided in section 1045.]

"(b) Approved by the vote of the holders of at least a majority of the outstanding shares at a special meeting of *shareholders* called for that purpose, or by the written consent of such shareholders. [As distinguished from section 1048 requiring the commissioner to obtain court approval and an order of the court directing the submission of the plan to the policyholders.]

"(c) Submitted to the commissioner and approved by him in writing. [Under the circumstances here prevailing with regard to the commissioner's position as conservator, liquidator and general supervisor of new company, this amounts to an idle act.]

"(d) Approved by a majority vote of all the *policyholders* of the class or classes for whose benefit the stock is to be acquired voting at an election by the policyholders called for that purpose, subject to the provisions of section 11528. * * *

"(e) Filed in the office of the Insurance Commissioner after having been approved as provided in subdivisions (b), (c) and (d) of this section."

Under the provisions of the rehabilitation agreement, a price determination committee consisting of four members was set up. The price determination committee reported to new company, in April, 1950, that mutualization was practicable and valued the stock of new company at \$3,000,000. The mutualization plan provided in part for the payment of the purchase price with simple interest at the rate of long-term government bonds (2½%). Under the terms of the rehabilitation agreement, "The Conservator for himself and for any successors in the ownership of said stock claiming under him in any manner other than through a sale of said stock pursuant to the provisions of sub-paragraph (d) hereof agrees to consent and hereby consents as the holder and owner of the stock of the New Company to such plan of mutualization. In the event said mutualization plan is adopted, the Conservator, or a

Liquidator as aforesaid, shall dispose of such stock in accordance with such plan."

Under the voluntary mutualization procedure heretofore set forth (section 11526) the mutualization plan is submitted to the commissioner after adoption by a vote of a majority of the directors and after a vote by a majority of the outstanding shares at a special meeting of shareholders called for that purpose. Section 11527 provides that "The commissioner shall examine the plan submitted to him under the provisions of subdivision (c) of section 11526. *He shall not approve such plan unless in his opinion the rights and interests of the insurer, its policyholders and shareholders are protected nor unless he is satisfied that the plan will be fair and equitable in its operation.*" (Emphasis added.) Fair and equitable to *which* company?

Under the provision of the rehabilitation agreement heretofore set forth, the then commissioner agreed for himself, and his successors, to agree to any plan promulgated by the price determination committee. It should be borne in mind that the stock of new company is now held by voting trustees who had no discretion, but were (as stated in the insurance commissioner's Answering Brief, p. 73) "not only *authorized*, but *bound*, to give their consent; and [that] they had no discretion to exercise." (Emphasis that of the commissioner.) There is evidence in the record which shows that the trustees voted for the plan of mutualization because they were told to so vote; that they did not examine into the merits of the plan. The next step provided for in section 11526 (Insurance Code) is that the plan shall be submitted to the commissioner for his written approval. The insurance commissioner states (Answering Brief, p. 83), "As we have already shown, the Liquidator [commissioner] had bound himself to consent to a Plan of Mutualization proposed in accordance with the Rehabilitation Agreement." The code, however, (§ 11527) provides that the commissioner shall examine the plan submitted to him under the provisions of subdivision (c) of section 11526 and that "*He shall not approve such plan unless in his opinion the rights and interests*

of the insurer, its policyholders and shareholders are protected nor unless he is satisfied that the plan will be fair and equitable in its operation." (Emphasis added.) The net result, under the circumstances prevailing in this case, is that the commissioner, as beneficial owner of all the stock of the new company, instructs the voting trustees to vote for any plan proposed by the price determination committee and then, when such plan is submitted to him for his approval, places his rubber stamp of approval thereon because he (or his predecessor) has, ten years prior to the promulgation of the plan, agreed to approve it *no matter what it is*—agreed, not only for himself, but for any successor in office, to approve the plan as proposed. It is shown, therefore, without a shadow of a doubt, that the earlier agreement to approve any plan proposed by the price determination committee has the effect of nullifying section 11527 of the Insurance Code, as well as the sections relating to mutualization of insolvent insurers.

Had the procedure outlined in sections 1045, 1046 and 1048 been followed, the result would be very different. Under section 1045 the *commissioner* would formulate the mutualization plan for the purpose of carrying out the rehabilitation of the insurer whose business was seized under the provisions of section 1011. The commissioner's plan would then be submitted to the court for its order directing the submission of the mutualization plan to the shareholders and policyholders of the seized insurer for their vote of approval, or disapproval as the case might be (section 1046, subdivisions (e) and (f)). Old company, not having been dissolved, still exists; new company was organized as the corporate agent of the commissioner to rehabilitate the business of old company with the assets of old company. New company cannot, as it appears, be considered as a completely independent and solvent organization under the facts here prevailing. As I have pointed out, the commissioner holds the entire beneficial interest in all the capital stock of new company for the benefit of stockholders, policyholders and creditors of old company; the legal title to

the stock of new company is held by voting trustees who vote it as directed by the commissioner. As I have also pointed out, the board of directors of new company are under the close supervision, control and direction of the commissioner and must, in reality, take orders from him as to every major, and some minor, business details. It cannot be said that this close supervision, control and direction exist in the usual "solvent" corporation.

Corporate Entity of New Company

Respondents argue that the corporate entity of new company cannot be disregarded so as to make the proposed mutualization a mutualization of old company. In support of this contention, *In Re Bond & Mortgage Guarantee Corp.*, 157 Misc. 240, 283 N.Y.S. 623, 652, and *Garrison v. Pacific Mutual Life Ins. Co.*, 83 Cal.App.2d 1, 9-10, 187 P.2d 893, are cited. In neither case was mutualization involved. In the *Bond & Mortgage Guarantee* case, the superintendent of insurance had organized *Bond & Mortgage Guarantee Corporation*. [157 Misc. 240, 283 N.Y.S. 641] "as a domestic insurance corporation, with a capital of \$1,000,000, a surplus of \$2,000,000, and a reserve for contingencies of \$200,000, all of which was paid out of the assets of the guarantee company in exchange for the entire capital stock of the new corporation, 10,000 shares of the par value of \$100 each; a certificate for said number of shares was issued in the name of the guarantee company and is held by the superintendent of insurance as an asset, for the benefit of the creditors (including the policyholders), of the guarantee company." (Emphasis added.) The guarantee corporation here involved took on the duty of insuring mortgages, "but on a restricted basis under a limited policy of guaranty." 283 N.Y.S. at pages 641, 650. This case involved a proceeding whereby the People, and certain individuals interested, applied for an order enjoining the State Mortgage Commission from demanding and receiving or assuming control of certain mortgages being serviced by the guarantee corporation pursuant to court order. The injunction was granted. The contention was that the

guarantee corporation, in servicing mortgages, was acting without adequate corporate powers. The court held that the corporation was acting within its corporate authority and, in answer to the contention that the guarantee corporation was a state agency inseparable from the superintendent of insurance (so as to permit another state agency, the Mortgage Commission, which came into being *after* the proceedings set forth had been had) to take it over, the court said: "Said corporation is like any other corporation; a distinct entity. All of its stock is owned by guarantee company, and the certificate therefor is held in the custody of the superintendent; this he holds as he does any other assets of the company in rehabilitation, as a receiver designated by statute for the benefit of the creditors and stockholders of said company; not as an owner, representing the state. It is a stock corporation, having been created, for one thing, *with a view to its possible sale for the benefit of the creditors, as its exhaustive by-laws make apparent*. During such time as the stock control remains as it is, the operation of the corporation is to be under the supervision of the superintendent as rehabilitator." (Emphasis added.) The court continued and said that the primary management of the corporation was with the board of directors, although it was subject to the supervision of the superintendent "in his capacity as supervisor of insurance companies". 283 N.Y.S. at pages 651, 652. The situation presented in the New York case and that presented in the case at bar are factually similar up to a point. I have heretofore quoted extensively from *Caminetti v. Pacific Mutual L. Ins. Co.*, 22 Cal. 2d 344, at page 356, 139 P.2d 908, wherein we set forth the extensive and minute supervision exercised by the commissioner over new company. This supervision exceeded by far anything required of him as "supervisor of insurance companies." We also said in *Carpenter v. Pacific Mut. Life Ins. Co.*, 10 Cal.2d 307, 324, 325, 74 P.2d 761, 772, that new company was organized "as a corporate agent to assist him [commissioner] in carrying on the business of the old company." See, also,

Caminetti v. Pacific Mut. Life Ins. Co., 22 Cal.2d 77, 80, 136 P.2d 779.

In *Garrison v. Pacific Mutual Life Ins. Co.*, 83 Cal.App.2d 1, 187 P.2d 893, 894, the court said, "The question for decision is whether an insurance company which was organized to conserve an insolvent insurance company and to rehabilitate its business is obligated to pay interest on claims allowed by the conservator against such insolvent based upon the breach by the latter of certain policies, in the absence from the rehabilitation agreement of a specific promise to pay such interest, the agreement having provided for the payment to the liquidator for the benefit of such claimants an amount equal to the sum of all 'allowed claims' against the insolvent company." New company, by the terms of the rehabilitation agreement had agreed (Paragraph 17) "to pay to the Liquidator for payment to claimants an amount equal to the sum of all claims against the Old Company filed with the Liquidator and finally allowed." The court answered the question put with this statement: "It is customary practice in liquidation proceedings to marshal the assets of the debtor, fix the amount of its liabilities and disburse the assets among the creditors pro rata. Such a process would not be possible if during the season of liquidation the claims should be varied by the additions of varying amounts of interest." 83 Cal.App.2d at page 9, 187 P.2d at page 898. Respondents rely upon the following paragraph from the opinion of the District Court in the *Garrison* case: "Appellants contend that new company is a reincarnation of old company and therefore has impliedly promised to pay all of the latter's indebtedness. In this they ignore provisions of the Insurance Code, Article 14 of Chapter 1, Part 2, Division 1, which article deals with insolvency and liquidation proceedings. Section 1043 of such article provides that in any proceeding under the article *the commissioner may mutualize or reinsure the business of any person* affected by proceedings thereunder and may enter into rehabilitation agreements. *New company was organized by the sovereign power for the purpose of rehabilitating the business of one of its own*

creatures whose very existence inhered in the blood and sweat of the people. It was to go forward under the guidance of the state. Its identity is utterly distinct from that of old company, notwithstanding the latter's equitable ownership of new company's stock. It cannot be fairly said that it is a continuance of old company. It did not take over the latter's assets or assume its burdens at the behest of old company. Such transfer and assumption were rendered indispensable to the public weal and were required by law to conserve the common good in general and the army of policyholders of old company in particular. New company was not organized by old company to do service in a prescribed manner for the latter but was created by the state to perform a public service. It must be and act in its own right upon the arena of trade and commerce and of human existence, free from the fetters of a collapsed institution which in the kaleidoscope of a changing world will soon be only a memory." 83 Cal. App.2d at pages 9, 10, 187 P.2d at page 898. New company was organized by the state to rehabilitate the business of old company; as the "corporate agent" of the insurance commissioner for that purpose. The language just quoted is, in part, illogical under the facts presented in this long line of litigation, including the *Garrison* case. It appears to me that the statement that "its [new company] identity is *utterly* distinct" is inconsistent with the latter part of the same sentence that this was so "notwithstanding the latter's [old company] equitable ownership of new company's stock" and with one of the preceding sentences wherein it is said that "New company was organized by the sovereign power for the purpose of rehabilitating the business of" old company, and the fact that new company "was to go forward under the guidance of the state." The duties and obligations imposed upon the commissioner in this case amount to far more than his usual supervision of the usual solvent insurance company. There can be no doubt that new company is a separate *corporate* agency and that it was not organized by old company, but it does not logically follow that it is "utterly distinct" from old company. In my opinion,

new company would have no existence but for the insolvency proceedings against old company. It also conclusively appears that the quoted statement from the Garrison case is dictum since it had nothing to do with the question involved there.

Respondents also argue that because this court said in *Carpenter v. Pacific Mut. Life Ins. Co.*, 10 Cal.2d 307, 334, 74 P.2d 761, 777, that new company was, as a reinsurer, "substituted as insurer in the place and stead of the original insurer" that the corporate identity of new company cannot be disregarded; that because this court said in the *Carpenter* case, 10 Cal.2d at page 335, 74 P.2d at page 777, that "Every policyholder who consents to the plan clearly enters into a novation with the new company" that the two companies cannot be considered as "essentially one and the same." New company will in time replace old company but so long as old company exists in any form, it is clear that new company is still *only the corporate agent* of the commissioner for the purpose of rehabilitating the business of old company and that the mutualization plan must be worked out in accordance with the procedure provided for in that part of the Insurance Code relating to involuntary mutualization of insolvent companies. The stock of new company, held now by voting trustees, with beneficial ownership in the commissioner is still held by him for the benefit of the policyholders and creditors of old company. This fact cannot be disregarded; nor can the rights of the policyholders and creditors of old company be disregarded. In holding that new company is "utterly distinct" from old company for *all purposes*, a majority of this court chooses to forget *all the facts* concerning this litigation and pretends that new company was organized as any other insurance company with its own assets and liabilities, that the insurance commissioner had only the normal, nominal, supervision over its affairs, and that no insolvency proceedings had ever been involved. In the light of the record before us, such a holding cannot stand the test of honest scrutiny.

Res Judicata

Respondents argue that it has been decided by the superior court that the commis-

sioner had authority to include in a rehabilitation agreement an option to mutualize the new company by voluntary proceedings and to agree to dispose of the stock of new company at the price, and on the terms, fixed by the price determination committee; and that this court has decided that the superior court had jurisdiction to so decide and that the superior court did not abuse its discretion in approving the rehabilitation agreement.

In the commissioner's Answering Brief (p. 61) is found this statement: "It is true that no attack seems to have been made on the mutualization provisions [of the rehabilitation agreement] in any of the appellate proceedings, but the courts have taken notice of them in determining various appeals." Neither this court, nor an appellate court, has been concerned in any of this litigation with the mutualization provisions of the rehabilitation agreement as will hereinafter appear.

In *Carpenter v. Pacific Mut. Life Ins. Co.*, 10 Cal.2d 307, 322, 74 P.2d 761, 771, we said that the plan of rehabilitation provided for "Ultimate mutualization, in the event the policyholders so elect." We were there concerned in the main with the organization of new company as the corporate agent of the commissioner to rehabilitate the business of old company. In *Carpenter v. Pacific Mut. Life Ins. Co.*, 13 Cal.2d 306, 89 P.2d 637, we were concerned with the validity of the "Order for Liquidation" and the mutualization provisions of the plan were not considered. In *Carpenter v. Pacific Mut. Life Ins. Co.*, 14 Cal.2d 704, 96 P.2d 796, we were concerned with an order of the trial court correcting its minutes nunc pro tunc. In *Caminetti v. Pacific Mutual Life Ins. Co.*, 22 Cal.2d 77, 136 P.2d 779, we were concerned with the claims of dissenting policyholders and, once again, the mutualization provisions were not considered. In *Caminetti v. Pacific Mutual Life Ins. Co.*, 22 Cal.2d 344, 353, 139 P.2d 908, 913, we were concerned with the propriety of creating a voting trust with the stock of new company under the provisions of section 1037(e) of the Insurance Code. We said there that "To adopt the contention that section 1037(e) was not intended to apply to stock of an insurance company *organized*

as a medium through which rehabilitation of the business of a delinquent insurer was to be accomplished would require us to disregard the clear language of the statute. Section 1037(e) specifically refers to stock issued to the commissioner 'as conservator or as liquidator in connection with a rehabilitation or reinsurance agreement.'" (Emphasis added.) We also said there, 22 Cal.2d at page 355, 139 P.2d at page 914, that the rehabilitation agreement (Paragraph 20) related to the "ultimate status and ownership of the new company." We then pointed out that subdivision (a) (Paragraph 20) authorizes the commissioner to dispose of the stock in accordance with "any plan of mutualization thereafter adopted by the policyholders of the new company, and such a disposition may include a transfer to voting trustees if the plan of mutualization so provides." We held that the voting trust agreement was not a disposal of the stock within the meaning or purpose of Paragraph 20 of the rehabilitation agreement and we said, 22 Cal.2d at page 358, 139 P.2d at page 915, that "It is true that the words 'dispose of' are used in subdivision (a) of paragraph 20 in connection with an authorization to the commissioner to transfer the stock of the new company to voting trustees in accordance with a plan of mutualization. *But it is clear that under that subdivision the transfer there provided for would require a complete alienation of the stock in order to carry out the plan of mutualization contemplated therein.*" (Emphasis added.) Again, the validity of the mutualization procedure was not passed upon; the only holding being that the rehabilitation agreement did not preclude the creation of the voting trust. In *Caminetti v. Pacific Mutual Life Ins. Co.*, 22 Cal.2d 386, 139 P.2d 930, we were concerned with disqualification of a judge and a party's waiver thereof. Mutualization was not considered. In *Caminetti v. Pacific Mut. Life Ins. Co.*, 23 Cal.2d 94, 142 P.2d 741, we were concerned with the correctness of the measure of damages adopted by the commissioner to be allowed disability policyholders. In *Garrison v. Pacific Mutual Life Ins. Co.*, 83 Cal.App.2d 1, 187 P.2d 893, the court was concerned with the question of interest on claims

allowed by the commissioner. In *Sanborn v. Pacific Mut. Life Ins. Co.*, 42 Cal.App.2d 99, 108 P.2d 458, the court pointed out that the following questions were involved: What was the effective date of the agreement between new company and the insurance commissioner as conservator of old company? Did appellant's present disability commence prior to such date and was notice of claim filed in accordance with the agreement?

It is contended by respondents, however, that a judgment upholding the validity of a contract establishes its validity, not only against the attacks actually made, but against those that could have been made, even though no question of invalidity was raised in the original proceeding and even though the judgment does not expressly pass on the contract.

Appellants argue that the procedure for mutualization provided for by statute cannot be altered by contract and that any attempt to do so is against public policy, illegal and void. It is true, of course, that the plan of mutualization, as proposed by the price determination committee, has never been before the courts until the present proceeding. The trial court, in its order of December 4, 1936, stated (13) "That said Rehabilitation and Reinsurance Agreement, and each and all of the terms and conditions thereof, and the plan therein embodied are, and each of them is, hereby approved; * * * ." Clk.Tr., p. 169. This was an approval *only* of the agreement and, while grossly wrong, does not now preclude this court from correcting the error since the *plan of mutualization* was not passed upon *nor could it have been* since it was to be promulgated *ten years* in the future.

We said in the *Caminetti* case, 22 Cal.2d 344, 363, 139 P.2d 908, 918, "This proceeding is wholly statutory. The duties imposed upon the commissioner, and the supervision over him vested in the courts, result from the statute." Appellants, citing *Fortenbury v. Superior Court*, 16 Cal.2d 405, 407-408, 106 P.2d 411, 412, contend that if the order of the trial court (December 4, 1936) is considered as having approved a plan of mutualization contrary to the statutory provisions therefor, it is void for want of juris-

diction of the subject matter. The respondents' position is that this court having previously determined the trial court's jurisdiction, the matter is *res judicata*. In the *Fortenbury* case, we said "The term jurisdiction originally included only the right to hear and determine concerning the subject matter in a particular case. But the modern tendency has been to broaden that meaning, particularly where the right to review a decision by certiorari, or other prerogative writ is the question for decision. *A court may have jurisdiction of the cause of action and of the parties, but it may lack the authority or power to act in the case except in a particular way.* Under such circumstances, it is now generally held that the court had no jurisdiction. As pointed out in the case of *Spreckels Sugar Co. v. Industrial Acc. Comm.*, 186 Cal. 256, 260, 199 P. 8, 9, 'the word is frequently used as meaning authority to do the particular thing done, or, putting it conversely, a want of jurisdiction frequently means a want of authority to exercise in a particular manner a power which the board or tribunal has, the doing of something in excess of the authority possessed.'" (Emphasis added.) We also said in *First Industrial Loan Co. v. Daugherty*, 26 Cal.2d 545, 556, 159 P.2d 921, 926, that "It is elementary that the power given to the Commissioner of Corporations (by section 10 of the act) 'to establish such rules and regulations as may be reasonable or necessary to carry out the purposes and provisions of this act' *does not include power to alter the statute or enlarge or impair its scope.*" (Emphasis added.)

It seems apparent that if the involuntary mutualization provisions for insolvent insurance companies are applicable the commissioner was acting without statutory authority in approving a plan of mutualization based upon the statutory provisions relating to voluntary mutualization of solvent companies and that his approval thereof was void, as was his agreement to approve such a plan. The rule is settled that a contract in violation of an express statutory provision is void and that it is not necessary that the statute expressly so declare, *City of Oakland v. California Const. Co.*, 15 Cal.2d 573, 576, 104 P.2d 30. A contract made in

any manner except that expressly provided in the applicable statute is *ipso facto* void, *Dale v. Palmer*, 106 Cal.App.2d 663, 667, 235 P.2d 650. If upon review of all the legislation on the subject, the contract appears to contravene the design and policy of the laws, the courts will not enforce it, *Kreamer v. Earl*, 91 Cal. 112, 27 P. 735; *Loew's, Inc., v. Cole*, 9 Cir., 185 F.2d 641. See *Hill v. Bank of San Pedro*, 41 Cal.App.2d 595, 607, 107 P.2d 399; *County of San Diego v. California Water, etc., Co.*, 30 Cal.2d 817, 186 P.2d 124, 175 A.L.R. 747; *Film Producers, Inc., v. Jordan*, 171 Cal. 664, 154 P. 605.

The parties are in disagreement as to whether or not the mutualization provisions were litigated at the time the order of December 4, 1936, was made. The insurance commissioner says that "*Presumably* these provisions did not go entirely unchallenged in the proceedings leading up to the Order of Rehabilitation." (Emphasis added.) Insurance commissioner's Answering Brief, p. 61. New company asserts that the "validity" of the rehabilitation agreement was put in issue and decided by the order of December 4, 1936, and that the same has been approved by this court. From all that appears, it is obvious that the precise question here involved has never been passed upon. It most certainly has not been passed upon by an appellate court, or by this court. Respondent, new company, points to the following quotations from the pleadings in the original proceeding as showing that the mutualization provisions of paragraph 20(a) were litigated. "Answer of Certain Interveners to Petition for Approval of Second Proposed Rehabilitation and Reinsurance Agreement, Folios 2757-2759 of Transcript on Appeal. L.A. 16182:

"That said plan, if executed, would be entirely void and of no effect, and would not be binding upon the parties thereto, and that the execution of the same is beyond the authority of the said Samuel L. Carpenter, Jr., as Insurance Commissioner of the state of California and as Conservator of The Pacific Mutual Life Insurance Company of California [old company], and that the execution of said agreement and the transfer of the assets by the said Insurance

Commissioner is wholly unauthorized by the Insurance Code of the state of California and is entirely beyond the power of the said Samuel L. Carpenter, Jr., as Insurance Commissioner and as Conservator as aforesaid, and the said agreement will be void when executed and beyond the power of the Insurance Commissioner under the statute in such cases made and provided and that the said agreement is of no binding effect whatever on any of the parties thereto and that any acts done pursuant thereto are wholly null and void."

"Amended Complaint in Intervention of Certain Intervenors, Folio 3882 of Transcript on Appeal, L.A. 16182:

"That the approval of said agreement is beyond the authority and jurisdiction of this court and, if given, would be void and of no force and effect, for the reason that authority therefor is not given in, and, in fact, is forbidden by, the terms and provisions of said Insurance Code of California, and, in particular, of articles is [sic] and 14 of chapter 1 of part 2 of division 1 thereof."

It appears to me that what was undoubtedly meant by these pleadings was that the *organization of new company* was said to be beyond the commissioner's power since that was the major issue in *Carpenter v. Pacific Mut. Life Ins. Co.*, 10 Cal.2d 307, 74 P.2d 761.

The next question that arises is whether or not the provisions for mutualization *could* have been litigated in that proceeding inasmuch as mutualization was not to take place until between 1946 and 1948, or "so long as the Conservator or a Liquidator of the Old Company may continue to hold any or all of said stock. * * *" Paragraph 20(a), rehabilitation agreement. The proposed voluntary mutualization plan was also to be in accordance "with the laws of the State of California in effect at the time of said request. * * *" The plan was also not to be proposed unless the price determination committee "shall determine whether in their opinion the proposed voluntary mutualization of the New Company * * * can then be practicably accomplished. * * *" In *Silva v. City & County of San Francisco*, 87 Cal.App.2d 784, 198 P.2d 78, 80, a county

board of supervisors passed a resolution that certain land of plaintiff's should be acquired when necessary. Plaintiff sued for a declaration as to the value of his property. The court, in refusing to place plaintiff's valuation on the property, declared: "The court may take judicial knowledge that real estate values do not remain constant. The value fixed during the present period may be disproportionate to what should be paid when the recreation department of the city decides to use the property as part of a 'playground.' Plaintiff seeks a final determination that the property is worth \$10,000 and that *if and when* defendant chooses to take the property this will be the amount it must pay." (Emphasis that of the court.) It was also said that "* * * the present complaint alleges in substance that the value of the property may be determined through condemnation proceedings when defendant deems it 'necessary.' The only declaratory judgment that could be rendered under the allegations of the complaint would be of an advisory nature—namely, that when defendant deems it necessary to institute condemnation proceedings the price be fixed at the then market value." 87 Cal. App.2d at pages 778-789, 198 P.2d at page 80.

In *Young v. Young*, 100 Cal.App.2d 85, 87, 223 P.2d 25, 26, it was held that an action to establish a foreign decree of divorce in California, and for ratification by the California court of a property settlement included in the foreign decree, did not present a justiciable controversy in the absence of a showing that defendant had refused or failed to comply with the foreign decree or the terms of the property settlement agreement. It was held that "The rule is accurately stated in 1 Cal.Jur.(1921) at page 335, section 25, as follows: 'To invoke the jurisdiction of a court of justice, it is primarily essential that there be involved a genuine and existing controversy, calling for present adjudication as involving present rights.' See, also, *Neill v. Five C. Refining Co.*, 79 Cal.App.2d 191, at page 193, 179 P.2d 818, wherein Mr. Justice Drapeau thus pointedly states the rule, 'An action not founded upon an actual

controversy, or prosecuted "for the gratification of the curiosity of the litigants" is collusive and will not be entertained. (Citing cases.)' "

In *Merkley v. Merkley*, 12 Cal.2d 543, 547, 86 P.2d 89, 91, the court stated that "The facts in the record present an academic question only. The courts will not exercise the discretionary power to declare rights which do not give rise to a present controversy."

In *County of San Diego v. California Water, etc., Co.*, 30 Cal.2d 817, 823, 826, 186 P.2d 124, 130, 175 A.L.R. 747, a case involving an agreement by a county to relocate a county highway, we enunciated the following rule: That if the Legislature had provided a method by which a county or city might abandon or vacate roads, that method was *exclusive*. We said: "It is clear, however, that neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public. See *Miller v. McKinnon*, 20 Cal.2d 83, 124 P.2d 34, 140 A.L.R. 570, and cases cited therein; *Pan American Co. v. United States*, 273 U. S. 456, 505, 506, 47 S.Ct. 416, 71 L.Ed. 734; *American Surety Co. of N. Y. v. United States*, 10 Cir., 112 F.2d 903, 906. In the *American Surety Co.* case the court stated that the government could not be estopped so as to 'frustrate the purpose of its laws or thwart its public policy.' 112 F.2d at page 906. In 3 *McQuillin, Municipal Corporations* [2d ed., 1943], § 1266, it is said that various statutory procedures or steps exist to protect citizens and taxpayers from ill-considered contracts or those showing favoritism and that if recovery is allowed for property or services on the ground of estoppel or implied contract, 'then it follows as the night the day that the statute or charter provision can always be evaded and set at naught.' The author adds that the rule denying indirect enforcement of such void contracts harmonizes with our governmental system, appears to be supported by reason, and is not unjust, because the other party is charged with notice of the law."

At any rate, the *plan* of mutualization, as distinguished from the *provisions* for mutualization as found in the rehabilitation agreement, has never until this case, been passed upon. That plan, while following the outline contained in Paragraph 20(a) made some ten years prior to the promulgation of the one here under consideration, is an entirely different matter and may properly be held void as not in accordance with the statutory scheme for involuntary mutualization of insolvent insurance companies seized by the commissioner under the provisions of sections 1010 and 1011 of the Insurance Code. The rule enunciated in *County of San Diego v. California Water, etc., Co.*, supra, hereinabove set forth would be applicable if the plan of mutualization is held void as against public policy and as being in excess of the commissioner's jurisdiction.

It should be noted that Paragraph 20(f) contains a provision to the effect that if all, or any part, of the paragraph should be contrary to law, or illegal, or void, the vulnerable provision should be deemed separable and the balance of the agreement should stand. If, as I believe, the validity of Paragraph 20(a) has never been before determined, the provision just noted would prevent anything that has been heretofore determined by either this court, or any appellate court, from conflicting with the determination made here.

Trial de Novo

If the procedure for involuntary mutualization had been followed, as it should have been, this question would never have arisen. Section 1048 of the Insurance Code provides that after the formulation of the mutualization plan, it "shall" be submitted by the commissioner to the court for its approval. The clear import of the procedure outlined for insolvent organizations is that those possessed of property rights in them must be accorded *court* protection at *every* stage. For example, the *court* appoints the appraisers (§ 1051). Such court approval, required by section 1048, accords the interested parties the equivalent of a trial de novo.

According to the majority opinion, the "alternative" reason given for affirmance

is reliance upon the doctrine of *res judicata*. That this reason is patently false is shown by Mr. Justice TRAYNOR when he points out that the court "could obviously not approve [the] plan at the time it entered its order approving the rehabilitation agreement. Moreover, it did not expressly approve in advance the carrying out of any mutualization plan that might be presented by the price determination committee." He shows that there is reserved to the court, by the agreement, continuing jurisdiction to approve or disapprove plans to be developed in the future for mutualization or other disposal of the stock in the hands of the commissioner. He points out that to so interpret the order subverts the primary purpose of section 1037(d) of the Insurance Code by securing to all interested parties "their right to court scrutiny." Appellants have not been accorded "court scrutiny" in its true sense.

Appellants correctly contend that the order of the commissioner approving the plan of mutualization was subject to full judicial review by the superior court. It is argued that the commissioner, in making his order, acted in a judicial capacity rather than in an administrative or legislative capacity as contended by respondents. Appellants contend that in reviewing a decision or order of a statewide administrative agency or of a state officer, the superior court must reweigh the evidence and determine for itself according to its independent judgment whether or not the decision is supported by the weight or preponderance of the evidence in every case where state judicial functions are involved. They rely upon *Thomas v. California Emp. Stab. Comm.*, 39 Cal.2d 501, 504, 247 P.2d 561; *Moran v. Board of Medical Examiners*, 32 Cal.2d 301, 308, 196 P.2d 20; *Laisne v. California St. Bd. of Optometry*, 19 Cal. 2d 831, 834-835, 123 P.2d 457; and *Drumme v. State Bd. of Funeral Directors*, 13 Cal.2d 75, 87 P.2d 848. Respondents, on the other hand, argue that the commissioner's order was an exercise of executive power and was not the exercise of such full judicial power as to entitle appellants to have the trial court exercise its independent judgment with respect to the

weight of the evidence. Respondents rely upon the cases of *Bank of Italy v. Johnson*, 200 Cal. 1, 251 P. 784; *Doble Steam Motors Corp. v. Daugherty*, 195 Cal. 158, 232 P. 140; *McDonough v. Goodcell*, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205, and *Southern California Jockey Club v. California, etc., Racing Board*, 36 Cal.2d 167, 223 P.2d 1.

The duties of the commissioner, as set forth in section 12921 have been held to be "that of a minister of the court in possession of the property, to the end of conserving the rights of everybody having any interest", 11 P.2d 873, 876, *H. D. Roosen Co. v. Pacific Radio Pub. Co.*, 123 Cal. App. 525, and discretionary, *Garris v. Carpenter*, 33 Cal.App.2d 649, 657, 92 P.2d 688. It was held in *Caminetti v. Guaranty Union Life Ins. Co.*, 22 Cal.2d 759, 764, 141 P.2d 423, 425, that the commissioner's " * * * office is not to perform functions in aid of the court's jurisdiction to decide a controversy between litigants, but he acts as a statutory officer, subject, however, to judicial supervision to prevent an arbitrary exercise of power or neglect of duty." The court in the *Caminetti* case, however, was referring to the commissioner as a receiver of the assets of insurance companies and stated that he did not derive his power from the court, but from the statute.

The distinction in the two lines of cases relied upon by appellants and respondents is that in those relied upon by appellants an existing vested property right was extinguished, or taken away, by the administrative order. For example, in the *Drumme* case, 13 Cal.2d 75, 87 P.2d 848, 853, *Drumme* and *Wilson* had been duly licensed embalmers and the State Board of Funeral Directors and Embalmers ordered their licenses suspended. This court held that it was dealing with a statute which conferred certain fact-finding powers on a board exercising statewide jurisdiction and that there was no "indication that the legislature intended the facts so found to be binding on the courts"; that no method of review was provided in the statute. We held that we could see no escape from the conclusion that in such a

proceeding the court to which the application for mandate is made must weigh the evidence, and exercise its independent judgment on the facts as well as the law, if the complaining party is to be accorded his constitutional rights under the state and federal constitutions. "The state constitutional provision discussed, *supra*, prohibits the conferring of judicial power on such administrative boards", 13 Cal.2d at page 84, 87 P.2d at page 853.

In *Laisne v. California St. Bd. of Optometry*, *supra*, the California State Board of Optometry had revoked Laisne's certificate of registration to practice optometry in this state. We held there that "On the authority of the *Drumme*y case the only type of review that would afford appellant his full constitutional rights would be a complete trial de novo as outlined in the decision in that case." 19 Cal.2d at page 843, 123 P.2d at page 464.

In *Moran v. Board of Medical Examiners*, *supra*, the State Board of Medical Examiners revoked the license of Dr. Moran to practice medicine in this state. We held "That the trial court in this case was 'authorized by law to exercise its independent judgment on the evidence' is well established. (See *Dare v. Board of Medical Examiners*, 1943, 21 Cal.2d 790, 795, 136 P.2d 304; *Sipper v. Urban*, 1943, 22 Cal.2d 138, 141, 137 P.2d 425; *Hohreiter v. Garrison*, 1947, 81 Cal.App.2d 384, 402, 184 P.2d 323.) As stated in the last cited case, 81 Cal.App.2d at page 402, 184 P.2d at page 334, 'Thus the ultimate power of decision rests with the trial court.'" 32 Cal.2d at page 308, 196 P.2d at page 25.

In *Thomas v. California Emp. Stab. Comm.*, 39 Cal.2d 501, 247 P.2d 561, it was held that unemployment benefits provided for by the Unemployment Insurance Act were such property rights as to fall within the rule that persons deprived of property rights by a statutory administrative agency were entitled to a limited trial de novo in the superior court.

Respondents' position (which has been adopted in toto by the majority opinion) is that the "Order" of the commissioner was

merely a "permit" which allowed mutualization if the policyholders so voted (section 11526(d)) and that the order did not deprive anyone of vested property rights. We have heretofore held, *Thomas v. California Emp. Stab. Comm.*, 39 Cal.2d 501, 504, 247 P.2d 561; *Laisne v. California St. Bd. of Optometry*, 19 Cal.2d 831, 123 P.2d 457; *Moran v. Board of Medical Examiners*, 32 Cal.2d 301, 308, 196 P.2d 20; *Drumme*y v. State Bd. of Funeral Directors, 13 Cal.2d 75, 87 P.2d 848, that where an existing property right is extinguished by the questioned administrative order the one so deprived is entitled to a trial de novo in the superior court. Appellants here are the beneficial owners of the stock of new company which is held by the voting trustees for their benefit. Under the proposed mutualization plan, this stock will be non-existent and they will be forced to accept a price therefor, as well as terms, over which they have exercised no control. Mr. Justice Traynor has pointed out that if the proper procedure had been followed, the rights of these people would have been protected by a court of law, rather than subjected to the action of one man acting in three irreconcilable positions. The assets of old company were transferred to new company in exchange for all the stock of new company which, in the beginning, was held by the commissioner, as conservator for the benefit of the creditors, policyholders, and stockholders of old company, *Caminetti v. Pacific Mutual Life Ins. Co.*, 22 Cal.2d 344, 351, 139 P.2d 908. Later, the stock of new company was transferred to voting trustees who held legal title thereto, "* * * with the power to exercise all the rights of ownership. The commissioner, however, retains the entire beneficial interest for the benefit of creditors of the old company and others interested." 22 Cal.2d at page 357, 139 P.2d at page 915. As stated by the insurance commissioner in his opinion and decision (page 7 of the Exhibit): "Greatly epitomized, the plan [of mutualization] determined that both the Participating and Non-Participating Life Departments of the company should be mutualized by the purchase and cancellation of all of the

outstanding shares of capital stock of the New Company, thus converting the New Company into a non-stock insurer conducted for the benefit of its members who shall be the policyholders of the participating and non-participating life classes." Inasmuch as purchase and cancellation of the stock of new company will be accomplished by the proposed mutualization, it appears that appellants have been deprived, by the order, of their vested beneficial ownership of that stock so as to entitle them to a trial de novo within the rule of the cited cases.

The majority opinion states: "The approval of the mutualization plan by the commissioner did not involve any deprivation of property rights or vested rights; it was in essence a permit or license authorizing the new company to purchase its own stock." This *would* be true *if* new company members owned their own stock (and therein lies the fallacy in calling new company a solvent corporation with all that term connotes). But the matter is not quite so simple. All the beneficial ownership, which is the *real* ownership is held by the policyholders and stockholders of old company; all the legal title is held by the voting trustees (appointed by the commissioner) for the benefit of *old company* policyholders and stockholders. In other words, new company holds neither legal nor beneficial ownership of its stock, but through the medium of the mutualization plan is given the right to deprive the beneficial owners of their property in clear violation of the law as heretofore propounded by this court. We held in the Drummey case that we could see no escape from the conclusion that the court must weigh the evidence and exercise its independent judgment on the facts as well as the law, if the complaining party was to be accorded his *constitutional rights* under the state and federal Constitutions. 13 Cal.2d 75, 87 P.2d 853. "The state constitutional provision discussed, *supra*, prohibits the conferring of judicial power on such administrative boards."

In *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 52, 56 S.Ct. 720, 726, 80 L.Ed. 1033, the court stated: "Legislative

agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive *where constitutional rights of liberty and property are involved*, although the evidence clearly establishes that the findings are wrong and *constitutional rights have been invaded*, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But, if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. *The principle applies when rights either of person or of property are protected by constitutional restrictions*. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority." (Emphasis added.) This case and this statement were relied upon by us in the Drummey case, *supra*, 13 Cal.2d 75, 85, 87 P.2d 848, and no information has been presented to me to show that the rule there set forth has been in any way changed. No clearer case than this could possibly be found to illustrate the evils to be avoided. Old company stockholders and policyholders have been, and are, at the "mercy" of administrative officials; those officials may, during the last ten years, have been either "expert and impartial" or "subservient."

I have heretofore set forth at length the self-evident fact that appellants are possessed of vested property rights of which they are being deprived. In *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289, 40 S.Ct. 527, 528, 64 L.Ed. 908, it was held: "The order here involved pre-

scribed a complete schedule of maximum future rates and was legislative in character. *Prentis v. Altantic Coast Line Co.*, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150; *Lake Erie & Western R. Co. v. State Public Utilities Commission*, 249 U.S. 422, 424, 39 S.Ct. 345, 63 L.Ed. 684. In all such cases, *if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts: otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment.* *Missouri Pacific Ry. Co. v. Tucker*, 230 U.S. 340, 347, 33 S.Ct. 961, 57 L.Ed. 1507; *Wadley Southern Ry. Co. v. Georgia*, 235 U.S. 651, 660, 661, 35 S.Ct. 214, 59 L.Ed. 405; [State of] *Missouri v. Chicago, Burlington & Quincy R. Co.*, 241 U.S. 533, 538, 36 S.Ct. 715, 60 L.Ed. 1148; *Oklahoma Operating Co. v. Love*, 252 U.S. 331, 40 S.Ct. 338, 64 L.Ed. 596." (Emphasis added.)

Appellants here complain bitterly because the mutualization plan provides that the price to be paid for new company's stock (of which they are the *beneficial owners*) is \$3,000,000 while that same amount was originally taken out of old company's funds to purchase new company's stock and, in addition, all the other assets of old company (over \$200,000,000 in assets plus such intangibles as going agency organization and concern, good will, etc., "worth several millions of dollars", *Carpenter v. Pacific Mut. Life Ins. Co.*, 10 Cal.2d 307, 325, 74 P.2d 761, 772) were turned over to new company! It surely must be crystal clear to everyone who can think that such an outrageous confiscation of property without due process of law has never before taken place in this state.

Evidence

In the trial court the evidence consisted of all of the record of the proceedings before the insurance commissioner, consisting of the reporter's daily transcript, the exhibits and the commissioner's decision. Appellants contend that they were prohibited from introducing evidence, or offering to do so, because of the rulings of the

trial court; that no issues of fact were litigated; that the court ruled that it was not empowered to exercise its independent judgment on the evidence taken before the commissioner. Respondents state that appellants were given leave to serve and file a motion and affidavits relative to the introduction of additional evidence and failed to do so. The memorandum opinion and order (July 2, 1951, Clk. Tr., 237-239) contains this statement: "After a careful study of the briefs submitted and the authorities cited I have come to the conclusion that, so far as any matter of fact is concerned, this Court is limited to determining whether or not the findings of the Commissioner are supported by substantial evidence in the light of the whole record, but that it is for this court to exercise its independent judgment in interpreting the *Rehabilitation Agreement* and in construing and applying section 11527 of the Insurance Code. * *

"I have come to the further conclusion that this Court cannot receive any additional evidence, but that upon proper showing may remand this matter to the Commissioner to take further evidence and reconsider the case in the light of such evidence. * * *

Appellants point to the statements made by the trial judge on the settlement of findings that "*I think it must be very evident if I had had this case to decide on a new question of fact my decision might have been the opposite*" (emphasis added; page 766, Rep. Tr.) and "It [fixing the price] is very complex, and I think you are making it more complex. My finding was, and the basis of my determination was that they [the price determination committee] had a reasoned basis in fixing the price. That is the fact. If they had acted unreasonably then I would have had to set it aside. It was only because I could not convince myself that it was not a rational conclusion that they acted upon that I ever decided the case the way I did. *Because I could not take the facts and arrive at the same conclusion; not by a long shot. But because I did not feel that I could substitute my opinion for theirs, or substitute my opinion for the Commissioner's, that is the reason I arrived at the conclusion that I did. But*

that is the crux of it. It is not the details that they took in. What you are entitled to find now is entirely evidentiary." (Emphasis added.) The inference from this is obvious—that had the involuntary procedure been followed, the court would have withheld its approval because the plan did not protect the interests of those owning the beneficial interests.

The just-quoted statement made by the trial court shows, without equivocation, that had there been a trial de novo his decision would have been contrary to that reached. His statement shows that he was convinced that the weight of the evidence was with appellants but, believing himself limited by the substantial evidence rule, his conclusion was in favor of respondents. The only rational conclusion to be drawn from the facts of this case is that appellants were possessed of a vested property right and, therefore, should have been given a trial de novo in a *judicial tribunal* provided by the state for the protection of private property rights. Because appellants were not afforded a trial de novo they have been deprived of their property without the due process of law guaranteed to them by both the state and federal Constitutions.

Summary of Major Points

(1) It is my opinion that the provisions of the Insurance Code relating to voluntary mutualization of solvent insurance companies were not applicable to new company. As I have heretofore pointed out, new company was organized because of the insolvency of old company and cannot be considered as a solvent company until the liabilities arising from the non-can policies have been paid or sufficient funds accumulated to pay them. The voluntary mutualization provisions of the Code in and of themselves show that they were intended by the Legislature to apply to not only a *solvent* company but to a company not so closely supervised by the commissioner as the one here under consideration. The ordinary solvent company is not such a hybrid as we have in new company. In using the voluntary procedure, we have the commissioner, acting as conservator and beneficial owner of the stock of new company,

agreeing to vote for the plan of mutualization as proposed by the price determination committee. As conservator, and beneficial owner of the stock of new company, he is *supposed* to be protecting the rights and interests of those in the position of appellants. When, as commissioner, he approves the proposed plan as fair and equitable, under the voluntary mutualization procedure, he is concerned with the fairness of the plan as it concerns those interested in new company. If the normal solvent company were being mutualized, the plan of mutualization would be proposed by the company itself, approved by its board of directors, adopted by a majority vote of its own shareholders, and then approved by the commissioner who, presumably, would not have seen the plan, or even heard of it, prior to the time it was presented to him for his approval as fair and equitable to those concerned—the shareholders and policyholders of the solvent company.

The following statement is found in the majority opinion: "In numerous cases where the action of an administrative officer was necessary *to prevent defeat of the statutory scheme*, his participation has been upheld although the grounds for disqualification were much more serious than those raised here." (Emphasis added.) The author again assumes too much. He assumes that the "statutory scheme" was being carried out. On the contrary, the statutory scheme is being *defeated*. The entire scheme for rehabilitation of insolvent corporations, and the statutory protection of the interested persons therein, is abrogated through the use of the procedure designed for mutualization of solvent corporations.

(2) I am also of the opinion that Paragraph 20(a) of the rehabilitation agreement has never before been judicially determined and, therefore, its provisions are not res judicata of the present controversy. I have pointed out that there is a separability clause in the rehabilitation agreement and that nothing heretofore done by this, or an appellate court, will be affected by a holding by this court that the parties may not validly contract to mutualize new

company contrary to the applicable statutory provisions.

(3) There should have been a trial *de novo* in the superior court where evidence relative to the proper method to be used by the price determination committee, or *court-appointed* appraisers, could have been introduced by both sides and a determination made by a judicial trier of fact. Both appellants and respondents here devote many pages of their numerous briefs to such material. Such methods are obviously matters for experts in the field of insurance and should be the subject of testimony in the trial court.

(4) If, as I firmly believe, the procedure for involuntary mutualization of insolvent companies is the proper procedure, sections 1049, 1050, 1051 and 1052 of the Insurance Code contain detailed provisions for hearings and the appointment by the court of appraisers to appraise "the then outstanding shares of the capital stock of such insurer, without regard to any appreciation or depreciation arising out of said mutualization plan as so approved or modified. Such appraisal shall fix the reasonable value of such shares of capital stock, including the goodwill, if any, of such insurer, and shall state the value, if any, assigned to such goodwill; and if the appraisers shall have found that such insurer has no goodwill, such finding shall be stated. Such appraisal, when confirmed by said court, shall be final and conclusive." Section 1051.

The use of the involuntary mutualization procedure for an insolvent company follows logically from the original proceeding under sections 1010 and 1011. It should be noted that section 1054 (still under the Insolvency and Delinquency sections) provides that: "*Such insurer, after mutualization, shall be a continuation of the original insurer, and such mutualization shall not affect existing suits, rights or contracts except as provided in said mutualization plan as approved. Such insurer, after mutualization, shall exercise all the rights and powers and perform all the duties conferred or imposed by law upon insurers writing the classes of insurance written by it, and to protect rights and contracts ex-*

isting prior to mutualization, subject to the effect of said mutualization plan." (Emphasis added.)

We held in *Carpenter v. Pacific Mut. Life Ins. Co.*, 10 Cal.2d 307, 334, 74 P.2d 761, that "reinsurance" was a contract by which one company (new company) takes over the insurance risks of another company (old company) and becomes substituted as an insurer in the place and stead of the original insurer. This holding is also the logical result of following the procedure outlined in the Insolvency and Delinquency division of the Insurance Code.

From what Mr. Justice TRAYNOR has said in his dissent and from the reasons heretofore set forth by me, the conclusion is *inescapable* that the judgment should be reversed.

SCHAUER, Justice.

I concur generally in the discussion, the reasoning and the conclusions of Mr. Justice CARTER.

Rehearing denied; CARTER, TRAYNOR and SCHAUER, JJ., dissenting.



134 Cal.App.2d 329

Birdle D. HUGHES, Plaintiff and
Respondent,

v.

Dee FORWARD, Defendant and Appellant.
Civ. 20718.

District Court of Appeal, Second District,
Division 1, California.

July 11, 1955.

Action to quiet title to certain real estate and stock. From an adverse judgment of the Superior Court, Los Angeles County, Louis H. Burke, J., the defendant appealed. The District Court of Appeal, Doran, J., held evidence was sufficient to sustain findings that there was not a valid delivery of the deed or the stock certificates

to the transferee and there was no intent on part of transferor to make a present gift.

Judgment affirmed.

1. Corporations Ⓒ139

Deeds Ⓒ208(1)

Gifts Ⓒ49(4, 6)

In action to quiet title to certain realty and stock by transferor whose name appeared in deed and stock certificates as joint tenant transferee, evidence was sufficient to sustain findings that there was not a valid delivery of the deed or the stock certificates to the co-transferee and there was no intent on part of transferor to make a present gift of the realty or stock to co-transferee.

2. Appeal and Error Ⓒ931(1), 1011(1)

The finding of the trial court on conflicting evidence is deemed conclusive and the conflict will be resolved in favor of the trial court's finding.

Robert S. Butts and John Leo Harris, Hollywood, for appellant.

A. J. O'Connor, George J. Hider, Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from a judgment quieting title to certain real estate and stock certificates in favor of plaintiff, now deceased, and against the defendant-appellant Dee Forward, plaintiff's niece. The record title to the property was in the joint names of plaintiff and defendant.

From the record it appears that plaintiff's husband died on July 2, 1949, leaving all property to the plaintiff. Mrs. Hughes, the plaintiff, was 72 years old, suffering from diabetes, arteriosclerosis, cancer, and partial blindness. On April 5, 1950, Dee Forward, appellant, at respondent's request, drove Mrs. Hughes to the law office of Glen Behymer, who had handled Mr. Hughes' estate, and Mrs. Hughes there executed the deed here in question conveying the real estate to "Birdie D. Hughes and Dee Forward, as joint tenants". This deed was notarized by Della R. Manes, Attorney Behymer's secretary. There is testimony

that the attorney explained the nature of the conveyance to Mrs. Hughes, but this episode is denied by Mrs. Hughes.

On the same day, the joint tenancy deed was recorded "at request of Birdie D. Hughes, Dee Forward", as shown by the Recorder's stamp on the deed, and was returned to Attorney Behymer's office pursuant to a notation on the back of the conveyance. The respondent, Mrs. Hughes, admitted going to the attorney's office and the genuineness of the signature, but denied any knowledge or recollection of executing a joint tenancy deed.

Plaintiff testified: "It was my idea to make a will, and I supposed that I was signing a paper that I thought was a will"; that plaintiff did not deliver the joint tenancy deed to Dee Forward, and did not authorize Attorney Behymer to make delivery. Mrs. Hughes further denied having any knowledge of the deed until some two years later when desiring to sell the property; never had possession of the paper and never intended to execute such an instrument.

In respect to certificates of stock in El Tejon Ranch Company, bearing the names of Birdie D. Hughes and Dee Forward as joint tenants, Mrs. Hughes likewise denied having ever instructed anyone to create such a joint tenancy, denied delivering the certificates to Dee Forward, and disclaimed any knowledge of the joint tenancy until in 1954. From the date of the decree of distribution under which the stock was received from Mr. Hughes' estate, Mrs. Hughes always considered herself the owner of the stock; "I not only considered it, I was. I took the dividends and spent it". Dee Forward never "claimed any right as an owner to any of these shares". During 1950-51, Mrs. Hughes and Dee Forward had a safe deposit box standing in both names. Appellant and respondent were living together in Mrs. Hughes home from approximately December, 1949 until March, 1952, at which time, due to a family misunderstanding, Dee Forward left.

The record discloses that Dee Forward, although present at the attorney's office, did not see Mrs. Hughes sign the joint tenancy deed, and the latter "never handed

it to me". The appellant testified: "Aunt Birdie (Mrs. Hughes) said that she was going to put the property in joint tenancy with me because she had been in failing health, and wanted my Aunt Kitty (sister of Mrs. Hughes) to be taken care of in the event of her death, and, in any event, that she wanted the property to—what remained, to go to me, to my mother, and to my boy". Dee Forward "did not pay Aunt Birdie D. Hughes anything for this deed", and "never paid taxes on the property at any time". Nor did the appellant ever collect any rents from the property, and never paid anything for maintenance thereof.

Likewise, Dee Forward testified in answer to the question "you never received any delivery of any certificate of those shares, (El Tejon Ranch Company) did you?", said, "No, I can't recall", never had possession of the certificates, never received any assignment of the stock, and had no power of attorney from Mrs. Hughes authorizing the stock to be placed in joint tenancy. Mrs. Hughes denied any recollection of signing a request that the stock be issued in joint tenancy. The evidence does not solve the problem of how the stock certificate came to be issued in the joint names of respondent and appellant. And, as stated in appellant's brief, "The evidence is not clear, however, as to how the deed came back into the possession of either party after being returned to Birdie D. Hughes' attorney".

Mrs. Hughes original complaint was for cancellation on the ground of fraud; for breach of contract, and to quiet title, but at the close of the evidence, plaintiff was permitted to amend to conform to proof on the additional ground that there had been no delivery of the deed or the stock. The trial court believed "that the evidence doesn't show a valid delivery of the deed or of the stock certificate or certificates", and "that the evidence does not show any intent on the part of Mrs. Hughes to make a present gift of either the property, the real property or the stock, to her niece, the defendant", and entered judgment accordingly.

It is appellant's contention that "A valid and irrevocable joint tenancy estate was

created" between appellant and respondent in respect to both the real property and the corporate stock, and that Mrs. Hughes' actions "constituted gifts inter vivos and cannot be revoked by the grantor". It is claimed that "There is no substantial evidence in the record to support the findings and judgment * * * quieting title * * * in Birdie D. Hughes and holding that Dee Forward had never acquired an interest as joint tenant in said property".

As pointed out in respondent's brief, "appellant concedes a conflict in the evidence; yet notwithstanding this concession, it is urged that plaintiff's evidence * * * 'is not only such as to tax the credulity of the trier of facts but also to justify an appellate court's total disregard thereof'." These contentions, in effect seeking a reconsideration and evaluation of weight and credibility of the evidence, are, as respondent says, "one which may be properly addressed to the trier of facts, and to the trial court on a motion for a new trial (both of which were done in this case and decided adversely to defendant) but not to an appellate tribunal."

[1, 2] A survey of the record leaves no doubt in the mind that there is substantial evidence in support of the findings and judgment. The fact that there is conflicting evidence merely brings the case within the well established rule that every such conflict must, on appeal, be resolved in favor of the trial court's findings "which are deemed conclusive". *Sutera v. Palmieri*, 79 Cal.App.2d 359, 361, 180 P.2d 414.

There is no serious question of law involved in the present appeal. The decision rests, rather, upon the credibility of the witnesses and which of two conflicting versions should be believed. If appellant's interpretation of the evidence is to prevail, then there was a fully executed gift inter vivos of land and stock which could not be recalled. But the trial court, having had the advantage of observing the demeanor of plaintiff and defendant on the stand and that of the supporting witnesses, came to a contrary conclusion—namely that Mrs. Hughes, ill and full of years, had never intended to make gifts to the niece, and that in some manner, not fully explained by

the evidence, the transfers of land and stock, making Dee Forward a joint tenant thereof, were accomplished. It cannot be said that this conclusion is without support, nor that the plaintiff's testimony is incredible. No reversible error has been pointed out.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J.,
concur.



134 Cal.App.2d 417

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Paul E. SMITH, Defendant and Appellant.
Cr. 5354.

District Court of Appeal, Second District,
Division 1, California.

July 19, 1955.

Prosecution for violation of section 288 of the Penal Code. From judgment of conviction of Superior Court, Los Angeles County, Burdette J. Daniels, J., defendant appealed. The District Court of Appeal, Drapeau, J., held that in sexual psychopathy proceedings it is only after the order of commitment as a sexual psychopath that a defendant may demand a jury on the issue of sexual psychopathy.

Judgment affirmed.

1. Criminal Law ⇨1159(2)

When a jury, in a criminal case, has determined a question of fact and there is substantial evidence to support that determination, the appellate court will not reweigh the evidence. West's Ann.Const. art. 6, §§ 4, 4b; Pen.Code, § 288.

2. Mental Health ⇨449

Record on appeal disclosed that sexual psychopathy proceedings were regular, sufficient, and proper, and in accordance

with governing statutes. Pen.Code, § 288; Welfare and Institutions Code, § 5512.

3. Jury ⇨25(6)

In sexual psychopathy proceedings it is only after order of commitment as a sexual psychopath that defendant may demand a jury.

Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and James D. Loeb, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

Defendant was convicted by a jury of violating Section 288 of the Penal Code. He admitted one prior conviction of a felony, (robbery and kidnapping) for which he served a term of imprisonment in the penitentiary. He appeals from the judgment of the Superior Court sending him back to state's prison.

Defendant argues the sufficiency of the evidence to establish the crime charged, and that it was error for the trial court to deny him a jury trial and a hearing on the issue of sexual psychopathy.

[1] So far as the sufficiency of the evidence is concerned, this Court is without power to do other than affirm the judgment. The boy victim of the defendant testified to the commission of the acts denounced by the Penal Code. Defendant denied them; the jury resolved the question of fact against him; and under familiar rules of appellate practice that is all there is to it.

The Constitution of this State limits a review by appellate courts to questions of law alone. Const. Art. VI, Secs. 4, 4b. And when a jury has determined a question of fact and there is substantial evidence to support that determination, it is not the function of an appellate court to reweigh the evidence. People v. Newland, 15 Cal. 2d 678, 104 P.2d 778.

[2,3] This Court has examined the record and finds that the sexual psychopathy proceedings were regular, sufficient, and proper, and in accordance with the

code sections defining and applying the sexual psychopathy statutes of this state. In such proceedings it is only after the order of commitment as a sexual psychopath that a defendant may demand a jury. *People v. Willey*, 128 Cal.App.2d 148, 275 P. 2d 522.

In this case defendant was not committed as a sexual psychopath. He was referred to a state hospital for observation and diagnosis. Section 5512, Welfare and Institutions Code. He was returned to the Superior Court with the report that while he was a sexual psychopath he would not benefit from further treatment in a state hospital. Then his application for probation was denied and judgment was pronounced.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



134 Cal.App.2d 161

**In the Matter of the ESTATE of Avil
NEPOGODIN, Deceased.**

**Lubov I. GOVIADINOFF et al., Petitioners
and Respondents,**

v.

**The ATTORNEY GENERAL of the State of
California, Appellant.**

Civ. 16463.

District Court of Appeal, First District,
Division 2, California.

June 27, 1955.

Proceeding on petitions of nonresident alien next of kin of intestate for payment to them of residue of estate, which had been previously distributed to state of California under escheat law. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., granted petition. State appealed. The District Court of Appeal, Nourse, P. J., held that where petitioners were nonresident aliens residing at Harbin, Manchuria, China, on January 13, 1949,

when intestate died, Court would take judicial notice that such place was within territory of Republic of China, and that under treaty between United States and China, providing for reciprocal rights of inheritance, petitioners were entitled to estate.

Judgment affirmed.

1. Aliens ⇨13, 14

Where treaty between United States and Republic of China gave reciprocal rights of inheritance only to nationals of the contracting parties, and residents of China, Harbin, Manchuria, who petitioned to take estate and who were not nationals, derived no rights from treaty, or rule that such treaty, as supreme law of land, superseded provisions of Probate Code which were inconsistent with it. Treaty between United States and China, Nov. 4, 1946, art. 8, subd. 4, 63 Stat. 1307; Probate Code, § 259.

2. Aliens ⇨14

In proceeding on petition of nonresident alien heirs of intestate to recover estate which had been paid to state under escheat laws, only function of treaty between United States and Republic of China was that of evidence of existence of reciprocity required by statute providing that right of aliens not residing in United States to take personal property by succession is dependent upon existence of reciprocal right upon part of citizens of United States to take personal property in country of which aliens are residents. Treaty between United States and China, Nov. 4, 1946, art. 8, subd. 4, 63 Stat. 1307; Probate Code, § 259.

3. Descent and Distribution ⇨1

Existence of a right of succession is determined as of the date of death of decedent.

4. Aliens ⇨14

Date of death of decedent was controlling as to existence of reciprocity between citizens of United States and Republic of China to succeed to personal property in each country. Treaty between United States and China, Nov. 4, 1946, art. 8, subd. 4, 63 Stat. 1307; Probate Code, §§ 259, 259.1.

5. Evidence ⚡26

District Court of Appeal took judicial notice that on January 13, 1949, Manchuria was an integral part of the Republic of China. West's Ann.Code Civ.Proc. § 1875, subd. 8.

6. Treaties ⚡9

Where exchange of ratifications between United States and Republic of China of treaty providing for reciprocal descent and inheritance had taken place one and one-half months before death of intestate, treaty was in force as to China as a whole, on date of death of intestate, although at that time civil war existed in China. Treaty between United States and China, Nov. 4, 1946, 63 Stat. 1300.

7. Treaties ⚡5

Action of political departments of the government is controlling as to ability of a foreign state to perform its treaty obligations and question of whether a treaty has been terminated.

8. Treaties ⚡7

Where treaty provided that treaty shall extend to all areas of land and water under sovereignty or control of either United States or Republic of China, parties referred to are the two states as such, not their governments at that moment. Treaty between United States and China, Nov. 4, 1946, 63 Stat. 1300.

9. Treaties ⚡1, 5

Treaties are contracts between sovereign states and are binding on those states even when the government and its form changes.

10. Treaties ⚡3

Fact that Chinese Communist Party declared after signing of treaty between United States and Republic of China, and before its ratification, that party would not recognize treaty, could have no effect on court's determination as of scope of treaty at time Party was engaged in civil war. Treaty between United States and China, Nov. 4, 1946, 63 Stat. 1300.

11. Aliens ⚡14

In statute providing that right of aliens not residing in United States to take personal property by succession is dependent

upon existence of reciprocal right upon citizens of United States to take personal property on same terms as residents of country in which such aliens are resident, word "country" means state, and so long as there is no stabilized secession of a part of a state, the decision as to whether such reciprocity exists must be based on the conditions in the foreign state as a whole, and not on temporary conditions in the specific locality or province of which claimants are residents. Probate Code, § 259.

See publication Words and Phrases, for other judicial constructions and definitions of "Country".

12. Treaties ⚡7

Treaties may be considered as evidence of foreign law.

13. Treaties ⚡9

In proceeding on petition of nonresident aliens to take intestate property which had gone to state under escheat laws, treaty between United States and Republic of China providing for reciprocal descent and distribution as to citizens of two states, was prima facie proof that one and one-half months after its effective date it represented law of China. Treaty between United States and China, Nov. 4, 1946, 63 Stat. 1300; Probate Code, §§ 259, 1027.

14. Treaties ⚡7

A state is bound to carry out in good faith the obligations which it has assumed by a treaty.

15. Evidence ⚡86

In proceeding on petition of nonresident alien heirs of intestate to take estate that had escheated, court could accept as evidence rebuttable presumption that law had been obeyed and official duty had been carried out in determining if reciprocity of right to take property existed in fact between citizens of United States and residents of Republic of China, as provided for in treaty. Treaty between United States and China, Nov. 4, 1946, art. 8, subd. 4, 63 Stat. 1307; Probate Code, §§ 259, 1027; West's Ann.Code Civ.Proc. § 1963, subds. 15, 33.

16. Aliens ⚡14

Fact that civil war existed in China, at time of death of intestate, and that such

civil war could have impeded in many parts of China effective enjoyment of reciprocal rights to take property under descent laws provided for under treaty between Republic of China and United States, was not decisive in determining whether nonresident aliens who resided in Manchuria were entitled to take intestate's personal property. Treaty between United States and China, Nov. 4, 1946, art. 8, subd. 4, 63 Stat. 1307; Probate Code, § 259.

17. Appeal and Error ⌘1010(1)

A finding by the trial court on the issue of reciprocity of rights of citizens of United States and claimant's country to take personal property by descent is to be treated like a finding on any other issue of fact, and if there is evidence to support it such finding will not be disturbed on appeal. Probate Code, § 259.

18. Escheat ⌘6

Statute providing that whenever any claim is made to receive money or other property deposited in treasury, under escheat laws, no recovery will be allowed unless it affirmatively appears that there are heirs or legatees who will receive such money or other property, does not require proof that the heirs will receive the property immediately, free from restrictions in the country of their residence. West's Ann. Code Civ.Proc. § 1354.

19. Escheat ⌘6

Purpose of statute providing that whenever any claim is made to recover money held by state in the Unclaimed Property Fund no recovery will be allowed unless it affirmatively appears that there are heirs or legatees who will receive such money or other property, is to prevent futile proceedings with respect to deposited property for which no entitled heirs are actually in existence. West's Ann.Code Civ.Proc. § 1354.

20. International Law ⌘10.22

Foreign Assets Control regulations providing for placing of distributive shares of nonresident alien heirs in blocked bank accounts, do not prevent such heirs from receiving property under statute providing that no recovery will be allowed of property

held in Unclaimed Property Fund unless it affirmatively appears that there are heirs or legatees who will receive such property. West's Ann.Code Civ.Proc. § 1354.

21. Appeal and Error ⌘151(6)

Where claimants did not appeal from judgment granting them property held by state in Unclaimed Property Fund, state was not entitled to review portion of judgment fixing salary of claimant's attorneys, as state was not aggrieved by that part of the judgment. Probate Code, § 1027; West's Ann.Code Civ.Proc. § 1021.

22. Appeal and Error ⌘880(1)

An appellant is entitled to review of only error which injuriously affects him, and cannot urge error which affects others who do not appeal.

23. Appeal and Error ⌘151(4)

Where federal Foreign Assets Control regulations required that money recovered by nonresident alien heirs of intestate from state unclaimed property fund, must be placed in blocked bank accounts, state's claim that money deposited in such accounts might escheat again was too remote to constitute state a party aggrieved by decision granting claimants attorney's fees, and did not entitle state to review of attorney's fees fixed. Probate Code, § 1027; West's Ann. Code Civ.Proc. § 1021.

Edmund G. Brown, Atty. Gen. of the State of California, Wayne D. Hudson, Deputy Atty. Gen., for appellant.

Douglas M. Moore, San Francisco, for respondent.

NOURSE, Presiding Justice.

The Attorney General of the State of California appeals from a judgment ordering the payment of the residue of the above captioned estate, which had been distributed to the State of California pursuant to Section 1027 of the Probate Code, to the attorney in fact of certain first cousins of decedent as his sole heirs and next of kin, and directing said attorney in fact to deposit said residue in a blocked account in a domestic bank to the credit of the heirs and pay out of said account certain fees, fixed

by the court, to himself and to the counsel of petitioners.

Avil Nepogodin, a single man, died intestate on January 13, 1949, a resident of the City and County of San Francisco. No person entitled to succeed to his estate appeared in probate and the residue consisting of cash in the sum of \$15,427.23 was distributed to the State of California as stated before. The respondents, six first cousins of decedent, by their attorney in fact Edward J. Niedens, timely petitioned for an order directing the payment of said amount to them and for the allowance of reasonable fees to said Edward J. Niedens and to their attorney for services rendered. The Attorney General opposed the petition on the ground among others that petitioners were non-resident aliens residing at Harbin, Manchuria, China, under the dominion of the Communist Government of China and that there did not exist on January 13, 1949, or thereafter reciprocal rights of inheritance between citizens of the United States and of China as required by Section 259 of the Probate Code,¹ and on the further ground that it could not be shown that they, as heirs, would receive the money as required by Section 1354, Code of Civil Procedure.²

1. At the time of decedent's death Section 259 of the Probate Code read in part: " * * * the right of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents."

2. At all times herein involved Section 1354 of the Code of Civil Procedure read in part: "Whenever any claim is made or petition filed by the representative of an estate or other person, under the provisions of this chapter, or under any other provision of law, to recover money or other property deposited in the State Treasury or held by the State or any officer thereof to the credit, or in the name, of any account in the Unclaimed

At the trial before the court without a jury, petitioners with respect to these two points asked the court to take judicial notice of the "Treaty of Friendship, Commerce and Navigation" between the United States of America and the Republic of China, dated November 4, 1946, United States Statutes at Large, Volume 63, Part 2, p. 1300, hereinafter called the Treaty, especially of Article VIII, subd. 4 thereof.³ They likewise asked the court to take judicial notice of, and they introduced into evidence the Foreign Assets Control Regulations, 31 C.F.R. part 500, which require that distributions of property from an estate to a national of China "shall be made by deposit in a blocked account in a domestic bank * * *" (Section 500.523(c) and which regulate the possibility of transfer from such blocked account pursuant to general or special license. Finally petitioners asked the court to take judicial notice of the fact that Manchuria is within the geographical boundaries of the Republic of China.

The court found with respect to these points in substance that petitioners at the time of the filing of said petition were residents of the Republic of China; that on January 13, 1949 and ever since that date there have existed between citizens of the

Property Fund, no recovery will be allowed unless it affirmatively appears that there are heirs or legatees who will receive such money or other property * * *."

3. Article VIII, subd. 4 of said treaty reads in part: "The nationals, corporations and associations of either High Contracting Party shall be permitted to succeed, as heirs, legatees and donees, to personal property of every kind within the territories of the other High Contracting Party, left or given to them by nationals of such other High Contracting Party or by nationals of any third country, and shall be permitted to take possession thereof, either by themselves or by others acting for them, and to retain or dispose of it at their pleasure, exempt from any restrictions, taxes or charges other or higher than those to which the nationals, corporations and associations of such other High Contracting Party are or may hereafter be subject in like cases."

United States and citizens of the Republic of China pursuant to the above treaty reciprocal rights to take personal property by succession as required by Section 259, Probate Code; that the deposit in a blocked account of the distributive shares of petitioners in accordance with the above Foreign Assets Control Regulations is an actual payment of said funds to petitioners who will be able to secure the release of said funds pursuant to general licenses granted in said regulations or special licenses issued by the Department of Treasury, so that they are heirs who will receive said funds as required by Section 1354 of the Code of Civil Procedure; that the reasonable value of the services of the attorney of petitioners was \$5,142.61 and of those of Edward J. Niendens \$500.

Appellant attacks said findings and the decision on the following grounds. 1) The Treaty does not extend to residents of Manchuria and even if it did, it would not prove that a citizen of the United States actually has an enforceable right to receive Manchurian property by succession, the burden of proof of which fact appellant contends is on the claimants under Section 259.1 of the Probate Code. 2) The blocking provisions of the Foreign Assets Control Regulations prevent the petitioners from actually receiving their distributive shares, as required, according to appellants, by Section 1354, Code of Civil Procedure, *supra*, and the licensing provisions of these regulations cannot provide such actual possession. 3) The award of attorney's fees is beyond the jurisdiction of the court, because the compensation of attorneys is left to the agreement of the parties except when specifically provided for by statute, § 1021 of the Code of Civil Procedure, and no such specific provision is applicable to the present situation. We have concluded that said grievances are without merit.

[1, 2] It must be noted from the outset that the provision of the Treaty on which the claimants rely, relates only to *nationals* of the contracting parties. There is no evidence or contention that claimants were at any time nationals of China, only that they were *residents*. Therefore the claimants can derive no rights from the Treaty and

the rule that such Treaty, as the supreme law of the land, supersedes the provisions of Section 259 of the Probate Code which are inconsistent with it, *Clark v. Allen*, 331 U.S. 503, 508, 67 S.Ct. 1431, 91 L.Ed. 1633; *In re Estate of Meyer*, 107 Cal.App.2d 799, 804, 238 P.2d 597, is not applicable to this case. The only function of the Treaty in this case is that of evidence of the existence of the reciprocity required by Section 259, *supra*, for the right of succession of the claimants.

[3, 4] As to the existence of the right of succession the date of the death of decedent is controlling. On the ground that under our law, the property of a decedent on his death vests at once by inheritance in his heirs it was held in *Re Estate of Giordano*, 85 Cal.App.2d 588, 594, 193 P.2d 771, that changes in the substantive law of succession to which Sections 259 and 259.1, Probate Code, belong, enacted after the date of death cannot divest it. The same reasoning supports the decisiveness of that date as to the existence of reciprocity and accordingly the reciprocity was decided as of that date in the California cases. See for instance *In re Estate of Arbulich*, 41 Cal.2d 86, 88, 257 P.2d 433. Although there is no finding to that effect it is undisputed that on the date of death of decedent respondents were residents of Harbin, Manchuria. The first point to be decided is therefore whether the provisions of the Treaty at that time (January 13, 1949) extended to Manchuria, as part of the territory of China. The facts regarding the geographical division and the political history of the world, of which our courts take judicial notice, Section 1875, subd. 8, Code of Civil Procedure; *Ocean Industries, Inc., v. Superior Court*, 200 Cal. 235, 241, 252 P. 722, support the implied finding of the trial court that they did.

During the rule of the dynasty of the Manchus in China (1644-1911) Manchuria formed part of their territory. In the late 19th and early 20th centuries Russia and Japan extended their influence into Manchuria acquiring seaside territories and developing railways. The Russo-Japanese war (1904-1905) was partly fought in Manchuria and over the influence there. In the

Treaty of Portsmouth (1905) which ended said war both states agreed to restore Manchuria to China, but nevertheless both retained influence there. The influence of Russia was mainly limited to an interest in the quasi-private Chinese Eastern Railway whereas Japan held another railway and the seaside territories and embarked on the economic penetration of Southern Manchuria. During the Chinese revolution and civil war (since 1911) Japan obtained the controlling influence in Southern Manchuria. At the Peace Conference of Paris in 1919 at the end of the First World War Japan obtained the enlargement of its Manchurian holdings with the former German holdings in Shantung and China therefore refused to sign the Versaille peace treaty with Germany. Although it continued its penetration of Manchuria, Japan, in 1922, was a party to the Washington Nine Power Treaty which provided for the respecting of the sovereignty and territorial integrity of China and for the abstaining from the supporting of individual spheres of interest. The Communist Government of Soviet Russia, which in 1919 had renounced all special privileges acquired by the Tsarist Government, in 1924 insisted on retaining a share in the administration of the Chinese Eastern Railway in Manchuria. In 1927 a conflict between the Soviet Union and China with respect to these privileges led to an invasion of Manchuria by Soviet troops but in December 1929 in negotiations between the Soviet Union and China the status quo ante was restored.

In 1931 Japanese troops forcibly occupied Manchuria and the Chinese rule there collapsed. China appealed to the League of Nations, but without practical success: when a report on this matter was unfavorable to Japan, it withdrew from the League. In 1932 it declared Manchuria an independent state under the name Manchoukuo. In 1934 it placed Pu Yi, the last Manchu emperor of China, who as a child had abdicated in 1912, on the throne of Manchoukuo. This puppet government was only recognized by Japan and its Axis partners (and San Salvador). This condition continued during the undeclared Japanese-Chinese

war which broke out in July 1937 and during the Second World War.

The continued Japanese aggression led in 1937 to a united front between the Kuomintang Government under Generalissimo Chiang Kai-shek (which in 1928 had been recognized by the United States as the National Government of the Republic of China) and the Chinese Communists, who since 1927 had been in a state of civil war with the Kuomintang Government. As part of this approach the Chinese Communist Party abolished its Soviet Government and its separate red army, which at least in name was placed under control of the National Government. However, notwithstanding the common fight against the Japanese, military friction between the communists and the government soon broke out again. It continued also when after Pearl Harbor the Chinese-Japanese war had become part of the Second World War.

At the Cairo Conference in November 1943 President Roosevelt, Prime Minister Churchill and Generalissimo Chiang Kai-shek declared that it was their purpose that all territories which Japan had taken from the Chinese, such as Manchuria, should be restored to the Republic of China. The Yalta Agreement (February 11, 1945), to which China was not a party, promised the Soviet Union, which would enter the war against Japan, among other things that the Manchurian railroads should be jointly operated by a Soviet-Chinese Company, that the preeminent interests of the Soviet Union should be safeguarded and that China should retain full sovereignty in Manchuria. On August 9, 1945, the Soviet Union entered the war against Japan. On August 14 a Treaty of Friendship and Alliance between the Republic of China and the Soviet Union was concluded. In separate notes and agreements the advantages promised the Soviet Union at Yalta were granted by China and the Soviet Union pledged that it would respect Chinese sovereignty in the control of all of Manchuria as an integral part of China. On the same date Japan surrendered. The Japanese troops in Manchuria surrendered to the occupying troops of the Soviet Union, which agreed to re-

move its troops before February 1946. The removal met with some delay so that it took place mainly in April 1946. The conclusion of the Sino-Soviet Treaty improved the willingness of the Chinese Communists to cooperate with the National Government. In a conference of Mao Tse-Tung with the Government in Chungking it was decided in October 1945 that the leadership of President Chiang Kai-shek would be retained, that at an early date the one party political tutelage of the Kuomintang would be changed to a democratic constitutional government and that a Political Consultative Conference of all parties and non-partisan leaders would further discuss the measures to be taken. On January 10, 1946, a cease fire agreement was concluded between the government and the communists, of which a provision for the movement of National Government troops into and within Manchuria for the purpose of restoring Chinese sovereignty there formed part. The Political Consultative Conference was in session till the end of January and published resolutions as to all pending problems. Further difficulties between the government and the communists prevented their implementation.

When late in 1945 General Marshall had been appointed Special Representative of the President in China, part of his stated task was to assist the Chinese National Government in transporting Chinese troops to Manchurian ports with American means of transportation and to evacuate Japanese troops; both before and after his arrival such was done on a large scale. However, notwithstanding the stated provision of the cease fire agreement, the arriving government troops met communist resistance in Manchuria. The Soviet troops were not cooperative in having the Chinese Government troops take over, but often arranged their retreat so that the Chinese Communists could take over the parts evacuated and the Japanese war equipment there present. On April 18, 1946, the Chinese Communists occupied Changchun, the former capital of Manchoukuo, and not long thereafter Harbin. On May 23, 1946, Changchun was captured by government troops, who from there continued their march north and east into territory where the

communists predominated. On June 6, 1946, a temporary truce as to Manchuria was concluded between the government and the communists, the government reserving its right under the Sino-Soviet Treaty to take over the sovereignty of Manchuria and on June 26, 1946, an agreement for cessation of all hostilities in Manchuria was reached; however, hostilities flared up again. On October 11, 1946, government troops took Kalgan an important communist center in northern China. Pending negotiations and increased fighting between communists and government troops also in Manchuria, the government troops mainly advancing, the Treaty of Friendship, Commerce and Navigation between the United States and the Republic of China was signed on November 4, 1946. It was to enter into force on the day of exchange of ratifications, (which took place on November 30, 1948) and was to continue in force for a minimum period of five years from that day. The negotiations between the government and the communists ended in November 1946. On February 1, 1947, the Central Committee of the Chinese Communist Party declared that the party would not recognize any of the loans, treaties and agreements established by the Chinese Kuomintang Government after January 10, 1946, which had not been passed by the Political Consultative Conference. When in 1947 the civil war fighting was resumed on a large scale, the government, though winning much ground in other parts, weakened in Manchuria so that it held there only some main points, the railway communications of which were cut by the communists. During 1948 all of Manchuria with all government troops there fell to the communists. Also in other parts of China the government lost heavily so that in the beginning of 1949 its position was critical although it still held many of the main cities like Peking, Nanking, Shanghai, and Canton.

[5] Most of the above historical facts are found in a voluminous book "United States Relations with China, With Special Reference to the Period 1944-1949", released by the State Department in August 1949. It may be noted that the map which forms part of this book shows the Man-

churian provinces as part of China. From these facts it must be concluded that at all times involved in this case, from the signing of the Treaty on November 4, 1946, to the death of decedent on January 13, 1949, Manchuria was an integral part of China. There might have been some doubt in this respect during the existence of the unrecognized Japanese puppet state of Manchoukuo, but that doubt disappeared with the surrender of Japan, the occupation of Manchuria by the Soviet Union, the recognition by the Soviet Union of the sovereignty of China over Manchuria and the withdrawal of the Soviet troops from Manchuria, all prior to the period here involved. It is evident that the Kuomintang Government, the Chinese Communists and the United States Government equally favored the unity of China with the inclusion of Manchuria as a sovereign nation, and that all foreign states so recognized it at the time in question.

[6,7] As to China as a whole we must hold that the Treaty was in force on January 13, 1949. The exchange of ratification which made it effective had taken place only one and a half months before. At that time the same civil war and the same weakened National Government had existed in China as on the above date of death of the decedent herein mentioned. The ratification exchange shows that the United States Government did not then consider the conditions existing in China an unsurmountable obstacle to the effectiveness of the Treaty. It had not denounced the Treaty at the date of decedent's death. As to the ability of a foreign state to perform its treaty obligations and as to the question whether a treaty has been terminated the action of the political departments of our government is controlling. *Clark v. Allen*, 331 U.S. 503, 514, 67 S.Ct. 1431, 91 L.Ed. 1633; *Terlinden v. Ames*, 184 U.S. 270, 285, 288, 22 S.Ct. 484, 46 L.Ed. 534. In *Clark v. Allen* it was held that the fact that Germany after its defeat in the Second World War was under Allied occupation could not be considered by the court to have terminated a treaty between that country and the United States concerning the right to succession to real property when there was no

evidence that that political departments had so considered it. The same must apply a fortiori to the civil war in China.

[8,9] Appellant's contention that the scope of the Treaty is limited to the territory over which the Nationalist Government of China under Chiang Kai-shek had effective control is without merit. When Article XXVII of the Treaty, on which appellant relies, provides that the Treaty shall extend to "all areas of land and water under the sovereignty or authority of either High Contracting Party, except the Panama Canal Zone" the parties referred to are the two states as such, not their governments of the moment. Treaties are contracts between sovereign states and are binding on those states even when the government and its form changes. See *Oppenheim Lauterpacht International Law*, 7th ed., pp. 791, 795, 830; *Draft Convention on the Law of Treaties*, § 24 and comment, 29 A.J.I.L.Supp. 1044; *V Hackworth Digest of International Law* 360 et seq.; *II Hyde International Law* 1528; *Ivancevic v. Artukovic*, 9 Cir., 211 F.2d 565, 566. At the time in question, there was only one sovereign Chinese state although it was in a condition of civil war. The Chinese Communists were a Chinese political party taking part in the civil war, but they had not seceded from the Chinese state. It is a wholly unacceptable proposition; not supported by any authority, that with every change in the fortunes of a fluid civil war, the territory of the state and the sphere of applicability of its treaties should change.

[10] With respect to the scope of the Treaty the court cannot attach any significance to the fact that the Chinese Communist Party has declared after the signing and before the ratification of the Treaty that it would not recognize it. It is very doubtful whether our courts can consider even the formal denunciation by a foreign state of a treaty to which the United States is a party so long as the political departments of our government have not conceded its termination. *Terlinden v. Ames*, supra, 184 U.S. 270, 287, 22 S.Ct. 484, 46 L.Ed. 534; *The Legal Nature of Treaties*, 10 A.J.I.L. 722. Certainly the adverse declaration of a party to a continuing civil war, which declaration did not halt the ratification of

the Treaty by our government can have no effect on our decision as to the Treaty.

[11] The next question is whether the Treaty sufficiently proved the existence of the right of citizens of the United States to take in China personal property by succession upon the same terms and conditions as Chinese residents and citizens as required by Section 259, Probate Code, *supra*. It is undisputed and undisputable that the Treaty provides for such right. However appellant contends that it does not prove the actual existence of such right because of the absence of proof of the construction and application of the Treaty by the Chinese Government and of the enforceability of the right under it so that American citizens would actually receive their inheritance. Appellant restricts his contention to Manchuria, but we are of the opinion that "country" in Section 259, Probate Code, means state and that so long as there is no stabilized secession of a part of a state the decision as to reciprocity must be based on the conditions in the foreign state as a whole and not on temporary conditions in the specific locality or province of which the claimants are residents. At the time here controlling (January 13, 1949) there existed no separate and stabilized "Communist Government of China" as alleged in appellant's answer. Only on September 21, 1949 did Mao Tse-tung proclaim the People's Republic of China in Peiping, which government was first recognized by the Soviet Union on October 2, 1949. The situation must be viewed as of January 13, 1949, not by hindsight.

[12-17] Treaties may be considered as evidence of foreign law, *In re Estate of Arbulich*, *supra*, 41 Cal.2d 86, 89, 257 P.2d 433, and the Treaty in this case was at least *prima facie* proof that one and a half months after its effective date it represented the law in China. It is a recognized rule of international law that "A State is bound to carry out in good faith the obligations which it has assumed by a treaty. (*pacta sunt servanda*)" Draft Convention on the Law of Treaties, Art. 20 with comment, 29 A.J. I.L.Supp. 977; I Oppenheim Lauterpacht International Law, 829; V Hackworth Digest of International Law, 164. There are

rebuttable presumptions that the law has been obeyed, Section 1963, subd. 33, Code of Civil Procedure, and that official duty has been regularly performed, Section 1963, subd. 15, Code of Civil Procedure, which the trial court could accept as evidence. For the rule that a presumption can constitute evidence as to reciprocity see *In re Estate of Kennedy*, 106 Cal.App.2d 621, 625, 235 P.2d 837. There was no proof or even contention in the trial court that the attitude of the recognized National Government of China or the domestic law of China on the point involved were at the time in question violative of the Treaty and we know in that respect of no facts of which the court should taken judicial notice. It is true that the existence of a state of civil war may have impeded in many parts of China the effective enjoyment of the reciprocal rights but such circumstances need not be considered decisive. In *Re Estate of Blak*, 65 Cal.App. 2d 232, 238, 150 P.2d 567, 570, the effect of the occupation of the Netherlands by the Germans was under consideration and it was held "That the exigencies of war may temporarily suspend or defer the remedy to enforce the right to receive does not militate against the right". The trial court could apply the same rule to the exigencies of the civil war. "A finding by the trial court on the issue of reciprocity is to be treated like a finding on any other issue of fact and if there is evidence to support it such finding will not be disturbed on appeal". In *re Estate of Arbulich*, *supra*, 41 Cal.2d at page 90, 257 P.2d at page 435. On that basis we must sustain the finding of reciprocity in this case.

[18-20] At the oral argument appellant has abandoned the contention that under the provision of Section 1354, Code of Civil Procedure, *supra*, the federal requirement that distribution to the claimants must be made by deposit in a domestic bank prevents their recovery. Correctly so. Section 1354, Code of Civil Procedure, does not require proof that the heirs will receive the property, immediately, free from restrictions, in the country of their residence. We understand the purpose of the provision to be the prevention of futile proceedings with respect to deposited property for which no

entitled heirs are actually in existence. In *re Estate of Zimmermann*, 132 Cal.App.2d 702, 283 P.2d 68; In *re Estate of Costa*, 109 Cal.App.2d 735, 741, 241 P.2d 621. Such purpose does not require acquisition free of restrictions. It is undisputed that claimants are decedent's next of kin and sole heirs at law and we have decided that they are not excluded from succession by Section 259, Probate Code. The Foreign Assets Control Regulations do not divest the title of these claimants to their distributive shares when deposited in a blocked account and do not prevent them from all enjoyment of them. When the owner of a blocked account comes into the United States he can pay from it for living, travelling and similar expenses within the United States (§ 500.518). (There was a statement at the trial that two of the claimants had left China for Brazil and might come to the United States.) Section 500.521 permits remittance of \$100 per calendar month to each blocked account holder or member of his household, by means of crediting the amount to be transferred to a blocked account in the name of a banking institution in China. The finding that the claimants will receive the property so as to satisfy the requirement of Section 1354 of the Code of Civil Procedure must be upheld.

[21-23] The question whether the trial court was entitled to fix the salary of respondents' attorney cannot be reviewed on this appeal by the State. The judgment orders the State to pay over to the attorney in fact of the claimants all that had been distributed to it, and said attorney in fact to pay the fixed salary to respondents' counsel. What happens to the money after the State has paid it out is of no concern to the State so that the State cannot be aggrieved by that part of the judgment. The claimants are the only parties interested and they do not appeal. An appellant is entitled to review of error only which injuriously affects him and cannot urge error which affects others who do not appeal. *Nichols v. Nichols*, 135 Cal.App. 488, 491, 27 P.2d 414; 3 *Witkin California Procedure* 2228 and compare *Ribero v. Callaway*, 87 Cal. App.2d 135, 139, 196 P.2d 109. The interest which the State claims on the ground that

money deposited in a blocked account might escheat again, is too remote to constitute the State a party aggrieved. If such were accepted the State would be a party aggrieved in all decisions adverse to a resident of the State.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.



134 Cal.App.2d 575

Bertha VELLEMAN, Plaintiff and
Respondent,

v.

Sidney STERN, the Farmers and Merchants
National Bank of Los Angeles, a national
banking association, John Doe, Jane Doe,
and One Company, a corporation, Defendants,

Sidney Stern, Appellant,
Civ. 20758.

District Court of Appeal, Second District,
Division 1, California.

July 26, 1955.

Rehearing Denied Aug. 16, 1955.

Hearing Denied Sept. 21, 1955.

Action by sister against brother to recover possession of certain U. S. Savings Bonds. The Superior Court, Los Angeles County, Louis H. Burke, J., entered judgment for sister and brother appealed. The District Court of Appeal, White, P. J., held that where sister purchased all of the bonds with her own funds but registered them in the name of herself and her brother and delivered them to her brother, evidence supported finding that sister did not intend to make a completed gift to brother but did make a gift causa mortis.

Affirmed.

1. Evidence — 461(1)

Where sister furnished all the funds for U. S. Savings Bonds which were made payable to her or her brother, neither sister

nor brother during the lifetime of both would be prevented from showing the true intent and purpose of the joint tenancy.

2. Joint Tenancy ⚡10

In sister's action against brother to recover possession of U. S. Savings Bonds paid for entirely by sister but placed in both names, the intent of sister in creating joint tenancy was a question of fact.

3. Gifts ⚡49(5), 82(2)

In sister's action against brother for recovery of possession of U. S. Savings Bonds paid for entirely by herself but placed in both names and delivered to brother, evidence was sufficient to support finding that sister did not intend to make a completed gift of the bonds but did make a gift causa mortis.

4. Gifts ⚡66(3)

Where sister procured U. S. Savings Bonds for which she paid entire consideration and registered them in the names of herself and her brother and delivered them to him, sister made a gift causa mortis only and retained complete control and title over the bonds until her demise.

5. Appeal and Error ⚡930(1)

Where a judgment is challenged on the ground of insufficiency of evidence all conflicts in evidence must be resolved in favor of the respondent and all reasonable and legitimate inferences must be indulged in to support the judgment.

Jerry Rolston, Los Angeles, for appellant.
McLaughlin & Casey, James A. McLaughlin, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff instituted this action to recover possession of certain government bonds which she had purchased and caused to be delivered into the custody of her brother, defendant Sidney Stern. At the commencement of the trial the action was dismissed as to all defendants except Stern.

As to the factual background surrounding this litigation, we consider the following to be a fair epitome thereof as reflected by the record. Ten of these bonds were

Series G, having a maturity value of \$18,000 and ten were Series E, having a maturity value of \$10,000. At the time of trial the total cash surrender value of these bonds was \$26,100. Plaintiff is a widow 70 years of age, and defendant, her brother, also unmarried, is 68 years of age. All of Series E bonds were purchased between August 1 and October 31, 1949, and at the time of such purchase, plaintiff caused the bonds to be issued in the names of "Mrs. Bertha Velleman or Sidney Stern," and to be delivered to defendant.

All of the Series G bonds, except five, were originally issued in plaintiff's name, but thereafter and prior to March, 1949, she caused them to be reissued in the names of "Mrs. Bertha Velleman or Sidney Stern." The other five Series G bonds were originally issued in the names of those two.

Around March of 1949, plaintiff caused all of the Series G bonds to be delivered to defendant, at which time she instructed him to keep these bonds in his safe deposit box at the Farmers and Merchants National Bank of Los Angeles until plaintiff's decease. Prior to the delivery of these bonds to defendant, plaintiff had told him that she intended to deliver these bonds to him because she had been advised that she could save inheritance taxes thereby.

Prior to such delivery, plaintiff had kept these Series G bonds in her custodian account with the Corn Exchange Bank in New York City. Neither plaintiff nor defendant filed any gift tax returns as to this transaction. Interest on these Series G bonds has been paid by the Treasury Department at regular intervals directly to plaintiff.

As is usual in cases of this nature, the evidence is conflicting. We deem it unnecessary to here set it forth in detail. Suffice it to say that in response to the question whether she intended to make a present gift of the bonds, plaintiff testified:

"I gave him the key to this vault and told him about the bank book and the bonds, and said, 'If I take sick in California, you may use what you need to pay my expenses, if I die, for cremation, and my body to be sent or ashes to be sent to New York.

And if anything is left, you can keep what is left over.”

On January 12, 1950, plaintiff wrote a letter to defendant on the reverse side of which appears the following recital:

“same as vault and contents. If anything happens to me—withdraw all, its yours.”

During the latter part of 1951, after plaintiff became ill, she wrote defendant requesting him to send her the savings bank book which was also delivered to him. With the return of the bank book defendant wrote his sister in part as follows:

“I have always considered this a sacred trust. A fund for your benefit should the need arise. So far as I am concerned I had no intention to touch one penny of this money while you were alive, and as you can see from the bank book, it is all intact.”

On May 9, 1952, plaintiff wrote a letter to defendant describing her ill health and her need for money in which she said:

“Please send me those Series E bonds. I must have cash.”

Receiving no reply to this communication, plaintiff again wrote defendant saying that she had received his several post cards, but was hurt at not having received a reply to her request for the bonds. She closed with the request, “Please send my property to me immediately.” Upon receiving no reply to this letter, plaintiff thereupon referred the matter to her lawyer in New York, who, in November, 1952, wrote two letters to defendant, which were also ignored by the latter.

Defendant testified that when plaintiff told him she was “going to give away all of her property while she was alive”, he remonstrated with her and urged her not to do so. That plaintiff insisted, saying that, “I (defendant) formerly was a sole beneficiary in her will, and one of the executors, and she is giving me this part of it, giving me \$50,000.00 as part of it in consideration that we have been very, very close throughout our entire lives, and further consideration that I at several times have given her thousand-dollar bonds, and further consideration that at one time I gave her over \$10,000 and gifts too many for me to occupy

his Honor’s time to enumerate here.” That he accepted the bonds as a gift only after he had vainly tried to dissuade her from “giving her money away”. Defendant insisted that nothing was ever said to the effect that the bonds were not to be his until the demise of plaintiff.

Another witness, Mrs. Sarah Quadow, a very dear friend of plaintiff, testified that late in December, 1949, at a luncheon meeting, plaintiff told the witness that “she (plaintiff) had given her brother Sidney (defendant) \$50,000.00”.

Upon the foregoing conflicting evidence the court found that in delivering the bonds, plaintiff “* * * instructed said defendant Sidney Stern to keep and retain the said bonds in his safe deposit box at the Farmers and Merchants National Bank of Los Angeles until plaintiff’s decease. That the defendant Sidney Stern accepted and received the said bonds and did place them in his safe deposit box in the Farmers and Merchants National Bank of Los Angeles and has retained the said bonds at all times since and does now have the said bonds in his possession in his said safe deposit box.” “That plaintiff did not at any time intend to make an immediate gift of the said bonds to defendant Sidney Stern or to transfer the ownership of said bonds to defendant Sidney Stern until after plaintiff’s decease. That plaintiff did intend that upon her decease such of the said bonds as remained in the defendant’s possession should become the property of and belong to the defendant Sidney Stern.” “That prior to the filing of this action, plaintiff, on numerous occasions following a date on or about the 9th day of May, 1952, did request and demand of defendant that he return the said bonds to plaintiff, but that defendant Sidney Stern has at all times failed, neglected and refused to return the said bonds or any of the same. That the said defendant has no right, title or interest in and to the said bonds or ownership therein, and plaintiff is entitled to the possession of all of said bonds.” Judgment was accordingly entered that plaintiff have and recover from defendant possession of the bonds in question. From said judgment defendant prosecutes this appeal.

The basic question presented to us is whether or not the evidence supports the finding that no present gift of the bonds had been accomplished. This brings us to the inquiry of whether the legal incidents essential to make an *inter vivos* transfer or completed gift are here present. This would depend upon whether having created a joint tenancy with respect to securities, the donor is precluded from proving that the transaction was only a device for passing title upon her demise, and if not so precluded, is there sufficient substantial evidence in the record to sustain the determination of the trial court that there was no completed gift of the bonds.

[1-4] As to the first of these questions, we are satisfied that during the lifetime of the two parties, either would have the right to establish the true intent and purpose of the joint tenancy, *Spear v. Farwell*, 5 Cal.App.2d 111, 113, 42 P.2d 391. And the question as to the intent of the respondent in causing the bonds to be issued to herself and appellant was one of fact for determination of the trial court, *Blankinship v. Blankinship*, 104 Cal.App.2d 199, 203, 230 P.2d 869; *Paterson v. Comastri*, 39 Cal.2d 66, 73, 244 P.2d 902. The record here contains substantial, though contradicted, evidence, as to the respondent's intent not to make a completed gift of the bonds to appellant, but to formulate a plan whereby the bonds would become the property of the appellant upon the death of respondent. In the instant case the trial court chose to believe the testimony of the respondent coupled with inferences drawn from documentary evidence as showing an intent upon her part to give the bonds to appellant in the event of his survivorship, and hence there was present in the transaction all the essential qualities of a gift *causa mortis* which respondent could revoke in her lifetime and which would not take effect until her death if not previously recalled. Under such circumstances, the control of respondent over the bonds was unlimited, and only at her death would be-

come the absolute property of appellant if he survived her. Until her demise the gift was not consummated and respondent retains the entire title.

As to the aforesaid second question presented, it follows from the foregoing conclusion at which we have arrived, that the evidence is sufficient to support the findings. As pointed out by respondent, if she "had intended to make a present of the bonds, it would have been a very easy matter for her to have the bonds issued in the name of appellant alone and to deliver the possession thereof to him. The fact that she placed them in the names of both herself and appellant indicates that she was attempting to effectuate a means whereby such of the bonds as had not been used by her would vest in appellant upon respondent's decease." Also noteworthy is the conceded fact that respondent purchased all the bonds with her own funds and, as heretofore pointed out, the interest on the Series G bonds had been paid by the Treasury Department at regular intervals to respondent.

[5] Where a judgment is challenged on the ground of "insufficiency of the evidence" an appellate tribunal in reviewing the evidence must resolve all conflicts in favor of the respondent, and all reasonable and legitimate inferences must be indulged in to support the judgment if possible. In other words, when a judgment is attacked as being unsupported, the power of the reviewing court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the duly constituted arbiter of the facts. And, though two or more inferences can be reasonably deduced from the facts, the reviewing court is not authorized to substitute its deductions for those of the trial court.

With these well-settled rules in mind the judgment herein must be affirmed. It is so ordered.

DORAN and DRAPEAU, JJ., concur.

134 Cal.App.2d 242

Marcella Jean HART, Guardian of the Person and Estate of Alva E. Richardson, Incompetent, Plaintiff and Appellant,
v.

Elizabeth RICHARDSON, Defendant and Respondent.

No. 4886.

District Court of Appeal,
Fourth District, California.

July 1, 1955.

Action for cancellation of note and to set aside trust deed adjudged the separate property of defendant in prior divorce action. The Superior Court, San Diego County, Robert B. Burch, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that evidence was insufficient to show that defendant knew that plaintiff was incompetent when she procured his signature to note and trust deed.

Judgment affirmed.

1. Judgment ⇨117

A default judgment can give no relief in excess of that demanded by complaint.

2. Stipulations ⇨18(7)

Where stipulation was furnished by husband in prior divorce action to effect that there was no community property and that note was the separate property of wife, and such stipulation was used in the case, the husband, who was not without notice of form of judgment that might be expected, in effect consented to the judgment which was entered in divorce action and which stated that note was separate property of wife and was estopped from questioning the effect of his stipulation in instant action to cancel note.

3. Divorce ⇨168

Allegation that extrinsic fraud was used in the procurement of judgment of divorce, alleged for first time in husband's subsequent action for cancellation of note and trust deed, could have and should have been raised in divorce action in which judgment was entered stating that note

secured by trust deed was wife's separate property.

4. Divorce ⇨169

The validity of a marriage is a matter which is necessarily intrinsic in a divorce decree.

5. Judgment ⇨443(1)

To constitute extrinsic fraud in procuring judgment there must have been some representation or concealment which prevented the plaintiff from having his day in court.

6. Divorce ⇨168

In action for cancellation of note and to set aside trust deed, that were held to be separate property of wife in prior divorce action, evidence was sufficient to show that no extrinsic fraud was used in procuring the divorce decree.

7. Mortgages ⇨86(3)

In action for cancellation of note and to set aside trust deed allegedly procured by fraud, evidence was insufficient to show that defendant knew plaintiff was incompetent when she procured his signature to note and trust deed.

8. Mortgages ⇨86(1)

In action for cancellation of note and to set aside trust deed, allegedly procured through fraud, burden of proving that note was obtained by undue influence or fraud was upon plaintiff.

White & Condra, Francis J. Maher, San Diego, for appellant.

Edwin M. Campbell, National City, for respondent.

BARNARD, Presiding Justice.

Alva E. Richardson, who will be referred to as the plaintiff, owned four lots in National City on which he operated a motel. On March 25, 1951, he and the defendant were married in Yuma, Arizona. On November 15, 1951, he deeded the motel property to the defendant and himself as joint tenants. On April 11, 1952, the defendant filed an action for divorce, and another action for a partition of the motel property. The complaint in the divorce action alleged

that the community property consisted of the furniture in the motel, and that the parties owned a motel business situated on property held by them in joint tenancy. The prayer was for a divorce, for all of the community property, and for such other relief as the court deemed proper. Summons and a copy of the divorce complaint were served on this plaintiff on April 14, 1952.

On May 23, 1952, this defendant signed a deed reconveying her interest in the motel property to this plaintiff, and he executed and delivered to her a note for \$13,375, secured by a trust deed on the property. This deed and trust deed were recorded on June 4, 1952. On the same day (May 23) this plaintiff also signed a stipulation, entitled in the divorce case, stating that said action might be heard on the complaint as a default matter and without notice to him, and further stipulating that a certain 1950 automobile and a certain note for \$13,375 secured by trust deed on the motel property were this defendant's separate property, and that there was no community property of the parties. This stipulation was filed in the divorce action on June 6, 1952. This defendant also dismissed her action for partition.

An interlocutory decree of divorce was entered on June 16, 1952, in which the court also found and adjudged that there was no community property, and that the 1950 automobile and this note for \$13,375, secured by a trust deed, were the separate property of this defendant.

On November 21, 1952, this plaintiff was adjudicated an incompetent person, and a guardian was appointed. On February 11, 1953, this action was filed. The complaint alleged that on May 23, 1952, the plaintiff owned this real estate as his separate property; that he was then, and for more than a year had been, incompetent; that on April 11, 1952, the defendant filed an action to partition said property, and an action for divorce; that on May 23, 1952, the defendant threatened to place a receiver on this property, and supplied the plaintiff with liquor; that while the plaintiff was in an intoxicated and incompetent condition, which was known to the defendant, she caused him

to sign a stipulation stating that the \$13,375 note and trust deed, and the 1950 automobile, were her separate property; and that at the same time she fraudulently induced him to sign this note and trust deed. The prayer was for a cancellation of this note and trust deed, and this written stipulation.

The answer denied the material allegations of the complaint and alleged that on November 15, 1951, the parties became the owners of the real property as joint tenants; that on April 11, 1952, the defendant filed an action for divorce, and another action for partition of the real property; that summons was served on April 14, 1952; that, thereafter, the defendant deeded her interest in the real property to the plaintiff in consideration of his assigning to her the automobile, and his execution and delivery to her of the note for \$13,375 secured by a trust deed on the real property; that this consideration was reasonable and just; and that no offer has been made by anyone to restore to the defendant her interest in the real property. The answer further alleged the entry of the divorce decree in the other action decreeing that the automobile and note were her separate property; that said decree had become final; that said decree has become res judicata as to any issue in this action; and that the plaintiff is estopped from seeking any cancellation of the documents mentioned in the complaint.

After a trial the court found that all of the material allegations of the complaint are untrue; that all of the denials and allegations in the answer are true; that the same issue of property rights as that here involved was presented and determined by the court in the divorce proceeding; that the court had jurisdiction in the divorce action to determine the right and title to the note and trust deed; that the plaintiff had due notice of said divorce action and the opportunity to be heard therein, and was then and there competent so to do; that he was not prevented in any manner from a full participation in said divorce action; and that no extrinsic fraud was used or practiced in the procurement of said divorce decree. A judgment was en-

tered in favor of the defendant, from which the plaintiff has appealed.

[1, 2] It is first contended that the court erred in holding that the judgment of divorce was *res judicata* as to the issue in this action. It is argued that the issue of fraud was not a necessary issue in the other action, and that the adjudication in the divorce decree that the \$13,375 note was the separate property of the wife exceeded the prayer of the complaint with respect to property rights, which was only that the court award her all of the community property. The general rule is that by a default judgment no relief can be given in excess of that demanded by the complaint. *Burnett v. King*, 33 Cal.2d 805, 205 P.2d 657, 658, 12 A.L.R.2d 333. In that case, it was stated that "The essence of the policy underlying section 580 of the Code of Civil Procedure, *supra*, is that in default cases, defendant must be given notice of what judgment may be taken against him—". In that case it was further pointed out that no contention of estoppel had been made, and that there was nothing in the record from which it could be said that the doctrine of estoppel was applicable to the situation there involved. In the instant case, this plaintiff furnished a stipulation to the effect that there was no community property and that this note was the separate property of this respondent which stipulation was used in the case. In *Capital National Bank v. Smith*, 62 Cal.App.2d 328, 144 P.2d 665, 674, the court said: "When a written stipulation of facts authorizes the rendering of judgment accordingly, that agreement should be construed with and it becomes controlling over the pleadings. It has been held the stipulation merges with the pleadings and is controlling with respect to the agreed facts therein contained." In *Morrow v. Morrow*, 40 Cal.App.2d 474, 105 P.2d 129, 135, it is said: "'As a general rule, however, one may be estopped by an agreement or stipulation made in a judicial proceeding. * * * The case for estoppel by stipulation is greatly strengthened, of course, where the stipulation has been acted upon and the adverse party would be injured if it were not given effect.'" In accordance with the stipulation the court

here found that there was no community property, for which the wife had prayed, and found that the note in question was her separate property. The situation was changed by the stipulation, and this plaintiff was not without notice of the form of judgment that might be expected. In effect, he consented to the judgment which was entered. He should be estopped from questioning the effect of his stipulation, and the court so found.

[3] It is further contended that the court erred in adjudging that no extrinsic fraud was used in the procurement of the judgment of divorce. It is first argued that the respondent's joint tenancy interest in the real property was conveyed to her in November, 1951, for a fiduciary purpose only, that she thereby became a trustee for this plaintiff, and that her conduct in exacting the execution of the note and trust deed in order to obtain a reconveyance of the trust corpus must, as a matter of law, be held to have been fraudulent. The respondent testified that this plaintiff gave her this interest in the property in November, and that he said at the time that everybody wanted to take the place away from him so he wanted her to have an interest in it for his own protection. While there was some evidence justifying a conflicting inference, not only was the question one of fact but this matter could, and should if relied on, have been raised in the prior action. Moreover, this contention was not raised in the pleadings or at the trial of this action and is raised for the first time on appeal. The respondent had this interest in the real property, and was asking for some community property when this stipulation was signed. By way of a partial settlement of the controversy this plaintiff entered into an agreement with the respondent, and executed papers accordingly. The facts support the estoppel which was found by the court.

[4, 5] It is also argued that the court refused to permit this plaintiff to introduce evidence to prove that at the time these parties were married the respondent had another husband living in New York. In that connection, the respondent was asked by this plaintiff's counsel "Did you disclose

to the court at the time of obtaining your divorce decree that you had a husband living in New York?" An objection to this question was sustained. No other evidence of such a prior marriage was offered. The validity of a marriage is a matter which is necessarily intrinsic in a divorce decree. *Mumma v. Mumma*, 86 Cal.App.2d 133, 194 P.2d 24. To constitute extrinsic fraud there must have been some representation or concealment which prevented the plaintiff from having his day in court. *Gale v. Witt*, 31 Cal.2d 362, 188 P.2d 755. If error be assumed in this connection, no extrinsic fraud appears.

[6, 7] It is also contended that the finding that no extrinsic fraud was used in procuring the divorce decree is unsupported by the evidence; and that the evidence "indicates" that the respondent knew that this plaintiff was incompetent when she procured his signature to the waiver and to the note and trust deed. The court found against the appellant in both of these respects, and these findings are amply supported by the evidence. This plaintiff was called to the stand by appellant's counsel and his testimony takes up 50 pages of the transcript. He testified that he did not remember being married to the respondent; that he was told the next day that he was married, but he did not believe it; that he did not remember anything about the deed conveying to her a joint tenancy in the property; that he remembered nothing about the divorce except that he was told that she was getting a divorce; that he remembered signing the stipulation and trust deed and note in the lawyer's office, but that he did not know what he was signing; and in general, that he could remember nothing about any business transaction during the fifteen months in question. He could not remember anything about the conversation in the lawyer's office at the time the papers were signed, or what the lawyer had said to him about the agreement and the effect of the papers, although these things had been taken down in shorthand at the time and were read to him. A reading of his testimony discloses why it was not believed by the trial judge. There was also evidence that he talked

about the matter to his brother-in-law, to a friend, and to a justice of the peace between the time he was served with summons in the divorce action and the time the papers were signed on May 23; that he was advised to see a lawyer; and that he refused to do so. The findings in question are also supported by the testimony of the respondent.

[8] If it be assumed that the decree in the divorce action was not *res judicata* with respect to the note here in question, and that there was extrinsic fraud in procuring that decree the plaintiff, or someone in his behalf, would of course be entitled to bring this action. However, it was still incumbent upon the appellant to prove that this note was obtained by undue influence or fraud. This burden was not met, and the court's findings to the contrary are sustained by the evidence.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



134 Cal.App.2d 528

James Martin MacINNIS, Plaintiff and Respondent,
v.

Grace S. POPE, Defendant and Appellant.
Civ. 16458.

District Court of Appeal, First District,
Division 2, California.

July 22, 1955.

Action on written contract for legal services. The Superior Court of the City and County of San Francisco, William T. Sweigert, J., directed verdict for plaintiff. Defendant appealed. The District Court of Appeal, Nourse, P. J., held that when attorney fully performs services required by contract he is entitled to fee stipulated in

contract and client's attempted cancellation after full performance was irrelevant.

Affirmed.

1. Appeal and Error ⇨724(1)

Though judgment on cross-complaint is reviewable on appeal from main judgment something more than mere argument is necessary to show error unless that can be determined on face of record.

2. Attorney and Client ⇨135

When attorney fully performs services required by contract he is entitled to fee stipulated in contract.

3. Attorney and Client ⇨134(2)

Where written contract between attorney and client provided that client would pay attorney 20 per cent of any money collected, and attorney recovered \$150,000 from estate of client's former husband by settlement for alimony and, after receiving money, client purported to repudiate agreement and discharge attorney, attorney had fully performed services required by contract and was entitled to fee stipulated in contract.

4. Libel and Slander ⇨7(13)

Where attorney stated that he gave client, for signature, check and papers concerning settlement of client's claim and that client shoved both check and papers down into her bosom and ran away, there was no libel.

Samuel Vartan, San Francisco, for appellant.

Sullivan, Roche, Johnson & Farraher, San Francisco, for respondent.

NOURSE, Presiding Justice.

[1] Plaintiff sued on a written contract for legal services. Defendant answered admitting the execution of the contract but alleging that she had cancelled it. The defendant failed to appear at the trial and offered no witness in her behalf. At the conclusion of plaintiff's case the trial court instructed the jury to bring in a verdict for plaintiff. The defendant also filed a cross-complaint and counter-claim for an alleged

libel. Respondent states in his brief that an order was made for a judgment on the pleadings for cross-defendant. No order of that nature appears in the clerk's transcript, but, from the reporter's transcript it appears that a motion was granted for such a judgment, and no record is made of the grounds of the motion or of the opposition to it. Though a judgment on a cross-complaint is reviewable on the appeal from the main judgment something more than mere argument is necessary to show error unless that can be determined on the face of the record.

Plaintiff's complaint pleaded that the written contract between attorney and client provided: "Out of the proceeds of any sums of money collected, whether by negotiation and settlement, court award, or otherwise, Grace S. Pope will pay unto James Martin MacInnis twenty per cent (20%) thereof, as his fee for representing her, in addition to costs and expenses advanced in the prosecution of the same affairs."

"Plaintiff recovered and/or collected, on behalf of defendant, Grace S. Pope, from the estate of the late W. K. Pope, also known as W. Kenneth Pope, and/or his personal representatives, the total sum of \$150,000, from and out of efforts thus undertaken by plaintiff, pursuant to said agreement; defendant, Grace S. Pope, accepted said recovery and/or collection, in the total sum of \$150,000, and has in fact received, from and out of said undertaking, the total sum of \$150,000".

Though defendant denied all these allegations (including the admitted receipt of the moneys collected for her) she refused to appear in court or to offer any evidence in her behalf.

Two questions arise on the appeal. (1) Did the trial court commit error in directing the verdict for plaintiff? The answer is no. The undisputed evidence is that the controversy involved the defendant's claim against her former husband's estate for alimony occurring after his death; that she employed plaintiff to collect such claim and agreed to pay him a fixed fee; that a settlement was made with the estate on July 11, 1952; that in August 1952 she received the moneys in settlement; and that on September 11, 1952, defendant pur-

ported to repudiate the agreement and to discharge plaintiff as her attorney when he attempted to collect his fee.

[2,3] This is not a case of "reasonable value". Plaintiff sued on a written contract fully performed. It would seem unnecessary to cite authority for the point that when an attorney fully performs the services required by the contract he is entitled to the fee stipulated in the contract. The authorities cited by appellant relating to the cases when the contract is breached before full performances have no relation to these issues.

(2) Did the trial court commit error in entering judgment on the cross-complaint? The answer is no so far as appears from the record.

The cross-complaint wholly fails to plead a cause of actionable libel. The language complained of appears in the statement of plaintiff that, following the settlement: "I got the check from the bank. As one of her attorneys, I said I would be glad to take it down to Beverly Hills and have her sign the settlement papers.

"I handed her the check and the papers to sign. She shoved both check and papers down into her bosom and ran down a terrace. I haven't seen her since."

[4] Appellant contends that there was some sort of libel in the "implication" or "inference" that she was thereby accused of stealing the check and the settlement agreement. But both belonged to her and were delivered to her as her property. How can one be charged with theft for taking that which rightly belongs to him? It is also suggested that there is some sort of implied libel in plaintiff's reference to the place of deposit. We cannot follow this argument either. It seems to be more probable that plaintiff was merely referring to a well-known place of deposit for women's valuables and that he meant it as a compliment rather than as a libel.

The whole case pleaded in the cross-complaint and counter-claim is just so much trash and nonsense. If the record should show that judgment was entered for respondent we would unhesitatingly say that judgment was proper.

The judgment on plaintiff's complaint is affirmed. Whatever was done on the cross-complaint and counter-claim adverse to appellant is affirmed.

DOOLING and KAUFMAN, JJ., concur.



134 Cal.App.2d 552

**Ex parte Robert ANDERSON on
habeas corpus.**

Cr. 3168.

District Court of Appeal, First District,
Division 1, California.

July 26, 1955.

Petition for writ of habeas corpus. The District Court of Appeal held that defendant who did not object at trial in Superior Court of Marin County and failed to move to dismiss in that court could not raise possible violation of his right to a speedy trial on habeas corpus.

Petition denied.

1. Criminal Law Ⓒ576(5)

The right to a speedy trial may be waived. Pen.Code, § 1382.

2. Criminal Law Ⓒ1035(1), 1044

Habeas Corpus Ⓒ25(1)

When defendant did not object in trial court and failed to move to dismiss in that court, the possible violation of his right to a speedy trial could not be raised on appeal nor on habeas corpus. Pen.Code, § 1382.

Robert Anderson, in pro. per.

PER CURIAM.

[1,2] The petitioner did not raise the question of a possible violation of Section 1382 of the Penal Code in the trial court, nor did he move to dismiss in that court

under that section. The point was not raised on the appeal, *People v. Anderson*, 126 Cal.App.2d 702, 272 P.2d 805, and but imperfectly mentioned on the petition for hearing. The United States Supreme Court denied certiorari. 348 U.S. 918, 75 S.Ct. 302.

Under well-settled principles, the right to a speedy trial may be waived. When a defendant does not object in the trial court, and fails to move to dismiss in that court, the point cannot be raised on appeal, and, of course, not on habeas corpus. *People v. Workman*, 121 Cal.App.2d 533, 263 P.2d 458; *People v. Greene*, 108 Cal.App.2d 136, 238 P.2d 616; *In re Alpine*, 203 Cal. 731, 265 P. 947, 58 A.L.R. 1500.

The petition for a writ of habeas corpus is denied.



134 Cal.App.2d 399

HIDDEN HARBOR, Inc., d/b/a Secret Harbor, Plaintiffs and Respondents,

v.

AMERICAN FEDERATION OF MUSICIANS, James C. Petrillo, individually and as an officer and agent thereof, Local Number 325 American Federation of Musicians of San Diego, Edward B. Wheeler, individually and as an officer and agent thereof, Local Joint Executive Board of San Diego, et al., Defendants,

American Federation of Musicians, Local 325 and Edward Wheeler, Appellants.

— Civ. 5105.

District Court of Appeal, Fourth District, California.

July 15, 1955.

Proceeding to enjoin musicians' union from interfering with private contract of member musician in order to aid other union to obtain a labor contract with same employer. The Superior Court, San Diego County, L. N. Turrentine, J., granted a preliminary injunction to employer and musi-

cians' union and representative appealed. The District Court of Appeal, Mussell, J., held that where musician's contract expired and labor controversy between musicians' union and employer was settled prior to review of the preliminary injunction, there was no present controversy, and all material questions involved were moot.

Appeal dismissed.

1. Appeal and Error ¶781(4)

District Court of Appeal is not required to give opinions on moot questions or abstract propositions.

2. Appeal and Error ¶781(4)

Where musicians' union was attempting to aid other union to obtain a labor contract with employer by interfering with a private contract of a member musician with the same employer, but musician's contract expired and labor controversy between musicians' union and employer was settled prior to review of grant of a preliminary injunction, no present controversy existed and all questions involved in the appeal were moot, and consequently the appeal would be dismissed.

3. Appeal and Error ¶781(4)

Appeal must be dismissed when controversy between parties thereto terminates.

4. Labor Relations ¶971

In proceeding to enjoin musicians' union from interfering with private contract of a member musician in order to aid other union in obtaining a labor contract with same employer, evidence was insufficient to show that trial court abused its discretion in issuing a preliminary injunction.

5. Appeal and Error ¶954(1)

Where there was no showing of abuse of discretion on part of the trial court in issuing preliminary injunction, the exercise of discretion was not reviewed on appeal.

Walter Wencke, San Diego, for appellants.

Clifford L. Duke, Jr., San Diego, for respondents.

MUSSELL, Justice.

Walt James Slocomb, a musician and member of appellant American Federation of Musicians, San Diego Local No. 325, entered into a contract of employment with plaintiff Hidden Harbor, Inc., dba Secret Harbor. Under this contract Slocomb was employed by plaintiff for fifty-two weeks, beginning on or before December 28, 1953, at a salary of \$150 per week. He began his employment on the date agreed upon and continued to work until the contract expired on December 28, 1954. On or about March 25, 1954, Hidden Harbor's culinary and bartender employees went on strike and began picketing the Hidden Harbor for the purpose of obtaining a labor contract.

It is alleged in the complaint that at the time said picket line was instituted Slocomb and Secret Harbor were informed by the musicians' union that the rules of the musicians' union did not prohibit Slocomb from continuing to perform the obligations of his contract with Secret Harbor and that Slocomb continued to perform said obligation at all times since March 25, 1954, behind the Joint Board picket line; that on or about May 11, 1954, E. B. Wheeler, as representative of the musicians' union, sent a letter to Hidden Harbor stating, among other things, that "No federation musicians will be permitted to accept engagements at the Secret Harbor after May 25, 1954"; that Slocomb, who was a member of the musicians' union, did not request nor authorize the musicians' union to terminate his contract; that he had no dispute with Secret Harbor and that there was no dispute between Secret Harbor and the musicians' union; that Slocomb feared that disciplinary action would be taken against him by the musicians' union if he failed to obey the orders of that union. This action was filed by Hidden Harbor on May 24, 1954, to restrain the defendants from interfering with the contractual relationship between Secret Harbor and Slocomb. On June 7, 1954, Hidden Harbor filed an action in the superior court in San Diego County (No. 189517) against the Local Joint Executive Board of San Diego, et al., seeking an injunction enjoining the defendants from picketing Secret Harbor and obstructing or interfering

in any way with the conduct or operation of its business. A preliminary injunction was issued therein on June 18, 1954, enjoining the picketing and this injunction remained in effect until March 23, 1955. On May 24, 1954, an order to show cause and temporary restraining order was issued by the court in the instant action (No. 189241) and after a hearing thereon the court issued a preliminary injunction enjoining the defendants American Federation of Musicians, Local No. 325, and Edward Wheeler, from (1) Demanding that Walt James Slocomb terminate his services at the Hidden Harbor, Inc. during the life of the contract between Hidden Harbor, Inc. and Slocomb; (2) Requesting either directly or indirectly by any means whatsoever that Walt James Slocomb cease performing at Hidden Harbor, Inc.; and (3) Refusing to permit Walt James Slocomb to continue performance during the life of his contract with Hidden Harbor, Inc. and that said defendants cease and desist from doing any act which interferes with the contractual relationship between Hidden Harbor, Inc. and Slocomb.

Defendants appeal from this preliminary injunction stating that the sole issue is "Whether one union may assist another union where":

"(a) Members of both unions work for the identical employer at the same place;

"(b) The first union is on strike for a legitimate labor objective (a labor contract);

"(c) The first (striking) union has established a peaceful picket line in front of the mutual employer's place of business;

"(d) The employer has been placed on an 'unfair list';

"(e) The striking employees have been replaced by non-union personnel;

"(f) The only union person working in the midst of the newly hired non-union personnel is a member of the second union;

"(g) The labor contract with the mutual employer governing the second union's members contains a condition subsequent to the effect that prevention

of service by those members due to a strike, 'unfair list' or order of the second union relieves them of any obligation or liability;

"(h) The condition subsequent materializes in that the second union orders its members to stop work because of a strike at, and the 'unfair listing' of, the mutual employer of the members of both unions."

[1-3] We do not deem it necessary to decide the issue thus stated in view of the evidence of events shown by the record to have taken place since the filing of the complaint herein. The contract of employment between plaintiff and Slocomb expired on December 28, 1954, and was fully performed by both parties. The picketing of Secret Harbor was enjoined in action No. 189517 on June 18, 1954. On December 24, 1954, Secret Harbor entered into an agreement with the Local Joint Executive Board and there has been no labor dispute since that date between respondent and said joint executive board or any of the American Federation of Labor affiliates. The preliminary injunction herein was issued enjoining appellants from interfering with said contract and the contract had no vitality after its termination. We are not required to herein give opinions on moot questions or abstract propositions. In *Consol. Vultee Aircraft Corp. v. United Automobile, etc., Workers*, 27 Cal.2d 859, 862, 863, 167 P.2d 725, 727, the court said:

"As the United States Supreme Court declared in *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293: 'the duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of plaintiff, to grant him any ef-

fectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.'" (Citations.)

The record herein shows that there is no present controversy between plaintiff and appellants and that all material questions involved in the appeal are moot. When a controversy between parties to an appeal ceases to exist the appeal must be dismissed. *Covina Union High School v. California Interscholastic Federation*, 136 Cal.App. 588, 29 P.2d 323.

[4, 5] There is no showing of abuse of discretion on the part of the trial court in issuing the preliminary injunction herein and under the circumstances shown the discretion of the trial court will not be reviewed on appeal. *Riviello v. Journeymen Barbers, etc., Union*, 88 Cal.App.2d 499, 510, 199 P.2d 400.

The appeal is dismissed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



134 Cal.App.2d 580

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Levi Dewey CONLEY, alias Richard Conley,
Defendant and Appellant.

Cr. 5375.

District Court of Appeal, Second District,
Division 1, California.

July 26, 1955.

Prosecution for grand theft. The Superior Court, Los Angeles County, Joe Raycraft, J., entered judgment on verdict of conviction. Defendant appealed from the judgment and from denial of motion for new trial. The District Court of Appeal, Drapeau, J., held that evidence sustained conviction.

Affirmed.

1. Criminal Law $\S$ 814(3)

In grand theft prosecution against defendant who allegedly kept proceeds of check given by used car dealer for purchase of automobile by defendant for dealer, evidence failed to disclose such partnership or joint venture between defendant and dealer as to require instruction on such matter.

2. Criminal Law $\S$ 717

Reading by prosecuting attorney in argument to jury of instructions which prosecuting attorney believes will later be given by judge is within discretion of trial court but is practice which should be discouraged.

3. Criminal Law $\S$ 1171(1)

In prosecution for grand theft, reading by prosecuting attorney in argument to jury of instructions which he said he was sure would later be given by the judge was not such prejudicial misconduct as to require new trial of case.

4. Embezzlement $\S$ 44(1)

Evidence sustained conviction for grand theft based on retention of proceeds of check given defendant for business purposes.

Loyal C. Pulley, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., and Marvin Gross, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

Defendant was convicted by a jury of grand theft. He was granted probation, with the first fifty-two days of it in the county jail. And he was directed to refund the money he stole from the prosecuting witness.

Defendant was given a cashier's check for \$300 by a used car dealer to purchase an automobile for him. Instead of purchasing the automobile, defendant endorsed the check, got the money, and kept it. He told the dealer that he had lost the

money in Las Vegas. He told a police officer who arrested him that he used the money to pay his personal bills. And on his trial he said that the dealer owed him \$455; so he cashed the check and applied the proceeds to that indebtedness.

[1] Defendant appeals from the judgment and from the denial of his motion for a new trial. He argues that there was a partnership or joint venture between him and the dealer, and that it was error to refuse to instruct the jury on that issue.

But there is nothing in the record from which an inference could be drawn that there was a partnership between the two men. Defendant purchased automobiles for the dealer on several occasions, upon the understanding that the dealer would furnish the money, defendant would sell the automobiles, and the two would share equally in the profits; or, if the dealer desired to take over any such automobiles and put them on his used car lot he would pay defendant \$25 for each of them. Therefore, the trial court was not called upon to give the proffered instruction.

[2-4] Defendant further argues that it was wrong for the prosecuting attorney in his argument to the jury to read instructions that he said he was sure would later be given by the judge.

While that practice is within the discretion of the court, *Boreham v. Byrne*, 83 Cal. 23, 23 P. 212, trial judges should discourage it. It is a waste of time, and could unfairly influence jurors by putting undue emphasis upon particular questions submitted to them.

This Court has performed the duty enjoined upon it by our constitution, and has read the record in this case. The evidence of guilt is clear and convincing, and the reading by the prosecuting officer was not such prejudicial misconduct as to require a new trial of the case.

The judgment and the order are, and each of them is, affirmed.

WHITE, P. J., and DORAN, J., concur.

134 Cal.App.2d 293

TELEVISION ARTS PRODUCTIONS, Inc.,
a corporation, Plaintiff,
v.

JERRY FAIRBANKS, Inc., a corporation;
National Broadcasting Company, Inc., a
corporation; Consolidated Television
Sales, a co-partnership consisting of Doe
One, Doe Two and Doe Three, and Doe
One, Doe Two and Doe Three, individual-
ly; Doe Four, doing business as Consoli-
dated Television Sales; Doe Company, a
corporation; Roe Company, a corpora-
tion; Doe Five; Doe Six; Doe Seven and
Doe Eight; Defendants.

NATIONAL BROADCASTING COMPANY,
Inc., a corporation, Defendant and Cross-
Complainant in Certain Pleadings,
Appellant,

v.

KTTV, Inc., a corporation, and Hallett Man-
ufacturing Company, a corporation, De-
fendants and Cross-Defendants in Certain
Pleadings, Respondents.

Civ. 20852.

District Court of Appeal, Second District,
Division 3, California.

July 7, 1955.

As Modified on Denial of Rehearing
July 27, 1955.

Hearing Denied Sept. 1, 1955.

Action for declaratory relief and ac-
counting and for damages for breach of
contract wherein a cross-complaint was
filed. From an order of the Superior Court
of Los Angeles County, Philbrick McCoy,
J., striking the cross-complaint, the cross-
complainant appealed. The District Court
of Appeal, Shinn, P. J., held that the cross-
complaint was erroneously stricken.

Order reversed.

1. Pleading ⚡147

Purpose of procedure by cross-com-
plaint is to avoid such circuitry of action as
would be involved if cross-complainant
were not allowed to have its rights adjudicated
under its cross-complaint. West's
Ann.Code Civ.Proc. § 442.

2. Pleading ⚡149

Where several persons are sued upon a
demand against which one defendant has

agreed to indemnify the other, latter may
have his rights to indemnity determined by
means of a cross-complaint.

3. Declaratory Judgment ⚡328

In action for declaratory relief and for
breach of contracts respecting use of motion
picture films and distribution thereof, cross-
complaint for a declaration of a cross-com-
plainant's right to indemnity in accordance
with the agreement for damages against the
cross-defendants and attorney's fees and
costs was erroneously stricken, where
theory of cross-complaint was that if
plaintiff recovered judgment against cross-
complainant, cross-defendants would be
bound to pay cross-complainant amount of
its liability, and a judgment for or against
cross-complainant in present action would
determine question of liability of cross-
defendants under their indemnity agree-
ments. West's Ann.Code Civ.Proc. § 442.

Loeb & Loeb, Harry L. Gershon, Los
Angeles, for appellant.

Sherman, Thompson & Glover, Chas. R.
Thompson, Los Angeles, for respondents.

SHINN, Presiding Justice.

This is an action brought by Television
Productions, Inc., against Jerry Fairbanks,
Inc., National Broadcasting Company, Inc.,
corporations, and Consolidated Television
Sales, a co-partnership, composed of Hallett
Manufacturing Company and KTTV, Inc.,
a corporation. The complaint prays for
declaratory relief and for an accounting
as to all the defendants and as against Jerry
Fairbanks, Inc., for damages for breach of
contract. Certain contracts are involved,
all of which create rights and obligations
as between the respective contracting parties
in and to the ownership and use of
certain motion picture films and a distribu-
tion of the proceeds from the exploitation
and distribution of the same. The question
on the appeal is whether the court was in
error in striking out portions of a cross-
complaint of National Broadcasting Com-
pany upon motion of defendants and cross-
defendants, KTTV, Inc., and Hallett Manu-
facturing Company. The ground upon
which the portions were stricken was that

the matter therein alleged was not a proper subject of a cross-complaint. It will be developed in our discussion that the claims for relief asserted in the causes of action that were stricken were directly related to the transaction which is the subject matter of the action and that they should not have been stricken.

Although the several contracts to be examined employ the customary verbosity, a greatly abbreviated digest of the same will serve the purposes of this opinion. The names of the parties will likewise be abbreviated. Television made and sold to Fairbanks 65 short motion pictures, agreed to make 65 more, and sell the same to Fairbanks, and gave to the latter an option over a 5-year period to call for and acquire additional pictures of the same kind, which it made to a total number of 195. Fairbanks agreed to advance certain sums of money, to exploit the pictures and, after deducting from the returns certain items of reimbursement, to hold in trust for Television and to pay over 50 per cent of the balance remaining. Fairbanks agreed that in contracting with any third party with respect to the films it would incorporate in its agreements the provisions of its agreement with Television that were designed to establish and protect the latter's rights, and it was agreed that no contract would be effective which did not contain such protective provisions. Television-Fairbanks contract provided that any contract made by Fairbanks with third parties under which he would retain a perpetual right to share in profits would not operate as a sale, license or other disposition of the films and that all receipts thereunder should be accounted for by Fairbanks in accordance with its agreement with Television. It was alleged that Fairbanks entered into an agreement with National by which it purported to sell, transfer and assign

to National all its right, title and interest in and to said television programs, which then numbered 195, but that the agreement contained no provision preserving the rights of Television under its contract nor any provision to hold any of the profits in trust for it; at the same time Fairbanks gave National an agreement of chattel mortgage-pledge and assignment which likewise contained no provision for the protection of plaintiff's rights; National foreclosed the mortgage, purchased 195 filmed programs at foreclosure sale and has entered into an agreement by which it purported to sell some interest in the 195 films to Consolidated. It was alleged that defendants claim that Television has no right, title or interest in or to the films or any right to any percentage of the net profits and that each defendant claims to be the sole owner of the films and entitled to all of the net profits. Television challenges the validity of the foreclosure sale and claims an interest in the films and the profits from their exploitation. In a second cause of action plaintiff asked for an accounting of profits, and in a third cause of action damages against Fairbanks occasioned through the breach by Fairbanks of its agreement to incorporate in its said agreements with National those provisions of the Television-Fairbanks agreement which were designed for the protection of Television's interest in the films and in the profits.

By its cross-complaint National alleged that it entered into an agreement with Fairbanks which antedated the Television-Fairbanks contract, which agreement contemplated and provided for the purchase by National from Fairbanks of motion pictures to be produced by the latter. It was alleged that with respect to any pictures purchased by National the agreement contained provisions as set out in the margin,¹ and that

1. "13. Fairbanks represents and warrants to NBC as follows: (a) That as of the date of delivery to NBC of any motion picture produced by Fairbanks for NBC, Fairbanks will own all the right, title and interest in and to such picture and the aural and visual broadcasting rights thereto throughout the world; all the characters, titles and text therein; the

exclusive rights enumerated in Paragraph 1(h) hereof; the right or world-wide license to utilize the music associated with such picture for any purpose for which NBC desires to use such picture or authorize such picture to be used; and the right to use in the exhibition of such picture and in publicizing, advertising and exploiting such picture the product or

the chattel mortgage agreement also contained the following: "Fairbanks warrants that it will own full, complete and unimpaired title to the pictures, properties and rights covered hereby, free and clear of any and all claims, rights, liens or charges thereon, which may to any extent defeat the rights of NBC * * *."

As to Hallett and KTTV, the cross-complaint alleged in a third cause of action that National sold and transferred to KTTV and Hallett all its right, title and interest in and to said cartoons and that said agreement contained a provision as set out in the margin.² A fourth cause of action alleged that National had incurred an indebtedness for legal fees and court costs in the present litigation in an amount in excess of \$5,000. It was alleged that a controversy existed between National and Hallett and KTTV in that National contends that it has the right to be indemnified and held harmless by Hallett and KTTV against any losses, damages, expenses or judgments incurred by cross-complainant, whereas Hallett and KTTV deny that National has any right to indemnification. The prayer of the cross-complaint was for a declaration of National's right to be indemnified in accordance with the agreements, for damages against the cross-defendants, for attorneys fees, expenses and costs. The court struck out the third cause of action and the fourth cause of action insofar as it related to Hallett and KTTV.

Section 442 of the Code of Civil Procedure permits the filing of a cross-complaint

service of any sponsor or sponsors thereof, and for institutional purpose of NBC, its affiliated stations, lessees and licensees and any sponsor or sponsors, the names characters, titles and text in and from the story and material contained in such picture, and the names, pseudonyms, photographs, likenesses and biographies of the actors and others appearing in or connected with such picture. * * *

"14. Fairbanks agrees to defend, indemnify, and to save and hold NBC harmless against and to make good to NBC and all other persons, losses, damages, expenses or judgments, including legal fees, incurred or sustained by or entered against NBC or such other per-

"Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought * * *." The words "matter, happening or accident" were added by Statutes 1915, page 298. The legislature could scarcely have chosen more clear and comprehensive language in extending the procedure by cross-complaint to cases in which the subject matter of the action and of the cross-complaint are the same. Of course, they are the same if they are not different and in the present case they are not different. Fairbanks was to exploit the pictures through television mediums. In fact, as shown by the contract, an agreement had been made or was expected to be made with National for that purpose. National, when it contracted with Consolidated, did not agree to indemnify Consolidated against such claims but, upon the contrary, was to be indemnified by Consolidated. It is not questioned that the claims of Television are within the scope of the indemnity agreements. Under the theory of National, translated into issues by the pleadings, if Television recovers judgment against National both Fairbanks and Consolidated will be bound to pay National the amount of its liability. In the present action, or in a separate action brought on the indemnity agreements, the primary question would be that of the liability of National. So far as appears from the pleadings a judgment for or against National in the present action would determine the question of liability of cross-defendants

sons by reason of any violation of any agreement, representation, or warranty contained in this Agreement. * * *

2. "Hallett and KTTV jointly and severally admit the validity of the Fairbanks debt and the Fairbanks mortgage, which mortgage will be foreclosed in the manner hereinabove indicated, and further admit the validity of the foreclosure sale and the foreclosure title obtained by NBC at said foreclosure sale, and agree to indemnify NBC against any and all claims, debts, demands, and causes of action which may be asserted against it based upon any claimed invalidity of said debt, mortgage, sale or title."

under their indemnity agreements. It is the precise type of liability sought to be fixed on National against which it claims the cross-defendants have agreed to hold it harmless. If there are defenses against liability under those agreements other than the non-liability of National to plaintiff they are not to be found in the pleadings.

[1-3] The purpose of the procedure by cross-complaint is to avoid such circuitry of action as would be involved if National were not allowed to have its rights adjudicated under its cross-complaint. Whether a cross-complaint is proper in such a case is not an open question. Where several persons are sued upon a demand, against which one defendant has agreed to indemnify another, the latter may have his rights to indemnity determined by means of a cross-complaint. It was so held in *Eastin v. Roberts, Carpenter & Co.*, 19 Cal. App.2d 567, 66 P.2d 224; *County of Humboldt v. Kay*, 57 Cal.App.2d 115, 134 P.2d 501; *Sattinger v. Newbauer*, 123 Cal.App. 2d 365, 266 P.2d 586. The order appealed from is directly contrary to the well-established rule of procedure in such cases. It was error to strike out the third cause of action of the cross-complaint and the allegations of the fourth cause of action insofar as they related to Hallett and KTTV.

The only question involved and all that we have decided is that the pleadings in their general aspects present a case in which the cross-complaint of National as against KTTV, Inc., and Hallett Manufacturing Company was properly filed. No questions respecting the interpretation or scope of the agreements or the liability of any party or parties thereunder nor as to any defenses against claims of liability are before us on the appeal. Aside from the question of the right of National to file its cross-complaint all matters in issue will be for the trial court and no implications to the contrary may be read into our opinion.

The order is reversed.

PARKER WOOD and VALLÉE, JJ.,
concur.

134 Cal.App.2d 389

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Arthur HANN, Defendant and
Appellant.

Cr. 891.

District Court of Appeal,
Fourth District, California.

July 14, 1955.

Prosecution for grand theft. The Superior Court, Fresno County, Edward L. Kellas, J., entered judgment of conviction and denied accused's motion to set aside judgment for purpose of withdrawing plea of guilty. Accused appealed from judgment and purported order denying new trial. The District Court of Appeal, Griffin, J., held that where accused made no motion for new trial in the action, his attempted appeal therefrom must be dismissed.

Judgment affirmed and attempted appeal from order denying new trial dismissed.

1. Criminal Law §1131(4)

Where accused convicted of grand theft made no motion for a new trial in the action, attempted appeal therefrom was dismissed.

2. Criminal Law §1134(10)

If certain proceedings in trial court by accused convicted of grand theft amounted to a motion to set aside information and enter plea of not guilty, where it was made after judgment and after notice of appeal from judgment had been filed, it was too late to be reviewed on appeal from judgment.

Howard Renge, Fowler, and Tom Okawara, Fresno, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant filed his notice of appeal on December 21, 1954, in propria persona, after personally pleading guilty to a charge of grand theft of a house trailer, admitting

a prior conviction of a felony (burglary), and that he served time therefor in a state penal institution in Illinois. He was then represented by counsel of his own choosing. After being denied probation he was duly arraigned for judgment which was entered on December 6, 1954, and he was sentenced to state's prison.

At defendant's request, other counsel were appointed by this court to represent him on appeal. The reporter's transcript shows the proceedings had in the Superior Court to be regular, and defendant's rights were fully protected by his counsel who appeared for him. As we understand it, defendant now claims, in a letter written to the trial judge on December 23, 1954, not made a part of the record on this appeal, that his former counsel visited him in jail and defendant told him he was not guilty of the charge, but his attorney stated he had talked to the district attorney and that upon entry of a plea of guilty defendant would receive probation or a short local jail sentence; and that it was further claimed the probation officer "guaranteed" defendant he would recommend probation, otherwise the defendant would have entered a plea of not guilty. Apparently defendant set this matter up in some form of proceeding in the Superior Court in the nature of a petition for writ of certiorari, coram nobis, or as a motion to set aside the judgment for the purpose of withdrawing the plea after judgment had been pronounced and after defendant's notice of appeal had been filed. At any rate, after the matter was heard upon conflicting evidence, the motion or writ was denied by that court and no appeal was taken from the order. It is defendant's claim that under the holding in *People v. Gilbert*, 25 Cal.2d 422, 154 P.2d 657, he should now be allowed to raise the same question on appeal from the judgment, and be permitted to enter a plea of not guilty.

[1,2] The record does not indicate that defendant made a motion for a new trial in the instant action and accordingly his attempted appeal therefrom must be dismissed. If the proceedings in the Superior Court amounted to a motion to set aside the information and enter a plea of not

Cal.Rep. 285-286 P.2d-21

guilty it came too late to be reviewed on an appeal from the judgment since it was made after judgment and after the notice of appeal from the judgment had been filed. It being an appealable order made after judgment and after notice of appeal from the judgment, this court has no jurisdiction to review it on an appeal from the judgment. 3 Cal.Jur.2d 688, sec. 199.

Defendant's appeal is based on a matter admittedly not a part of the record on appeal from the judgment. Accordingly, since no error affirmatively appears, the judgment must be affirmed. The attempted appeal from the purported order denying a new trial is dismissed.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



134 Cal.App.2d 226

DURALADD PRODUCTS CORPORATION,
a corporation, Petitioner,

v.

SUPERIOR COURT OF THE STATE OF
CALIFORNIA, IN AND FOR THE COUNTY
OF SACRAMENTO, Honorable James
H. Oakley, Judge thereof, Honorable C. C.
LaRue, County Clerk of the County of
Sacramento, and Carl E. Moore, Respondents.

Civ. 8819.

District Court of Appeal,
Third District, California.

June 29, 1955.

Hearing Denied Aug. 18, 1955.

Original proceeding for writ of prohibition by foreign corporation to enjoin court from proceeding further in action for personal injuries brought against foreign corporation and others, and to require court to vacate order denying motion to quash substituted service of summons on corporation. The District Court of Appeal, Andrew R. Schottky, J., held that where for-

eign corporation manufactured parts for ladders and sold them to California company which assembled ladders, furnished advertising material to California company, and had its representative make annual visit to California company for purpose of technical consultation, foreign corporation held out California company as its California distributor or representative, and was doing business within state for purpose of assumption of jurisdiction and amenability to process.

Petition denied and alternative writ discharged.

1. Corporation $\S$ 642(1)

The essence of "doing business" within the state is that the corporation is present within the state sufficiently to constitute it just and equitable that it be amenable to process within the state.

See publication *Words and Phrases*, for other judicial constructions and definitions of "Doing Business".

2. Corporations $\S$ 642(1)

Not any activity of a foreign corporation in the state will make it amenable to process, and there is no precise test that can be applied, but it is a combination of local activities conducted by foreign corporation, their manner, extent and character which becomes determinative of the jurisdictional question.

3. Corporations $\S$ 642(4½)

Where foreign corporation manufactured parts for ladders outside state, and shipped parts into state for assembly by company that had contract with it, furnished advertising material to California company and had its representative make annual visit for purpose of technical consultation with California company, foreign corporation held California company out as its California distributor or representative, and was doing business within state for purpose of assumption of jurisdiction and amenability to process.

C. Ray Robinson, Auburn, for real party in interest.

SCHOTTKY, Justice.

Petitioner, a New Jersey corporation, filed in this court a petition for a writ of prohibition to enjoin the Superior Court of Sacramento County from proceeding further in an action for personal injuries brought against it and others by Carl E. Moore, and to vacate an order denying petitioner's motion to quash the substituted service of summons made on it in said action. Attached to said petition as exhibits were copies of the first amended complaint, plaintiff's affidavit for service of process on a foreign corporation, notice of motion to quash service of summons and affidavit in support thereof, and pertinent extracts from depositions of John B. Lindquist and Eleanor C. Lindquist.

Plaintiff Carl E. Moore, as the real party in interest, filed an opposition to the issuance of the writ of prohibition. We issued an alternative writ requiring respondent court to show cause why further proceedings against petitioner in said action should not be prohibited and restraining further proceedings against petitioner until this court determined the matter.

It is the contention of petitioner that it was not doing business in California and was therefore not amenable to service of process upon the Secretary of State. The same record is before us as was before the superior court upon the hearing of the motion to quash service of summons. In support of its motion petitioner submitted the affidavit of Charles S. Schulek, a vice president of the Duraladd Products Corporation, and plaintiff and respondent Moore relied upon the affidavit of his attorney filed in support of the motion for service of process and the depositions of John B. Lindquist, Eleanor C. Lindquist and Louis C. Larson. The question which we must determine is whether the court's order denying petitioner's motion to quash the service of summons is supported by the record.

The facts are not in substantial dispute. The action is one for personal injuries resulting to plaintiff from the collapse of an aluminum ladder which had been purchased

Archibald D. McDougall, Sacramento, for petitioner.

from defendant, Sacramento Stucco Company. The latter had obtained the same through the wholesale hardware firm of defendant, Thomson-Diggs Company, which in turn had received it from defendant Louis C. Larson, a San Jose distributor. Larson, in turn, had purchased it from defendant Larson Ladder Company, a Los Angeles concern, which was engaged in the business of producing such ladders and selling them to distributors, of which Larson of San Jose handled the northern California business.

Larson of Los Angeles operates under a contract with Duraladd, whereby it purchases from Duraladd in New Jersey ladder parts which are shipped to Los Angeles and paid for by the Los Angeles company. These ladders arrive in a "knocked down" condition. They are there assembled and sold to dealers. The volume of business so done in 1952 approximated \$25,000. It was less than that in 1951, and more in 1953. The contract under which this arrangement is still being carried on was entered into in 1950, between Duraladd and Larson of Los Angeles, and provided for outright sale of ladder parts under an exclusive distributorship arrangement. Duraladd manufactures these parts solely in its New Jersey plant; maintains no sales, or other representatives, or office in California; does no business with any other firm or person than Larson of Los Angeles, with whom it has the contract mentioned which it terms a licensing agreement.

The affidavit of its vice president asserts that the only connection Duraladd has with California is the sale of ladder parts to Larson of Los Angeles under this agreement, a copy of which is attached to Duraladd's affidavit; and that no officer of Duraladd has done business in California since its president, one Dold, came to California in 1950 to execute the contract. However, it appears from other evidence that when Larson started to set up its ladder assembly business in Los Angeles, a representative of Duraladd came to California and assisted in setting up the assembling machine and gave instruction in the method of operating it. Since that time Duraladd has had a man at Larson's plant several times, though not recently. This was the same man who

helped set up Larson's operation and he dropped in to see how it was operating. About two years ago, Larson also received some instructions from Duraladd in regard to the assembly of the ladders. Larson also has received technical information from Duraladd as to tests, strength, and composition of their products.

The machine used in this assembly process is called an "air machine," operated by one person, and it applies 380 pounds air pressure, by which the ladder rungs are annealed to the side of the rails. There is no welding, and there are no screws or rivets used in the process. Larson has assembled over 1,000 of these ladders since 1950. This air machine was designed by Duraladd and purchased by Larson from Duraladd's representative in Wisconsin. If anything goes wrong with the machine, Larson does not go to Duraladd, but to an air company in Los Angeles. The ladders, themselves, are Duraladd's design and manufacture. All parts arrive in Los Angeles machined, stamped, and ready to be assembled. Larson does no machine work on the parts; merely assembles them. The rungs are all cut to size and packed in barrels. The ladder dogs or catches (for extension arms) are already attached.

Duraladd does no advertising in California, but Larson puts out a catalog sheet, a copy of which has been submitted as an exhibit. This sheet or brochure contains at the top the following lettering:

"Aluminum Ladders

Larson Ladder Company

Distributors For Duraladd, The

Lifetime Ladder."

It appears that Duraladd furnished the dies for this brochure and composed the copy, but Larson had it printed and paid for it. Larson put its name on as distributors for Duraladd and sent this brochure out to wholesalers as advertising, so that the latter could put the material in their salesmen's book. This brochure was put out about one year after Larson started handling Duraladd products, and it is still in use.

The air machine, originally set up with help from the Duraladd representative, is the same as when originally set up, except

for retooling that was done under Duraladd's instructions.

Respondent Moore contends that under the facts and circumstances shown by the record in the instant proceeding petitioner Duraladd Products Corporation was doing business in California within the meaning of the applicable code sections. He argues that "in determining whether or not a foreign corporation is subject to service of process in this State, the test is not merely mechanical or quantitative (*International Shoe Co. v. [State of] Washington*, supra [326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95],)" and quotes from the recent case of *Jeter v. Austin Trailer Equipment Co.*, 122 Cal.App. 2d 376, at page 388, 265 P.2d 130, at page 137, as follows:

"By way of recapitulation of the current state of the law under the evolving concept of the 'doing business' requirement, it is deducible from the cases that the essentials of due process are fully met, at least for the purposes of amenability to local process and jurisdiction, if a foreign corporation maintains substantial contacts with a state through a course of regularly-established and systematic business activity, as distinguished from casual, isolated, or insubstantial contacts or transactions. The court must be astute to weigh the facts of the individual case to determine whether the particular type of activity in, relation to, or nexus with, the forum is of such substance as will make it just and equitable to conclude that a corporation is 'doing business' in the sense required by the purpose at hand."

Respondent Moore also cites *Sales Affiliates, Inc., v. Superior Court*, 96 Cal.App. 2d 134, at page 136, 214 P.2d 541 at page 542, where the court said:

"* * * There is no need for us to indulge in a repetitious analysis of the authorities. Every factual situation where the question arises calls for a comparison of the business advantages derived from the methods employed by the corporation, with those it would enjoy if it conducted its business through

its own offices or paid agents in the state. If the representation which petitioner maintained in the state gave it in a practical sense, and to a substantial degree, the benefits and advantages it would have enjoyed by operating through its own office or paid sales force, it was clearly doing business in the state so as to be amenable to civil process."

[1,2] As stated in *Fielding v. Superior Court*, 111 Cal.App.2d 490, at pages 494, 496, 244 P.2d 968, at page 970:

"* * * The essence of doing business is that the corporation is present within the state sufficiently to constitute it just and equitable that it be amenable to process within the state. *Milbank v. Standard Motor Const. Co.*, 132 Cal. App. 67, 22 P.2d 271; *Boote's Hatcheries [& Packing] Co. v. Superior Court*, 91 Cal.App.2d 526, 528, 205 P.2d 31.

* * * * *

"In the final analysis it would seem that this is really not a question of the power of the state, but whether there is afforded to both parties a greater amount of justice by allowing suit in this state rather than requiring it elsewhere. See 20 C.J.S., Corporations, § 1918, p. 148; *International Shoe Co. v. [State of] Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 [161 A.L.R. 1057]."

And as this court said in *Martin Brothers Electric Co. v. Superior Court*, 121 Cal. App.2d 790, at page 793, 264 P.2d 183, at page 185:

"Not 'any activity' of a foreign corporation in the state will make it amenable to process and there is no precise test that can be applied in all cases. It 'is the combination of local activities conducted by such foreign corporation—their manner, extent and character—which becomes determinative of the jurisdictional question.' *West Pub. Co. v. Superior Court*, 20 Cal.2d 720, 728, 128 P.2d 777, 781. In the language of *Sales Affiliates, Inc., v. Superior*

Court, *supra* (96 Cal.App.2d 134, 214 P.2d 542), it must be shown that the corporation 'maintained in the state' a representation which 'gave it in a practical sense, and to a substantial degree, the benefits and advantages it would have enjoyed by operating through its own office or paid sales force'."

[3] In the instant case we have a situation where the Larson Company was not only an exclusive distributor, but, in so far as it assembled parts into a completed whole, it participated in the final stages of manufacture of Duraladd's products. Such products were purchased outright by the California concern and Duraladd had no financial interest whatever in them from the time of shipment. However, it is apparent that Duraladd maintained a continuous course of business with the California company and continued after the original installation of the assembly equipment to maintain an interest in seeing that the assembling was done properly; and, also, Duraladd was obviously interested in maintaining the volume of California sales and to that end furnished advertising material. In the agreement between petitioner and Larson Ladder Company it is provided, among other things, that "It is the intention of the parties listed in the within agreement that Mr. Dodd of the Corporation shall make annual visits to Larson for the purpose of technical consultation." Duraladd, at least tacitly, held out Larson Ladder Company as its California distributor or representative.

As stated by the Supreme Court of the United States in *International Shoe Co. v. State of Washington*, 326 U.S. 310, 319, 66 S.Ct. 154, 159, 90 L.Ed. 95, 103-104:

"It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit,

and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less.

* * * Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. * *

"But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue. * * *"

In view of the facts and circumstances of the instant case, as hereinbefore set forth, and bearing in mind the rules laid down in the authorities hereinbefore cited, we are satisfied that the activities of petitioner in this state bring it within the framework of the "doing business" concept for the purpose of assumption of jurisdiction and amenability to process, and that there is substantial evidence to support the order denying the motion to quash the service of summons.

The petition for a peremptory writ is denied; and the alternative writ heretofore issued is discharged.

VAN DYKE, P. J., and FINLEY, J. pro tem., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

134 Cal.App.2d 416

**Thomas F. SEWARD, Plaintiff and
Respondent,**

v.

**William R. WILKERSON, Defendant and
Appellant.**

Civ. 21136.

District Court of Appeal, Second District,
Division 1, California.

July 19, 1955.

Proceeding on motion to augment the record in an appeal from the judgment of the Superior Court, Los Angeles County, Allen W. Ashburn, J. The District Court of Appeal, Drapeau, J., held that, where defendant moved to augment record by adding papers involved in issuance of writ of attachment, on ground that, when plaintiff invoked remedy of attachment, action was converted from equity to law and, as a consequence, plaintiff elected to proceed in law, record would be so augmented regardless of sufficiency of defendant's contention so that court would have entire record before it when it considered merits of case.

Motion granted.

Appeal and Error ⇐654

Where defendants moved to augment record by adding papers involved in issuance of writ of attachment on ground that, when plaintiff invoked remedy of attachment, action was converted from equity to law and, as a consequence, plaintiff elected to proceed in law, record would be so augmented regardless of sufficiency of defendant's contention so that court would have entire record before it when it considered merits of case.

Bautzer, Grant & Silbert, Beverly Hills,
for appellant.

No appearance for respondent.

DRAPEAU, Justice.

Motion by defendant to augment the record.

Defendant contends that when plaintiff invoked the remedy of attachment the ac-

tion was converted from equity to law, and that as a consequence plaintiff elected to proceed in law. Therefore, defendant moves to add to the record the several papers involved in the issuance of the writ of attachment.

Without passing upon the sufficiency of the contention, this Court is of the opinion that it will do no harm to have the entire record before it when it considers the merits of the case.

The motion is granted.

WHITE, P. J., and DORAN, J., concur.



134 Cal.App.2d 361

**The CITY OF OCEANSIDE, a Municipal
Corporation, Plaintiff, Appellant and
Respondent,**

v.

**The PACIFIC TELEPHONE AND TELE-
GRAPH COMPANY, a Corporation, De-
fendant, Appellant and Respondent.**

No. 4883.

District Court of Appeal,
Fourth District, California.

July 13, 1955.

Action by city against telephone company to collect taxes levied under ordinance requiring telephone company to pay license tax of \$400.00 per year plus additional tax of \$2 per year for each pay telephone within city limits. The Superior Court, San Diego County, Joe L. Shell, J., entered judgment for city with respect to \$400 per year license tax but declared that \$2.00 per year tax for each pay telephone was unconstitutional and each party appealed from so much of the judgment as was adverse to them. The District Court of Appeal, Mussell, J., held that since evidence supported finding that \$400 license tax was at a higher rate and in a different manner and form than that levied on mercantile, manufactur-

ing and business corporations it was unconstitutional and tax of \$2.00 per year per pay telephone constituted a burden on interstate commerce.

Affirmed in part and reversed in part.

1. Taxation ⇨155

Constitutional provision forbidding the levying by political subdivision of a tax on telephone company at a rate higher or in form different from that imposed upon mercantile, manufacturing and business corporations refers to tax rate to be imposed by such political subdivision and not tax rate that might be imposed anywhere in the state. West's Ann.Const. art. 13, § 14.

2. Municipal Corporations ⇨957(1)

Constitutional provision respecting taxation of public utilities provides a limitation on power of municipalities to tax public utilities. West's Ann.Const. art. 13, § 14.

3. Licenses ⇨32(2)

In action by city against telephone company to collect taxes levied against telephone company under ordinance, evidence supported trial court's finding that license tax levied was at a higher rate and in a manner and form different from tax levied upon mercantile manufacturing and business corporations within meaning of constitutional provision prohibiting discriminatory taxation. West's Ann.Const. art. 13, § 14.

4. Licenses ⇨29

Where license tax levied by city against telephone company was at a higher rate and in a manner and form different from tax levied upon mercantile, manufacturing and business corporations, it was not necessary for telephone company to show that city did not have any reasonable basis for classifying it in a different category since discriminatory taxation is prohibited by Constitution. West's Ann.Const. art. 13, § 14.

5. Commerce ⇨69(5)

Where city levied against telephone company a license tax of \$2 per year for each pay telephone within city limits and such telephones were used for both interstate and intrastate commerce, such license

tax constituted an improper burden on interstate commerce.

6. Commerce ⇨69(5)

Fact that city ordinance levying license tax on telephone company at rate of \$2 per year for each pay telephone within city which was used in both interstate and intrastate commerce, stated that tax did not include any business in interstate commerce, did not avoid effect of tax as being a burden on interstate commerce. U.S.C.A. Const. art. 1, § 8, Cl. 3.

James A. Moore, Oceanside, for plaintiff and appellant.

John A. Sutro, Noble K. Gregory, Pillsbury, Madison & Sutro, San Francisco, Leslie C. Tupper, Lawler, Felix & Hall, Los Angeles, Gray, Cary, Ames & Frye, San Diego, for defendant and respondent.

MUSSELL, Justice.

This is an action brought by the city of Oceanside, a city of the sixth class, to collect from the defendant, hereinafter referred to as the "Telephone Company", municipal license taxes alleged to be due from the defendant for the first three quarters of the year 1953 pursuant to the terms of ordinance No. 741, as amended, of said city.

This ordinance provides for the levy of two license taxes on telephone companies (1) A tax of \$400 a year (at the rate of \$100 per quarter); and (2) A tax of \$2 a year (50¢ per quarter) for each pay telephone located within the city. The telephone company refused to pay either of these taxes on the ground that both violate the provisions of Article XIII, section 14, of the Constitution of the State of California and refused to pay the special tax of \$2 per year for each pay telephone for the further reason that such telephones are instrumentalities of interstate and foreign commerce and such a tax constitutes an unlawful burden upon interstate commerce in violation of Article I § 8, of the Constitution of the United States.

The trial court found that the tax of 50¢ a quarter (\$2 a year) for each pay telephone located within the city of Oceanside

would constitute a burden on interstate commerce, and further found:

"9. The business license tax of \$100 a quarter (\$400 a year) upon telephone companies provided for by section 29 of Ordinance No. 741 of The City of Oceanside is a higher rate than, and in a manner and form different from, the business license tax levied by The City of Oceanside under Ordinance No. 741, as amended, upon and collected from mercantile, manufacturing and business corporations doing business within the State of California, but the evidence fails to show that The City of Oceanside did not have any reasonable basis for classifying telephone companies for business license tax purposes in a different category from mercantile, manufacturing and other business corporations."

Judgment was rendered in favor of the city for \$300. (\$100 for each of the first three quarters of 1953.) The telephone company appeals from the judgment and the city appeals from "that part of the judgment" denying recovery of the tax levied on pay telephones.

The issues on the appeal by the telephone company relate to the application of section 14 of Article XIII of the State Constitution. The first paragraph of this section provides, among other things, that all property, other than franchises, owned by telegraph and telephone companies shall be assessed annually by the State Board of Equalization, at the actual value of such property. The second paragraph provides that all property so assessed by said board shall be subject to taxation to the same extent and in the same manner as other property, and the third paragraph is as follows:

"All companies herein mentioned and their franchises, other than insurance companies and their franchises, shall be taxed in the same manner and at the same rates as mercantile, manufacturing and business corporations and their franchises are taxed pursuant to Section 16 of this article; provided, that nothing herein shall be construed to release any company mentioned in this

section from the payment of any amount agreed to be paid or required by law to be paid for any special privilege or franchise granted by any political subdivision or municipality of this State; provided further, that no excise, or income tax or any other form of tax or license charge shall be levied or assessed upon or collected from the companies, or any of them, mentioned in the first paragraph of this section, in any manner or form, different from, or at a higher rate than that imposed upon or collected from mercantile, manufacturing and business corporations doing business within this State."

Ordinance No. 741 of said city, as amended, provides for taxation of corporations doing business within the city in three forms: (1) A tax measured by gross receipts; (2) A tax measured at flat rates; and (3) A tax measured by the number of vehicles used within the city. The first form is applied to most mercantile businesses and it was stipulated that in 1953 most mercantile corporations were taxed by the city under this form of tax based upon their gross receipts in 1952. The remaining mercantile, manufacturing and business corporations doing business within the city were taxed pursuant to either the flat rate form of tax or the wheel tax and such taxes were applied to approximately 61 such mercantile, manufacturing and business corporations. The gas, electric and telegraph companies were taxed under the flat rate provision. In 1953 the city levied upon and collected from gas and electric corporations a business license tax of \$100 a quarter and from a telegraph corporation a business license tax of \$7 per quarter. In the same year the city sought to collect from the telephone company a business license tax of \$400 a year, plus \$2 a year for each pay telephone.

There was substantial evidence supporting the trial court's finding that the gross receipts of the telephone company from the intrastate business done within the city during the year 1952 were approximately \$380,238. Applying the schedule of rates set forth in section 9 of ordinance 763, amending ordinance 741, we find that the tax on

the defendant company would have amounted to an annual license fee of \$185 instead of the \$400 yearly tax sought to be collected.

The total annual license tax collected from all but two of the mercantile, manufacturing and business corporations, taxed under the flat rate provision of the ordinance, was less than the basic \$400 a year tax that the ordinance purports to impose on telephone companies. The two exceptions noted were a trailer park and an amusement company. The trailer park was taxed at the rate of 50¢ per trailer space per quarter and apparently the amusement company was taxed in various amounts for games and rides. The total amount of the annual license tax collected by the city from these two corporations was less than the sum per year (approximately \$754) which the city sought to collect from the telephone company. The highest total annual tax collected in 1953 under the wheel tax provisions of the ordinance was the sum of \$176 and no corporation taxed under that provision of the ordinance paid a tax in 1953 equivalent in either rate or total amount to the basic \$400 a year tax attempted to be imposed on the defendant corporation.

[1] The city apparently admits that the tax sought to be imposed on defendant was different from and at a rate higher than that imposed upon or collected from mercantile, manufacturing and business corporations within the city but contends that there was no finding that the license fee was at a higher rate either in a manner or form different from that imposed upon or collected from mercantile, manufacturing and business corporations doing business elsewhere in the state. There is no merit in this contention. It seems quite clear that the plain and unambiguous wording of the latter portion of paragraph three of section 14 of Article XIII of the State Constitution permits no such construction. Obviously the statute refers to taxes to be imposed by the city without regard to the rate charged by other municipalities in different parts of the state. The city's contention is that this section should read as follows:

"* * * no excise, or income tax
or any other form of tax or license

charge shall be levied or assessed upon or collected from the companies, or any of them, mentioned in the first paragraph of this section, in any manner or form, different from, or at a higher rate than that imposed upon or collected from [any] mercantile, manufacturing and business corporations doing business [anywhere] within this State."

To insert the italicized words in the section would defeat the purpose of the prohibition against discriminatory taxation and add a meaning not to be found in the clear wording of the section. We are not at liberty to add provisions to what is declared in definite language. *People v. Campbell*, 138 Cal. 11, 15, 70 P. 918.

[2] It is contended by the city that section 14 of Article XIII of the State Constitution does not provide any limitation whatsoever on the power of municipalities to license utilities. This contention is likewise without merit. In 1910 section 14, as amended, provided for a state gross receipts tax upon public utilities, which tax was "in lieu of all other taxes and licenses, State, county and municipal." This provision not only prohibited the various taxing authorities in this state from taxing the operative property of telephone companies and all other public utilities, but also prohibited them from imposing any form of license tax on such utilities. *City and County of San Francisco v. Pacific Tel. & Tel. Co.*, 166 Cal. 244, 135 P. 971; *Pacific Gas & Electric Co. v. Roberts*, 168 Cal. 420, 143 P. 700. In 1933 section 14 was again amended and now provides as hereinbefore set forth. The first two paragraphs of this section prevent local taxing authorities from discriminating against public utilities in the taxation of their properties by providing that such property shall be assessed by the State Board of Equalization and when so assessed shall be subject to taxation "to the same extent and in the same manner as other property." The first clause of the third paragraph of section 14 prevents the state from taxing such utilities and their franchises in a different manner or at a different rate from mercantile, manufacturing and business corporations, and provides that such utilities shall be taxed by the state (pursuant to

section 16 of Article XIII) "in the same manner and at the same rates as mercantile, manufacturing and business corporations." The last clause is substantially the same as the provisions contained in the 1910 provisions of section 14. It provides that nothing in section 14 should be construed to release any such utilities from the amounts they have agreed to pay or are required by law to pay for any special privilege or franchise granted by any political subdivision or municipality. The last clause in paragraph 3 of section 14 provides that "*no excise, or income tax or any other form of tax or license charge shall be levied or assessed upon or collected from the companies, or any of them, mentioned in the first paragraph of this section, in any manner or form, different from, or at a higher rate than that imposed upon or collected from mercantile, manufacturing and business corporations doing business within this State.*" (Italics ours.) The phrase "No * * * tax or * * * charge" clearly indicates that the prohibition therein set forth is applicable to taxes imposed by all taxing authorities, including the city of Oceanside. When the entire section is read as a whole it is apparent that the section provides a limitation on the power of municipalities to tax public utilities, such as the defendant herein.

[3,4] While the trial court found that the license tax levied by the city against the telephone company was at a higher rate and in a manner and form different from the tax levied upon mercantile, manufacturing and business corporations doing business within the state, and this finding is supported by the evidence, the court further found that the telephone company had failed to show that the city of Oceanside did not have any reasonable basis for classifying telephone companies for business license tax purposes in a different category from mercantile, manufacturing and business corporations. It was not necessary for the telephone company to show that the city did not have any reasonable basis for classifying it in a different category from mercantile, manufacturing and business corporations since the city is prohibited by the provisions of section 14, Article XIII of

the State Constitution from taxing telephone companies in a manner and form different from or at a higher rate than that imposed or collected from mercantile, manufacturing and business corporations doing business in the state.

[5] The city, in its appeal from that portion of the judgment which determined that it could not recover its special business license tax of \$2 a year (50 cents a quarter) for each pay telephone within the city, contends that the said tax does not constitute a burden on interstate commerce within the meaning of the Constitution of the United States, Art. I, § 8, cl. 3. In this connection the trial court found that "14. A tax of 50 cents a quarter (\$2 a year) for each pay telephone located within The City of Oceanside would constitute a burden on interstate commerce," and concluded that "4. In so far as Ordinance No. 741 of The City of Oceanside provides for a tax of 50 cents for each pay telephone located within said City, said ordinance violates Article I, section 8, clause 3, of the Constitution of the United States." This finding and conclusion are supported by the record. The defendant telephone company is a corporation engaged in rendering a local, state-wide and interstate communication service within the states of California, Oregon and Washington and the northern part of Idaho. By connecting with other telephone companies, it provides communication service throughout the United States and other parts of the world. As a part of this service it maintains pay telephones within the city of Oceanside which are used in making telephone calls from the city to telephones located outside of the state of California. These pay telephones may be connected with over 80 million telephones throughout the world. The use of such pay telephones for interstate commerce is substantial. From February 21, 1952, to January 20, 1954, there were 9,212 telephone calls from such pay stations to telephones outside of the state of California and 283 calls went to points outside of the United States. In this connection the trial court found:

"12. The same telephone instruments, the same signaling apparatus, the same wires, lands, buildings, central

office equipment and operative organization of The Pacific Telephone and Telegraph Company within The City of Oceanside are used in providing interstate toll telephone service from pay telephones located within said City as are used in providing intrastate toll telephone service from said pay telephones.

"13. It would not be practicable or feasible for The Pacific Telephone and Telegraph Company to provide separate systems for intrastate and interstate telephone service from pay telephones within The City of Oceanside. The Pacific Telephone and Telegraph Company could not discontinue intrastate telephone service from pay telephones in The City of Oceanside without also discontinuing interstate telephone service from the same telephones."

In this connection it is conceded by the city in its opening brief that "The intrastate business of the defendant in the City of Oceanside cannot be discontinued without discontinuing the interstate business also; nor can the defendant provide separate pay telephones for intrastate and interstate use."

In *Cooney v. Mountain States Tel. & Tel. Co.*, 294 U.S. 384, 55 S.Ct. 477, 481, 79 L.Ed. 934, the telephone and telegraph company brought suit to restrain the enforcement of two acts of the legislature of Montana imposing annual license taxes. The acts prescribed a tax to be paid for each telephone instrument used in the conduct of the business of operating and maintaining telephone lines and furnishing telephone service in the state of Montana. Plaintiff was a Colorado corporation operating a state-wide telephone system in Montana. There, as here, the company furnished telephone services of a interstate and intrastate character and its system extended throughout several states. Its telephone instruments in Montana were an integral part of its system and were a part of a still greater system extending throughout the United States and to many foreign countries. All of its telephones were instrumentalities of interstate and foreign commerce and plaintiff could not discontinue its intrastate business and operations in Montana without

virtually destroying and being compelled to abandon and withdraw from its interstate and foreign business. The court there held:

"There is no question that the state may require payment of an occupation tax from one engaged in both intrastate and interstate commerce. But a state cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination. *Leloup v. Port of Mobile*, 127 U.S. 640, 8 S.Ct. 1380, 32 L.Ed. 311. There are 'sufficient modes' in which the local business may be taxed without the imposition of a tax 'which covers the entire operations.' *Id.*, page 647 of 127 U.S., 8 S.Ct. 1380, 1383. See *Williams v. Talladega*, 226 U.S. 404, 419, 33 S.Ct. 116, 57 L.Ed. 275. Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business. *Sprout v. South Bend, Inc.*, 277 U.S. 163, 171, 48 S.Ct. 502, 72 L.Ed. 833, 62 A.L.R. 45; *East Ohio Gas Co. v. Tax Commission*, 283 U.S. 465, 470, 51 S.Ct. 499, 75 L.Ed. 1171."

The city contends that the *Cooney* case is distinguishable from the instant case in that the Montana license tax was levied for the privilege of doing joint interstate and intrastate business, whereas the Oceanside ordinance is so worded that the levy is for the privilege of doing intrastate business, Citing *Pacific Telephone & Telegraph Co. v. Tax Commission*, 297 U.S. 403, 414, 56 S.Ct. 522, 525, 80 L.Ed. 760, where the court said: "Although the two branches of the

business of the companies are inseparable, the tax is not laid inseparably upon both. Thus it is not open to the objection held fatal in *Leloup v. Mobile*, 127 U.S. 640, 8 S.Ct. 1380, 32 L.Ed. 311, and *Cooney v. Mountain States Telephone & Telegraph Co.*, 294 U.S. 384, 55 S.Ct. 477, 79 L.Ed. 934." However, in the *Pacific Telephone Company v. Tax Commission* tax case the court distinguished the *Cooney* case on the ground that it involved a flat-rate tax measured by an instrumentality used in both interstate and intrastate commerce, whereas the tax involved in the *Pacific Telephone & Tel. Company v. Tax Commission* case was measured solely by gross receipts from intrastate (as distinguished from interstate) business and held that a tax on the privilege of engaging in intrastate business measured solely by gross receipts from such intrastate business would not necessarily burden interstate commerce.

[6] The fact that the city ordinance here involved states that the special tax measured by pay telephones does not include any business done to and from points without the state of California and that no license levied by the city shall be presumed to apply to interstate commerce does not avoid the effect of the tax. In the instant case, as in the *Cooney* case, the tax, being indivisible and indiscriminate in its application, necessarily burdens interstate commerce. It is not laid on revenue derived from local service as distinguished from interstate service, and is not imposed with respect either to the nature of the revenue, to the character of the service, or to the manner in which charges for the service are fixed.

In the recent case of *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 1954, 347 U.S. 157, 166, 74 S.Ct. 396, 401, 98 L.Ed. 583 the court held: "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it."

The record shows that the city's business license tax ordinance, by imposing the special tax on pay telephones, violates sec-

tion 14 of Article XIII of the State Constitution in that the telephone company is required to pay two license taxes on its privilege of engaging in business in the city of Oceanside, while only one business tax is imposed on mercantile, manufacturing and business corporations.

The judgment rendered in favor of the city is reversed and that part of the judgment denying recovery of the tax levied on pay telephones is affirmed. Each party to pay its own costs on appeal.

BARNARD, P. J., and GRIFFIN, J.,
concur.



134 Cal.App.2d 461

ELIIS R. DELBON, Plaintiff and Respondent,

v.

IRMA F. BRAZIL, Defendant and Appellant.
Civ. 8617.

District Court of Appeal, Third District,
California.

July 20, 1955.

Rehearing Denied Aug. 17, 1955.

Action by real estate broker to recover commission from vendor. From adverse judgment of Superior Court, Stanislaus County, B. C. Hawkins, J., vendor appealed. The District Court of Appeal, Van Dyke, P. J., held evidence sustained findings that, pursuant to exclusive listing contract providing that broker would be entitled to commission if vendor sold property within thirty days after expiration of term to any person with whom broker had negotiated for sale during term, broker negotiated with purchaser who subsequently purchased property within thirty days after expiration of broker's exclusive listing term and broker was therefore entitled to recover commission.

Affirmed.

1. Appeal and Error ⇨931(1)

Although not all testimony in support of trial court's judgment was uncontradicted, reviewing court must assume truth of such testimony.

2. Brokers ⇨53, 55(1)

Where exclusive listing contract provided that broker would be entitled to commission if vendor sold property within thirty days after expiration of one month term to any person with whom broker had negotiated for sale during term, it was not necessary that broker be procuring cause of sale in order that he recover commission and fact that another broker was active in effecting sale did not prevent recovery.

3. Brokers ⇨88(3)

What would constitute "negotiation for sale" requirement in broker's exclusive listing contract providing for payment of commission to him if vendor sold property within thirty days after expiration of exclusive listing term to anyone with whom broker had negotiated for sale during term, was primarily question of fact for trial court.

See publication Words and Phrases, for other judicial constructions and definitions of "Negotiation for Sale".

4. Brokers ⇨40

Parties to broker's contract are at liberty to make compensation of broker depend upon any lawful conditions they see fit to place therein.

5. Brokers ⇨86(1)

In action to recover broker's commission based on exclusive listing contract providing that broker would be entitled to commission if vendor sold property within thirty days after expiration of the term to any person with whom broker had negotiated for sale during term, evidence sustained finding that pursuant to contract broker negotiated with purchaser who subsequently purchased property within thirty days after expiration of broker's exclusive listing term.

6. Trial ⇨404(1)

Rule that findings of trial court must be construed liberally by reviewing court in support of judgment is peculiarly applicable in absence of request for more specific findings.

7. Trial ⇨392(1)

In action to recover broker's commission based on exclusive listing contract providing that broker would be entitled to commission if vendor sold property within thirty days after expiration of exclusive listing term to any person with whom broker had negotiated for sale during term, failure to specifically find that broker's negotiations for sale with purchaser occurred prior to termination of his exclusive listing was not error where there was evidence which would support such finding and vendor made no request for more specific findings.

George G. Murry, Gustine, for appellant.

Gilbert Moody, Turlock, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment in the amount of \$3,200 in an action to recover a real estate broker's commission.

The action was based upon a brokerage contract which gave to respondent, a licensed real estate broker, an exclusive right to sell real property during the period from June 16 to July 16, 1952. That contract contained the following provisions: "The appellant as owner of the property involved agreed to pay respondent 'the agreed commission upon the actual sales price if the above described property is sold or agreed to be sold to any person prior to the termination of such right, or if such property is sold or agreed to be sold within 30 days thereafter to any person with whom said Broker or his agent negotiated for its sale, prior to the expiration date hereof.'" Respondent's action was based upon the second alternative.

[1] There was substantial evidence of the following: A licensed real estate salesman employed by respondent held an interview with Horace C. Spencer, who later purchased the property, in the respondent's office. This occurred July 11, 1952. During that conference and for an hour or more the salesman discussed appellant's property with Spencer. In part he told Spencer that the property would be good clover ground,

easily leveled, gave him the approximate slope of the lands, and stated the listing price of \$225 per acre. During the interview he offered to show the property to Spencer, but the latter replied that he preferred to go alone, whereupon the salesman drew a diagram of the location of the property for Spencer so that he would be able to find it. Three days later the salesman telephoned Spencer who said he had looked at the property and wanted more information as to the legal description, the amount of water available for use on the property, and the amount of taxes and assessments thereon. The next day the salesman journeyed to Merced and obtained this information. He telephoned the information to Spencer and at that time gave him the name and address of appellant as owner. Spencer replied that he was then looking at another property and would let the salesman know when he decided one way or another. Within a week the salesman telephoned Spencer again and was informed that Spencer was still waiting to decide between appellant's property and another. Spencer was interested at the time in the purchase of a large piece of land, had known the property was for sale, and had seen it before his visit to respondent's office, but not as a prospective purchaser. About a week before Spencer purchased the property he went to the office of a second real estate broker, through whom he purchased the property after July 16, that is, after the expiration of respondent's exclusive agency but within 30 days thereafter. He purchased it at a lower price than the price quoted by respondent's salesman. It appears that after the expiration of respondent's listing the appellant had listed the property with the second broker. Not all of the above testimony was uncontradicted, but under the familiar rule we must, in support of the trial court's judgment, assume the truth thereof.

The trial court, after quoting the material provisions of the agreement, found that "pursuant to said written agreement, plaintiff by and through his salesman * * * negotiated with one Horace Spencer for the purchase of said real property"; that Spen-

cer had purchased the property within 30 days after the expiration of respondent's exclusive listing, and as a conclusion of law from those findings declared that respondent was entitled to recover the agreed commission, that is, five per cent upon the actual sales price, amounting to the sum for which judgment was given.

[2-4] Appellant contends the finding that respondent negotiated with Spencer for the sale of the property is contrary to law and the evidence and that judgment must be reversed for failure to establish that respondent was the procuring or efficient cause of the sale to Spencer. With this we do not agree. Under the contract respondent was to be paid a commission in either of two events: (1) Consummation of a sale or an agreement therefor between June 16 and July 16, 1952; or (2) a sale within 30 days thereafter to any person with whom respondent had "negotiated for a sale" during that period. To collect a brokerage for a sale, respondent would, of course, have had to have been the procuring cause thereof, but to carry that requirement over into the second provision for payment of commission would be to rob the latter of any meaning not already contained within the former except as to the extended period. To recover under the second provision it was not necessary that respondent be the procuring cause of the sale to Spencer. Under the latter clause the fact that another broker was active in effecting the sale and inducing the purchaser to buy does not prevent respondent's recovery. *Maze v. Gordon*, 96 Cal. 61, 66-67, 30 P. 962; *Kimmell v. Skelly*, 130 Cal. 555, 560, 62 P. 1067; *Mills v. Hunter*, 103 Cal.App.2d 352, 357, 229 P.2d 456; *Baumgartner v. Meek*, 126 Cal.App.2d 505, 508, 272 P.2d 552. See also 27 A.L.R. 2d 1348, 1408 et seq. What would constitute in this case "negotiation for a sale" was primarily a question of fact for resolution by the trial court. *Munson v. Furrer*, 261 Wis. 634, 53 N.W.2d 697, 699. Obviously negotiation for a sale is something less than an actual sale. The parties to a broker's contract are at liberty to make the compensation of the broker depend upon any lawful conditions they see fit to place therein. The simple question is, what does the con-

tract provide? *Baumgartner v. Meek*, supra, 126 Cal.App.2d at page 510, 272 P.2d at page 554, 555. In *Munson v. Furrer*, supra (also 12 C.J.S., Brokers, § 88, page 203) it was said [261 Wis. 634, 53 N.W.2d 699] that "negotiation", when used in a contract such as here before us, meant that the "efforts of the broker to interest a prospect must have proceeded to the point where the prospect would be considered a likely purchaser." "Ordinarily," said the court, "this would be a question of fact for determination by the jury."

[5] We think the trial court properly interpreted the contract and that the evidence presented before it amply sustains its conclusion that all of the conditions under which, by the contract, the owner was obligated to pay a commission to respondent based on the actual sales price of the property were present.

[6, 7] Appellant makes a further contention that the trial court's conclusions of law and judgment are not sustained by the findings of fact. They point out, and correctly, that for respondent to succeed in his action he had to prove that respondent's "negotiations for a sale" occurred prior to the termination of his exclusive listing. And they say that the court failed to specifically find that this contract requirement had been met. Findings must be construed liberally in support of the judgment. *K. & M., Inc., v. Le Cuyer*, 107 Cal.App.2d 710, 238 P.2d 28; *Heifetz v. Bell*, 101 Cal.App.2d 275, 225 P.2d 231. The rule is peculiarly applicable in the absence of a request for more specific findings. Appellant requested none. In view of the evidence which would support a specific finding that respondent negotiated with Spencer for a sale, during the period June 16 to July 16, the court's findings were sufficient.

Judgment affirmed.

FINLEY, J. pro tem., concurs.

285 P.2d—45½

134 Cal.App.2d 600

Bernice E. JOHNSON, Plaintiff and
Appellant,
v.

The CITY OF LOS ANGELES, a Municipal
Corporation, Defendant and
Respondent.
Civ. 20801.

District Court of Appeal, Second District,
Division 3, California.

July 27, 1955.

Rehearing Denied Aug. 15, 1955.

Hearing Denied Sept. 21, 1955.

Pedestrian's action against city for injuries arising from fall on allegedly defective sidewalk. The Superior Court, Los Angeles County, J. T. B. Warne, J., entered judgment for city and pedestrian appealed. The District Court of Appeal, Parker Wood, J., held that where pedestrian's claim, required by statute to be filed with city, stated that defect in sidewalk was on the southeast corner of intersection though accident happened on southwest corner, and there was no showing that pedestrian intended to mislead city, the claim was in substantial compliance with statute.

Reversed.

1. Municipal Corporations ☞812(7)

Where pedestrian sued city for injuries received from fall on allegedly defective sidewalk and her claim filed with city stated that defect was on the southeast corner of intersection though accident had happened on southwest corner and there was no evidence of pedestrian's intent to mislead city, claim was in substantial compliance with statute. *West's Ann.Gov. Code*, §§ 53052, 53053.

2. Evidence ☞83(2)

In absence of a record showing condition of sidewalk at a specified corner, it will be assumed that public duty with respect to properly maintaining that corner has been performed and there was no hole in sidewalk.

Ralph B. Helm and Gordon T. Shepard,
Los Angeles, for appellant.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., Victor P. Spero and Weldon L. Weber, Deputy City Attys., Los Angeles, for respondent.

PARKER WOOD, Justice.

Action for damages for personal injuries resulting from a fall allegedly caused by tripping on a defect in a public sidewalk. Plaintiff appeals from judgment in favor of defendant.

The amended complaint alleged that the accident occurred on July 27, 1952; that on September 18, 1952, plaintiff filed, with the clerk of the legislative body of defendant, "a verified written claim for damages specifying the name and address of the plaintiff claimant, the date and place of the accident, and the extent of the injuries and damages received"; that defendant negligently permitted a portion of a public sidewalk on the west side of Main Street at or near its intersecting point with 82nd Street to deteriorate and become "a dangerous, defective and broken hazard to persons using said sidewalk"; that "the area [portion of sidewalk] complained of" extended from a point about 18 inches east of the south corner of the north entrance (on Main Street) of the "Corner Market" on the southwest corner of the intersection of Main Street and 82nd Street to a point about 30 inches east of said south corner of said entrance; that said area was about 12 inches long, about 6 inches wide, and about 4 inches deep. The complaint was filed July 6, 1953.

A recital in the judgment is that counsel for the parties stipulated: "that the issue as to the legal sufficiency of the claim first be tried as a condition precedent to the maintenance and prosecution of said action before proof of damages be made"; and "that the claim filed in behalf of the plaintiff stated the location of the accident was on the sidewalk at the *southeast* corner of 82nd and Main Street"; and "that the accident actually occurred on the sidewalk at the *southwest* corner of 82nd and Main Street in the City of Los Angeles."

The question is whether the claim filed by plaintiff was legally sufficient with respect to specifying the place of the accident.

Section 53052 of the Government Code provides: "When it is claimed that a person has been injured * * * as a result of the dangerous or defective condition of public property, a verified written claim for damages shall be filed with the clerk or secretary of the legislative body of the local agency within ninety days after the accident occurred."

Section 53053 of the Code provides: "The claim shall specify the name and address of the claimant, the date and place of the accident, and the extent of the injuries or damages received."

There is no reporter's transcript herein. A copy of the claim is not attached to any of the pleadings. The claim is not before this court—it does not appear from the record that it was received in evidence or for identification.

Appellant argues that there was substantial compliance with the requirement of said Section 53053 that the claim specify the place of the accident; that there was no evidence of intent on the part of plaintiff to mislead the defendant, and that in the absence of anything indicating that defendant was misled the claim was legally sufficient.

In *Perry v. City of San Diego*, 80 Cal. App.2d 166, at page 169, 181 P.2d 98, at page 101, it was said: "From these authorities [cited above] it seems clear that California courts have taken a reasonably liberal view of the claim statutes and that where a reasonable attempt is made to comply with the law in good faith and no intent to mislead or conceal appears the claim will be upheld in the absence of anything indicating that the municipality has been misled, if the claim substantially conforms to the requirements of the statute." (The question in that case pertained to the sufficiency of the statement in the claim regarding negligence.)

In *Silva v. County of Fresno*, 63 Cal. App.2d 253, 146 P.2d 520, 521, the claim stated: "* * * 'the place of injury was on a public highway approximately four miles east of Dos Palos in the County of Fresno, State of California'" and "* * * the cause and manner of such injury and

facts connected therewith are as follows: A dangerous and defective road in that there were no signs kept or maintained by said County of Fresno indicating that the public highway upon which this claimant was riding came to an abrupt end". It was held therein that there was a substantial compliance with the statute in describing the place of the accident. In that case the name or number of the highway was not stated in the claim and the place of the accident was not described with particularity. The reference therein to a highway that "came to an abrupt end" was not a reference to a "dead end" highway but it was a reference to a right-angle turn in a highway.

Respondent cites *Hall v. City of Los Angeles*, 19 Cal.2d 198, 120 P.2d 13, 15, wherein the claim stated that it was for "Personal injuries received from slipping on sidewalk which was covered with mud, leaves and debris, resulting in injury * * *." The claim therein did not state what city the sidewalk was in, but the complaint alleged that the accident occurred on the sidewalk at the corner of Union Drive and Sixth Street in Los Angeles. In that case the court, after referring to certain cases, stated, 19 Cal.2d at page 202, 120 P.2d at page 15, that those cases held "that a defect in the form of compliance is not fatal so long as there is substantial compliance with the essentials of the requirement. In the present case [the cited case], however, there is an entire failure on the part of the plaintiff to comply with one of the mandates of the statute. Substantial compliance cannot be predicated upon no compliance." In the *Silva* case, *supra*, in referring to the *Hall* case, *supra*, it was said further, 63 Cal.App.2d at page 257, 146 P.2d at page 521: "In that case [*Hall* case] it was held there was an entire failure to designate in the claim the place where the accident occurred. Considering the territorial extent of the city limits of the city of Los Angeles, such a description of a sidewalk as one being somewhere in the city limits of that city would be quite indefinite and uncertain. In the instant case, however, there was an endeavor to state the place of the accident and injury. The

place where the accident occurred was on a country road, away from the inhabited portions of the valley, about four miles east of the small town of Dos Palos, and was a public highway which came to an abrupt end, where no signs were maintained by the county so indicating."

[1] In the present case respondent says that the erroneous designation of *southeast* corner instead of *southwest* corner was more misleading than no designation and made it impossible for the city to locate the defect "from the claim itself." It is to be noted that said statement is not a statement that the error made it impossible or difficult for the city to locate the defect;—the statement limited the asserted impossibility to locating the defect "from the claim itself." Respondent also asserts in effect that such an erroneous designation was more misleading than no designation, especially since sidewalks are ordinarily not kept in perfectly smooth condition and since minor defects, small holes, or slight irregularities do not constitute actionable defective conditions. As above stated, the "claim itself" (or a copy) is not before this court, and of course we cannot draw conclusions as to its sufficiency from a reading of it. Respondent in its brief, however, has volunteered information that "the claim referred to no other identifying feature except a 'hole,' and that no "other identification is given in the claim such as the size of the hole, the presence of some large object nearby, or the street number or name of the owner of the property in front of which the defect existed—such as existed in cases in which an error or inaccuracy in the description of the place was permitted." In view of the stipulation that the accident actually occurred at the southwest corner, and since there is no implication or any basis for an implication that the claimant acted in bad faith or intended to mislead by designating the place of the accident, it is apparent that the word "southeast" was inadvertently used in the claim instead of the word "southwest." This is not a case, such as the *Hall* case, where the designation of the place was so general and indefinite that there was no semblance of compliance with the statute. In the *Hall* case the

cause of the fall was a removable substance on a sidewalk (mud and leaves), whereas in this case the cause was a hole in the sidewalk. It is to be assumed that the word "hole," used in the claim herein, meant a hole of some significance as an actionable defective condition, as opposed to a minor defect or small hole (mentioned by respondent) that obviously was of no significance as a basis for an action for damages. If there was no hole of any significance at the southeast corner, it should have been obvious to an investigator of the claim that the word "southeast" was inadvertently used.

[2] The record does not show whether a hole was at that corner, but in the absence of a record showing the condition of the sidewalk at the southeast corner, it will be assumed that public duty with respect to properly maintaining that corner had been performed and that there was no hole in that sidewalk. If the claim were considered by an investigator for respondent in the light of the principle of substantial compliance, rather than on the basis of strict and precise compliance, it is apparent that, under the circumstances here and without any appreciable inconvenience or effort, he would have ascertained that the hole on the southwest corner was the one which was intended to be referred to. Respondent cites cases wherein it is held that knowledge, on the part of a city of facts required to be specified in a claim, does not give rise to an estoppel to assert the defense of failure to comply with the statute. One of those cases is *Ghiozzi v. City of South San Francisco*, 72 Cal.App. 2d 472, 164 P.2d 902, wherein no written claim was filed. In that case defendant changed the course of creeks by building canals, and plaintiff's land was damaged by sand and water as a result of a flood. It was established therein that the city engineer knew the facts regarding the damage to plaintiff's land. It was held therein that, irrespective of such knowledge, it was necessary to file a claim. Another of those cited cases is *Hall v. City of Los Angeles*, supra, 19 Cal.2d 198, 120 P.2d 13, wherein as above stated the claim which was filed was so general and indefinite that it was

no compliance at all with the statute. Also, in that case, it was stated that knowledge on the part of city officials of the facts required to be stated in the claim does not dispense with the filing of a proper claim. Those cases were not governed by the doctrine of substantial compliance—there was no compliance at all therein.

It appears that the claim in the present case complied more substantially with said sections of the Government Code than the claim in the case of *Silva v. County of Fresno*, supra, wherein the name or number of the highway was not stated and the place was referred to as being on a public highway approximately four miles east of Dos Palos in Fresno County; and it was also stated that the highway came to an abrupt end (referring to a right-angle turn in the highway). In the present case, the claim was a substantial compliance with said sections of the Government Code.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; SHENK, EDMONDS and SCHAUER, JJ., dissenting.



134 Cal.App.2d 410

**The PEOPLE of the State of California,
Plaintiff and Respondent**

v.

**William J. McNALLY, Defendant and
Appellant.
Cr. 5357.**

**District Court of Appeal, Second District,
Division 1, California.**

July 18, 1955.

Rehearing Denied July 26, 1955.

Defendant was found guilty by jury in Superior Court, Los Angeles County, David Coleman, J., of grand theft. His motion to set aside the judgment and conviction was denied and he appealed. The District Court of Appeal, Doran, J., held that the burden had been on the accused, with respect to his motion, to produce convincing

proof of some fact which would constitute legal ground for setting aside the judgment, and that the burden had not been sustained.

Affirmed.

1. Criminal Law §998

Defendant's remedy with regard to his contentions, on motion to vacate judgment, that he did not have effective aid of counsel, that court did not honor his request for change of counsel, that judgment was pronounced against him though he had shown sufficient cause why it should not be pronounced, that he was not informed of his rights, that inherently improbable and perjurious testimony was used against him, that irrelevant facts were brought out by prosecution, that he was subjected to double jeopardy by two different statements of one alleged offense, that court failed to give customary instruction on introduction of alleged extrajudicial admissions, and that witnesses defendant had requested were not called, was by appeal.

2. Criminal Law §997(2)

Failure to appeal does not, as matter of law, justify resort to coram nobis.

3. Criminal Law §997(1)

Law with regard to coram nobis is well settled and its application is limited.

4. Criminal Law §998

On motion by accused to annul, vacate and set aside judgment, burden was upon him to produce convincing proof of facts which would constitute legal ground for setting aside the judgment.

5. Criminal Law §998

On motion by accused to annul, vacate and set aside judgment against him in criminal case, there was strong presumption that judgment was valid in all respects.

6. Criminal Law §998

On accused's motion to annul, vacate and set aside judgment against him in criminal case, his proof was insufficient to overcome presumption of validity of judgment, and he was entitled to no relief from appellate court.

7. Criminal Law §1028

Matters not presented to court below on motion to annul, vacate and set aside

judgment in criminal case could not be considered on appeal.

William J. McNally, in pro. per., William Bronsten (appointed by Court), Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendant was found guilty of grand theft by the jury. A motion for a new trial was argued and denied. Judgment was entered October 15, 1953. No appeal was taken from the judgment or order denying the motion for a new trial. The record reveals, as recited in respondent's brief, that, " * * * on or about April 23, 1954, the defendant filed with the Clerk of the Superior Court, a 'Motion for the trial records,' noticing it for hearing 'for the master calendar.' On May 17, 1954, McNally also filed with the court his 'Application for Permission of the Court to File Certain Amendments to Original, Pending Motion for Trial Records.' The motion for the trial records, as amended, came on for hearing and the same was denied on June 1, 1954. On June 9, 1954, McNally filed with the Clerk of the Superior Court a notice of appeal from the order of the court denying his motion for records. The record on appeal in that case was filed with this Honorable Court and assigned 2d Criminal No. 5241.

"On respondent's motion to dismiss noticed for September 14, 1954 the appeal (2d Crim. No. 5241) was ordered dismissed and the remittitur issued on or about the 14th of October, 1954, and was filed with the Clerk of the Superior Court October 18, 1954.

"Thereafter, and on or about October 19, 1954, there was filed with the Clerk of the Superior Court defendant McNally's 'Motion to Annul, Vacate and Set Aside Judgment and Conviction.'

"On November 22, 1954 the motion of the defendant to annul, vacate and set aside the judgment and conviction was denied. On November 30th, the notice of appeal was filed commencing the instant appeal."

Appellant appears in propria persona. It is argued that the motion to annul, vacate and set aside the judgment was filed commencing the instant appeal."

Appellant appears in propria persona. It is argued that the motion to annul, vacate and set aside the judgment was in the nature of coram nobis. It is contended by appellant:

1. That defendant did not have effective aid of counsel;

2. That judgment was pronounced against defendant although he claimed that he had shown sufficient cause why judgment should not be pronounced;

3. That defendant had requested the court for change of attorney and the court did not act upon his request;

4. That judgment was pronounced even though he was not represented by counsel of his choice;

5. That he was not informed of his rights;

6. That "inherently improbable and perjurious testimony" was used by the prosecution in presenting the case against him;

7. That irrelevant and immaterial facts were brought out by the prosecution;

8. That defendant was subjected to double jeopardy in that there were two different statements of the one alleged offense;

9. That the court failed to give a customary instruction on the introduction of alleged extra-judicial admissions;

10. That witnesses that defendant had requested were not called; and

11. "Further facts that defendant's court-appointed counsel may be able to present to this Court."

[1-6] That the court's order denying defendant's motion is supported by the record and the law there is no question. Obviously, defendant's remedy with regard to all of the above noted contentions, was by appeal. Failure to appeal does not, as a matter of law, justify resort to "coram nobis". The law with regard to coram nobis is well settled and its application is limited. It is unnecessary to cite and quote from the many decisions on this subject.

As argued by respondent, "Under the circumstances, the trial court had no alternative but to deny the motion to annul, vacate and set aside the judgment. In a case such as this, the burden is on the applicant for the relief to produce convincing proof of a fact which constitutes legal ground for setting aside the judgment. The presumption that the judgment is valid in all respects is strong. It is clear that the appellant failed in the trial court to overcome this strong presumption and that he is entitled to no relief from an appellate court. *People v. Shorts*, 32 Cal.2d 502, 508, 197 P.2d 330.

[7] "Of course, matters not presented to the court below (contention number 11) cannot be considered on appeal. *People v. Bailey*, 105 Cal.App.2d 150, 153, 232 P.2d 518."

The order is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.



134 Cal.App.2d 635

Annabell GRISSO, Plaintiff and Appellant,

v.

Leonard BROUDE, Defendant and Respondent.

Civ. 21024.

**District Court of Appeal, Second District,
Division 3, California.**

July 28, 1955.

Hearing Denied Sept. 21, 1955.

Action by guest for personal injuries sustained in intersectional automobile collision. The Superior Court, Los Angeles County, Jesse J. Frampton, J., granted defendant's motion for new trial after verdict and plaintiff appealed. The District Court of Appeal, Vallée, J., held that evidence was sufficient to support granting of motion for new trial.

Affirmed.

1. Appeal and Error §1015(3)

An order granting new trial will be reversed only when it can be said as a matter of law there is no substantial evidence to support contrary judgment.

2. New Trial §70

In action by guest for injuries in intersectional automobile collision, substantial evidence relating to signal controlling traffic as defendant motorist entered intersection would support finding that defendant was not negligent so that there was no error in granting new trial motion for insufficiency of evidence to justify verdict for guest.

Louis A. Audet, Los Angeles, for appellant.

Wyman & Finell, William B. Rodiger, Beverly Hills, for respondent.

VALLEE, Justice.

Appeal by plaintiff from an order granting defendant's motion for a new trial after a jury verdict in her favor in an action for personal injuries sustained by her while riding as a guest in an automobile caused by a collision with an automobile driven by defendant. The motion was granted on two grounds: 1) insufficiency of the evidence to justify the verdict; and 2) error in law in an instruction as to the contributory negligence, if any, of plaintiff.

[1] The order of the trial court will be reversed only when it can be said as a matter of law there is no substantial evidence to support a contrary judgment. *Gibson v. Stuck*, 125 Cal.App.2d 340, 342, 270 P.2d 17.

The accident occurred at the intersection of Union Avenue and 12th Street in Los Angeles, on July 30, 1952, at approximately 6:00 p.m. The intersection was controlled by semaphore traffic signals installed at each of the four corners. The signals were set to allow a "Go" or "Stop" period of 27 seconds with a 3-second period when all four signals were "Stop" to allow traffic to clear and the signal to change. The signals located at the northwest and southeast cor-

ners controlled north- and south-bound traffic on Union Avenue. Those at the northeast and southwest corners controlled east- and west-bound traffic on 12th Street. At the time of the accident, 12th Street was a one-way, west-bound traffic lane. Both streets were approximately 40 feet wide.

Plaintiff was a guest passenger in an Oldsmobile sedan owned and driven by Mabel Allen Smith. Just before the collision, plaintiff and Mrs. Smith were traveling north on the curb side of Union; defendant was driving west on the north side of 12th in a Buick.

The front of the Buick struck the right side of the Oldsmobile. The point of impact was 10 feet west of the east curbline of Union Avenue and approximately 16 feet south of the north curb of 12th Street. The Oldsmobile was shoved in a northwesterly direction, striking a building, and came to rest after traveling 67 feet from the point of impact. The Buick was thrown out of control, turning in a clockwise manner so as to come to rest facing northeast against a telephone pole located at the northwest corner of the intersection. Before the impact, the Buick laid down 8 feet of skid marks. No skid marks were attributed to the Oldsmobile.

Plaintiff testified that she was sitting on the right-hand side of the front seat of the Oldsmobile; as she and Mrs. Smith approached the intersection the signal changed from "Go" to "Stop" and they stopped; they waited until the signal on the northwest corner turned to "Go" and "we started, and we got out, I don't remember how far, but I looked to the right and I looked to the left, * * * I didn't see any car from any direction"; "I don't believe I could see a block * * * there was a hedge or something there that I don't remember how far I could see down that [12th] street"; she could see over the hedge and could see the lanes of traffic coming from the east and going west; she looked "just for a split second" to her right; she didn't see any vehicle coming; at the time she looked "we had started out, we were going, * * * [w]e were moving."

A newsboy testified that as he was lying on his news box, facing skyward, on the northeast corner of the intersection, he "heard a screeching of brakes, and as I come up I could see the signals, and they were changing"; he saw the signal above him, the one on the northeast corner, change; he did not remember from, or to, what they were changing; a "split second" later he saw the impact.

Defendant testified that at the time of the accident he was traveling about 25 miles an hour; as he approached the intersection of Union and 12th, he could see at least two blocks ahead; there were no vehicles in front of him for a distance of several blocks; there was a house with a hedge on the southeast corner; as he came to the intersection, there was no cross-traffic going north or south on Union, nor did he at any time become aware of any traffic on Union; when he was about 200 feet from Union he noticed the signal on the northeast corner and it said "Go"; he kept his eye on the signal until he came to a point where he could no longer see it and then he watched another signal; when he was 8 or 10 feet from the intersection he saw the Oldsmobile which was already in the intersection; "[j]ust as I approached, and probably a split second or so before where these skid marks started, I noticed the plaintiff's car coming, and I jammed on my brakes, and there was the collision"; he noticed the other car when he was about 10 feet from where the skid marks started; the front of his car struck the right side of the Oldsmobile.

There was substantial evidence that would support a finding that defendant was not negligent. Defendant testified that when he was approximately 200 feet from Union the signal controlling west-bound traffic on 12th Street said "Go" and he proceeded. The newsboy testified he observed the signal on the northeast corner of the in-

tersection, the signal controlling traffic for defendant, change after he heard the screeching of brakes. The time sequence of the traffic signals was such that if defendant's signal had changed from "Go" to "Stop," or vice versa, there necessarily would have to have been a 3-second interval after the change in which all the signals for both streets would have to have been "Stop." Both defendant and Mrs. Smith would have been required to stop for 3 seconds. The point of impact was approximately 16 feet south of the north curb of 12th Street or 24 feet north of the south curb. The Oldsmobile had traveled more than half way across the intersection before it was struck by defendant's Buick. After the impact the Oldsmobile was pushed in a northwesterly direction and continued 67 feet before it came to a stop after striking a building; the Buick was spun around so as to come to rest against a telephone pole on the northwest corner, facing northeast. The court might reasonably have inferred the physical facts were not consistent with the claim of plaintiff that the Oldsmobile entered the intersection after a complete stop and, believing the testimony of the newsboy, that defendant's version of the accident was more reasonable: that he entered the intersection when the signal for the west-bound traffic still said "Go" and the Oldsmobile moved across the intersection against the traffic signal. We cannot say as a matter of law there was no substantial evidence to support a verdict for defendant.

[2] Since the evidence was sufficient to support the granting of defendant's motion for a new trial, it is unnecessary to decide whether the order might also be sustained on the ground of error in law in the giving of an instruction on the subject of contributory negligence.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

134 Cal.App.2d 343

CALIFORNIA FUNDING CORPORATION,
a corporation, Plaintiff and
Respondent,

v.

LONG BEACH NATIONAL BANK, a corpo-
ration, Defendant and Appellant.

Civ. 20644.

District Court of Appeal, Second District,
Division 1, California.

July 13, 1955.

Rehearing Denied Aug. 1, 1955.

Hearing Denied Sept. 8, 1955.

Action by finance company for declaratory relief to determine its contractual rights with bank under financing agreement. From adverse judgment of Superior Court of Los Angeles County, Paul Nourse, J., bank appealed. The District Court of Appeal, Drapeau, J., held that evidence established fact that when agreement was made the parties were competent, they were dealing with lawful subject matter, and made valid contract, and there was a meeting of the minds supported by consideration and that bank was bound by the agreement.

Affirmed.

1. Contracts ⇨99(3), 141(3)

In action by finance company for declaratory relief to determine its contractual rights with bank under financing agreement, evidence established fact that when agreement was made the parties were competent, they were dealing with lawful subject-matter.

2. Sales ⇨475

Where automobile finance company, to secure funds, assigned conditional sales contracts to bank under agreement whereby interest to be prepaid to bank on unpaid balance of conditional sales contracts was adjusted for two prior agreements and 7% interest was provided for present agreement, there was a meeting of minds supported by consideration and contract was valid.

3. Banks and Banking ⇨101

Alleged fact that reduction of prepaid interest from eight percent to seven per-

cent to be paid to bank on unpaid balance of conditional sales contracts assigned to bank by finance company under financing agreement was ultra vires and contrary to banking laws and regulations did not necessarily make agreement void.

Pray & Price and Eric A. Rose, Long Beach, for appellant.

Walker & Horn, Long Beach, for respondent.

DRAPEAU, Justice.

There is no dispute about the facts in this case.

Plaintiff corporation is in the business of financing purchases of motor vehicles, using conditional sales contracts. To secure funds for a part of its financing, plaintiff assigned conditional sales contracts to defendant bank on three occasions.

On the first occasion the bank agreed to pay plaintiff the total balance of the conditional sales contracts assigned to it, less 5 % to be placed in a reserve account for losses, and less 5 % per annum simple interest, prepaid to the bank.

On the second occasion the agreement was substantially the same, except that the bank was to receive 8 % prepaid interest, and plaintiff was to repurchase any of the contracts sixty days delinquent.

On the third occasion it was agreed, among other things: (a) that interest on the unpaid balance of the contracts assigned under the first transaction would be 7% instead of 5%; (b) that interest on the unpaid balance of the contracts under the second transaction would be 7% instead of 8%, and (c) that on this third transaction interest would be 7%.

Thereafter the bank repudiated the third agreement, and demanded interest at the rate of 8%, as provided in the second agreement.

Plaintiff brought this action in declaratory relief, to determine its rights.

The bank contended it was not bound by the third agreement for several reasons. The trial court found against this con-

tention, and judgment followed for plaintiff. The bank appeals from the judgment.

In support of its appeal the bank argues: (1) That the third transaction attempts to modify an executed oral contract and a written contract by an oral contract without consideration. (2) That a debt due to the bank cannot be released by an officer thereof and such transaction is ultra vires and void. (3) That the material findings of fact are not supported by the evidence.

[1,2] The record establishes the fact that when the third agreement was made the parties were competent; they were dealing with a lawful subject-matter, and made a valid contract; and there was a meeting of the minds supported by consideration.

[3] Whether or not the reduction of interest in the third transaction was ultra vires and contrary to banking laws and regulations does not necessarily make the agreement void. *Machado v. Bank of Italy*, 67 Cal.App. 769, 228 P. 369.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



134 Cal.App.2d 413

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Sammy EPPERSON and Frederick Bryant,
Defendants,

Sammy Epperson, Appellant.
Cr. 5366.

District Court of Appeal, Second District,
Division 1, California.

July 18, 1955.

Prosecution for forgery of endorsement. The Superior Court, Los Angeles County, Clement D. Nye, J., entered judg-

ment of conviction and defendant appealed. The District Court of Appeal, White, P. J., held that evidence sustained conviction.

Judgment affirmed.

1. Forgery ⚡44(2)

Evidence sustained conviction of forgery of endorsement. Pen.Code, § 470.

2. Forgery ⚡4

The elements necessary to establish forgery of endorsement are (1) that the person whose name was alleged to have been forged was a real person, (2) that his name was signed to the check without his authority, and (3) that the check was cashed with intent to defraud. Pen.Code, § 470.

3. Criminal Law ⚡406(1)

In prosecution for forgery of endorsement, where defendant's pretrial statements covered his and another's activities in taking check out of mailbox, writing in name of payee and in accomplice's cashing of check, but did not contain a statement that by his actions he intended to defraud, such pretrial statements constituted admissions rather than confessions and were admissible. Pen.Code, § 470.

4. Forgery ⚡35

In prosecution for forgery of endorsement, evidence was sufficient to show that defendant wrongfully forged payee's name to check without authority and warranted trial court in inferring from facts and circumstances that defendant intended to defraud some one. Pen.Code, § 470.

5. Forgery ⚡44(1)

In prosecution for forgery of endorsement, the signing of the name of another as endorser of a check without authority is conclusive evidence of the signer's intent to prejudice or damage payee. Pen.Code, § 470.

John H. Marshall, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James D. Loebl, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County the above defendants were jointly charged with the crime of forgery of endorsement, Penal Code, § 470.

Following the entry of pleas of not guilty and waiver of trial by jury, the case of the People was by stipulation submitted on the transcript of the testimony adduced at the preliminary examination. Defendant Epperson testified as a witness in his own behalf. Thereafter, the court adjudged each defendant guilty of the crime charged in the information. Defendant Epperson was sentenced to imprisonment in the Los Angeles County Jail for the term of one year. From the judgment of conviction he prosecutes this appeal.

Concerning the factual background surrounding this prosecution the record reflects that the above named defendants took a check from a mailbox at 905 East 40th Place in the City of Los Angeles. The check was drawn on the Bank of America payable to Robert A. Tracy in the amount of \$17.29 on the Disability Insurance Account of the Department of Employment of California. At the time of the preliminary hearing and the trial, the check bore the endorsement of Robert Tracy and subendorsement of Frederick Bryant.

G. W. Smith, a police officer of the City of Los Angeles, assigned to the forgery division, was the arresting officer in the case. On July 28, 1954, he had a conversation with defendant Epperson in which the latter stated that he signed the name Robert Tracy and used a pawn ticket which had been supplied by his co-defendant Bryant in attempting to duplicate as closely as possible the true signature of Robert Tracy. In a subsequent conversation, in the presence of Epperson, defendant Bryant admitted that he took the check into a Safeway store and cashed it in the presence of Epperson. Bryant further admitted to Officer Smith that he was at first going to represent himself as Tracy, but then decided to sign his true name underneath the endorsement of Robert Tracy on the back of the check. Both men admitted that they had been waiting at the 40th Place address

all day for the mailman to deliver the check.

Charles Hurd, a clerk for Safeway Stores at 4077 Avalon Boulevard, testified that he saw the check in question in defendant Bryant's hand when Bryant came up to the cash register, on or about the 23rd of February, 1954. Hurd cashed the check at the request of Bryant and gave him in exchange a small amount of groceries and the rest of the \$17.29 in cash. At the time Hurd cashed the check the signature Robert Tracy and the signature Frederick Bryant were on it. Neither signature was written in Hurd's presence.

Robert A. Tracy of 3514 South Central Avenue, Los Angeles, testified that he previously lived at 905 East 40th Place and was entitled to disability insurance payments from the State of California. Tracy was entitled to receive two disability insurance checks in February of 1954, but he received only one. Examining the check in question, Tracy denied that he ever gave anyone permission to sign his name to the check. He further denied that either of the endorsements on the back of the check were in his handwriting.

Defendant Sammy Epperson testified in his own behalf. He denied signing someone else's name on the back of the check in question, or being present when it was so signed. Epperson denied telling Officer Smith that he had forged Tracy's name to the check. He did say, however, that he told Smith that he received no money at all from the proceeds of the check. He further denied that he had any part in taking the check out of the mailbox.

[1, 2] We have narrated the evidence in detail because it furnishes a complete answer to appellant's contention that the evidence is insufficient to support the judgment finding him guilty of forging the endorsement on Mr. Tracy's check. The evidence conclusively establishes that the person whose name was alleged to have been forged was a real person; that his name was signed to the check without his authority, and that the check was cashed with intent to defraud. Such proof constitutes the elements necessary to establish

the crime charged, *People v. Cullen*, 99 Cal.App.2d 468, 472, 221 P.2d 1016.

[3] Appellant next contends that the judgment is against law in that the court erred in admitting, over his objection, an alleged confession made by appellant, without which incriminating testimony it is claimed there is no evidence to connect him with the commission of the crime charged. Appellant urges that the extra-judicial statements testified to by Officer Smith were inadmissible because no foundation was laid showing that they were freely and voluntarily made, and without promise of immunity.

There is merit in the People's argument that, in the case at bar, appellant's pretrial statements constituted admissions rather than confessions in that at no time did appellant admit an intent to defraud in connection with the passing of the check. His statements covered his and Bryant's activities in taking the check out of the mailbox, and writing in the name of Robert Tracy, and finally in Bryant's cashing the check at the Safeway store, but in none of his comments is there contained a statement that by his actions he intended to defraud. Though the element of felonious intent may be inferred from other evidence in the case it is totally absent from appellant's statements, and as pointed out above, this is a necessary ingredient of the crime of forgery. The distinction between admissions and confessions is thus stated in *People v. Cryder*, 90 Cal.App.2d 194, 203, 202 P.2d 765, 770: " * * * 'Admission' is not the synonym of 'confession.' In a criminal action an admission against interest relates to factual matters and does not convey the idea of a criminal intent on the part of him who admits, whereas a confession is an acknowledgment of the guilt of the crime charged. It is only with respect to the confession that the rule obtains requiring preliminary proof that it was voluntary. (Citing cases.)" Since the statements of appellant and those by defendant Bryant in the presence of the former did not amount to confessions as that term is known to the law, their admission into evidence was not error.

[4,5] Since there was sufficient evidence to show that appellant wrongfully forged Tracy's name to the check without authority, the trial court had the right reasonably to infer from the facts and circumstances established at the trial, that appellant intended to defraud someone. When a person without authority, signs the name of another as endorser of a check, that in itself is quite conclusive evidence that his intent was to prejudice or damage that person, *People v. Collins*, 60 Cal.App. 263, 268, 212 P. 701.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



134 Cal.App.2d 256

**William E. CRAWFORD, Plaintiff and
Respondent,**

v.

**HUB RANCH OF PARADISE VALLEY, a
partnership, Shigeru Uchiyama and Eva H.
Halliburton, as Executrix of the Estate
of Clair Emory Halliburton, also known
as C. E. Halliburton, Deceased, Defend-
ants and Appellants.**

Civ. 4936.

District Court of Appeal, Fourth District,
California.

July 5, 1955.

Rehearing Denied July 29, 1955.

Hearing Denied Sept. 1, 1955.

Action by lessee for damages for breach of lease. Two members of lessor partnership cross-complained to recover amount of loan made to lessee. One cross-complainant died before trial of action and his executrix was substituted for him. The Superior Court, Fresno County, Strother P. Walton, J., gave judgment for lessee against lessor on complaint and judgment for cross-complainants on cross-complaint. Executrix appealed from order denying motion for judgment n. o. v. Lessor ap-

pealed from judgment against it. The District Court of Appeal, Mussell, J., held that where lease provided that lessor agreed that two-thirds of all payments received under lease would be applied to discharge of any indebtedness secured by mortgage on any portion of demised premises, and parties were aware at time of making lease that there was a mortgage on portion of premises, lessor was not required by terms of lease to remove mortgage from premises except by making payments as provided in lease.

Judgment reversed and order denying motion for judgment n. o. v. reversed as to executrix.

1. Landlord and Tenant ⇨147

Where lease provided that two-thirds of all payments received under contract would be applied to discharge of any indebtedness secured by mortgage on portion of demised premises, and parties knew that there was mortgage on portion of premises leased at time of making lease, lessor was not required to remove mortgage from leased premises except by making payments provided for.

2. Evidence ⇨450(4)

In action by lessee for damages for breach of lease, court properly admitted parol evidence to aid in interpreting paragraphs in lease which provided that lessor agreed to execute necessary loan documents to consummate borrowing by lessee of money to complete development of land leased, and which provided that lessor agreed that two-thirds of all payments received under lease would be applied to discharge of any indebtedness secured by mortgage on premises leased.

3. Evidence ⇨455

If a contract is uncertain or ambiguous parol evidence is admissible to show what the parties meant by the uncertain or ambiguous phrase used in the written contract, but if the language of the instrument is clear and explicit, the intention of the parties must be ascertained from the writing alone, and unless a court can to a certainty and with sureness, by a mere reading

of the document, determine which is the correct interpretation, extrinsic evidence becomes admissible as an aid to its interpretation.

4. Landlord and Tenant ⇨147

Where lessee's application for loan to improve leased land was refused by insurance company because it was a speculative type of venture, and not because of existence of mortgage made by lessor on premises, lessee's failure to secure loan from insurance company did not constitute breach of lease by lessor and lessor was not liable for any damages suffered by lessee's failure to obtain loan.

5. Landlord and Tenant ⇨48(1)

In action by lessee for damages for breach of lease, evidence was insufficient to support award of damages, for loss of money expended to improve land, and loss of profits and potential profits from crops.

Iener W. Nielsen, Mikio Uchiyama and Harold v. Thompson, Fresno, for appellants Hub Ranch of Paradise Valley and Shigeru Uchiyama.

Kimble, Thomas, Snell, Jamison & Russell; Wild, Carlson & Reeve; and Robert M. Barnard, Fresno, for appellant Eva M. Halliburton.

H. A. Savage and Stutsman, Hackett & Nagel, Fresno, for respondent.

MUSSELL, Justice.

This is an action for damages for breach of a lease agreement entered into on August 12, 1949, by and between plaintiff, William E. Crawford, and James DeLucas, as lessees, and Hub Ranch of Paradise Valley, a partnership, composed of Shigeru Uchiyama, C. E. Halliburton and R. R. Bray, the general partners, as lessor. A cross-complaint was filed against Crawford to recover a loan in the sum of \$2,500 made to him by Halliburton and Uchiyama. Halliburton died before the trial of the action and Eva M. Halliburton, as executrix of his estate, was substituted, and said executrix filed an amended answer. A jury trial was had, resulting in a verdict for plaintiff and against defendants for the sum of \$134,640,

and in favor of the cross-complainants on their cross-complaint for the sum of \$2,500. Defendants appeal from the judgment against them and defendant Eva Halliburton, as executrix, also appeals from the order denying the motion for judgment notwithstanding the verdict.

The defendant Hub Ranch, a limited partnership, early in 1949 purchased approximately 41,400 acres of land in Humboldt County, Nevada, and 12 sections thereof are involved in this action. The said 12 sections were undeveloped and required clearing, leveling and developing of a water supply from underground sources before they could be farmed. R. R. Bray was the general manager of the Hub Ranch and was authorized to enter into partnership transactions and contracts not exceeding the sum of \$1,000.

In May, 1949, plaintiff and James DeLucas visited the property, contacted Mr. Bray, and discussed with him the leasing of 12 sections of the ranch property. Bray informed them that he was general manager and that their primary negotiations would be with him, subject to the approval of the other partners. Crawford stated that they did not have the money to "go ahead and" complete a development the "size potentially had there" and asked Bray whether or not it would be possible "to do some outside financing". Bray then stated that there was a financing setup already established through an insurance company whereby it agreed to advance so much money on land as it was developed. Bray further stated that Mr. Herman, who represented the insurance company, had visited the land and would advance \$10,000 a section at such time as the land was leveled and water was brought to the surface. Several weeks prior to the date of the lease here involved Bray and Crawford, at Bray's suggestion, went to Los Angeles to discuss the insurance loan with Mr. Herman. Crawford testified in this connection that one purpose of this discussion with Mr. Herman was to verify the insurance loan and "also to have the loan made out to me, with the land being put up as security"; that Herman asked him if he had enough money to carry out the development, to

level the first section, and Crawford stated that he had with the exception of the well; that he, Crawford, stated he would level the section and put a well on it if the insurance company would grant \$10,000 upon completion; that Herman said "Yes", he says, "The minute the land is level and the water is on top of the ground". He says, "You 'phone me long distance down here, and I'll come up there." He says, "You'll have a check in less than 30 days"; that Herman stated that he had already approved the loan of \$10,000 per section and that "It was only necessary to change the application over into my name, and then send it back to the home office. And he said the home office rarely, if ever, turned down a loan once he had okayed it out here on the west coast."

Early in August, 1949, Crawford went to Fresno for the purpose of negotiating a lease with the Hub Ranch for 12 sections of land. Bray and Crawford went to the office of Mr. Hollins, an attorney, and the lease was prepared by him. This draft was signed by Bray, Crawford and DeLucas. It was then submitted to the remaining general partners of the Hub Ranch and a conference was held at the office of Mr. Snell, one of the attorneys for the defendants. The Hollins draft of the lease was not acceptable to the remaining partners of the Hub Ranch particularly by reason of the fact that it contained no reference to existing encumbrances on the property or the payment of the indebtedness then secured by a mortgage on the premises.

The lease here involved was then drawn up and executed by the Hub Ranch, Crawford and DeLucas. It provided generally as follows: Twelve sections of land were leased to plaintiff and James DeLucas for a period of five years, with an option to renew for an additional five years. The twelve sections were to be adjoining and were to be selected by the lessees within sixty days. The lessees were to clear and level said land, install wells, equipment and ditches for irrigation or drainage, one section the first year, two sections each and every year thereafter until all of said land had been developed as therein provided. The lessees agreed to devote all of the leased

premises to the raising of grains or other suitable crops and as return for the said leased premises the lessor was to receive one-fifth of the entire crop of grain and other crops raised on the premises, except as to vegetables, of which it was to receive one-sixth. The lease also contained an option to purchase one or more sections of said land at \$50 an acre, provided that one-half of the rent lessor received was to apply on the purchase price of the land upon which lessees exercised the option to purchase. The lease also contained a covenant against assignments without the written consent of the lessor, and contained the following two paragraphs:

"8. It is understood that the Lessees contemplate borrowing money for the purpose of clearing, leveling, irrigating, draining and water development, including wells, pumps and pipelines, and Lessor agrees to execute the necessary loan documents to consummate the borrowing of moneys to complete the foregoing development."

"21. Lessor agrees that two-thirds of all payments received under this contract will be applied to the discharge of any indebtedness now secured by mortgage on any portion of the demised premises. Lessor shall not, except with consent of Lessees, borrow money upon the security of the demised premises unless the money so borrowed is expended in improvement of the demised premises."

[1] It is the contention of the plaintiff that said paragraph 8 required the leased premises to be free and clear of all encumbrances to enable lessees to borrow money to develop the land and it is the contention of the defendants that the language of paragraph 8 was clear and unambiguous and merely required the lessor to subordinate his interest in the leased premises to any loan which the lessees might secure for the development of the property. Defendants further contend that said paragraph 21 clearly disclosed the existence of the then existing encumbrance on the property, to which encumbrance they agreed to apply two-thirds of the lease rentals in repayment.

It is undisputed that at the time of the execution of the lease there was a then existing deed of trust on the property, which is referred to throughout the trial as the Cordoza deed of trust, in the amount of \$26,666.67. This deed of trust covered one of the sections plaintiff chose to develop first, namely, section 21.

The lessees moved their equipment upon the property in August and September, 1949, and commenced the development of section 21 and a portion of section 20. This development consisted chiefly of clearing off the sage brush, disking and land planing. The lessees then proceeded with the drilling of a well and entered into a contract with one R. L. Norris to drill it on section 21. The contract was executed on September 28, 1949. The well was completed by Mr. Norris, the driller, on or about October 30, 1949, and a pump installed. The well would pump 2,500 gallons per minute and was adequate to irrigate section 21 if it were properly prepared.

DeLucas testified that some time after the middle of August, 1949, he went up to the property and Crawford was then engaged in tearing down a fence; that he assisted Crawford until their equipment "was finally intact up there"; that they proceeded to clear all of section 21 and part of section 20; that they burned the brush, disced and land planed; that it was in the latter part of September, 1949, that they had finished the grading and leveling of section 21 and that they then did some work on section 20.

In November, 1949, James DeLucas assigned in writing his interest in the lease to plaintiff William E. Crawford.

Crawford testified that some time in March, 1950, he planted section 21 to barley and planted 92 acres of wheat on section 20; that by May 5, 1950, the grain was two or three inches out of the ground; that he secured the loan of a pump early in May but was unable to irrigate any appreciable portion of his land and the crop failed. He further testified that shortly before September 21, 1949, he discovered for the first time that section 21 was subject to the Cordoza trust deed in the sum of \$26,666.67; that on September 21, 1949, he

turned the lease over to H. A. Parichan, an attorney, who on that date wrote a letter to the Hub Ranch advising them that they had failed to comply with paragraph 8 of the lease and that he hoped it would not be necessary to enforce the agreement. On September 27, 1949, Crawford and DeLucas wrote to Mr. Halliburton stating, in effect, that they had employed Mr. Parichan to expedite the removal of the first trust deed on the property; that they could not wait "after the completion" of their work, and that everything must be in order so that they could collect the insurance company loan immediately.

A meeting of the Hub Ranch partners was held November 3, 1949, to discuss the removal of the Cordoza trust deed. At this meeting DeLucas told the group that they had reached "the end of their rope" and had to have the insurance loan in order to install a pump and start irrigating. While the partners did not admit they were under obligation to lift the Cordoza trust deed, they instructed their attorney, Mr. Snell, to prepare an agreement to see if that could be accomplished. On or about November 26, 1949, a number of persons, including Halliburton and Uchiyama, entered into an agreement as joint venturers to acquire the Cordoza trust deed and agreed to contribute the sum set opposite their respective names in said agreement. In pursuance of this agreement the Cordoza note and trust deed was, on November 30, 1949, assigned to one Oscar Crain as trustee for the joint contributors.

On March 10, 1950, Mr. Leighton, attorney for Mr. Norris, wrote to Mr. Snell enclosing a statement rendered by Norris to Crawford and stating that in addition to the amount shown therein Norris had agreed to furnish and install a pump which would complete the work on the well and have it ready for pumping; that the amount shown on the statement, plus the cost of the pump and its installation, was the basis of the amount which must be financed and was shown on the note enclosed to be secured by a deed of trust on section 21, to be executed for the benefit of Mr. Norris. It was further stated therein that Norris would enforce a lien on the land unless

security was given him. Snell replied to this letter stating that section 21 was then subject to a trust deed and further stated, in effect, that he was unable to comply with the request of Mr. Norris.

It is evident from the voluminous record before us and the statements in respondent's brief that his principal contention is that the defendants breached the lease and caused his damages by failing to secure the release of the Cordoza deed of trust, and by refusing to execute a trust deed to Mr. Norris on section 21 for the cost of the well. However, paragraph 21 of the lease provided that two-thirds of all payments received under the contract would be applied to the discharge of any indebtedness then secured by mortgage on any portion of the property. The evidence shows without contradiction that this paragraph was not in the original draft of the lease prepared by Mr. Hollins and that it was added to the lease at the insistence of defendants. There was then only one encumbrance on the property of the Hub Ranch and that was the Cordoza trust deed. The defendants were unable to execute the lease without providing for its payment as set forth in said paragraph 21. Crawford knew that there was an encumbrance on the property and so testified. He claimed that he did not know section 21 was subject to a trust deed until some time in September, 1949. However, when he signed the lease he had not made his selection of the sections to be leased and could easily have selected an unencumbered section for his first development and could have ascertained the fact that the trust deed covered section 21. Under the terms of the lease defendants were not required to remove the Cordoza trust deed except as provided in paragraph 21 of the lease.

[2,3] The trial court ruled that parol evidence was admissible to aid in interpreting paragraphs 8 and 21 of the lease and this rule is supported by the holding in *Schmidt v. Macco Construction Co.*, 119 Cal.App.2d 717, 730, 731, 260 P.2d 230, where the court held that if a contract is uncertain or ambiguous, parol evidence is admissible to show what the parties meant by the uncertain or ambiguous phrase used

in the written contract; that if the language of the instrument is clear and explicit, the intention of the parties must be ascertained from the writing alone, and parol evidence is admissible only when the language used is doubtful, uncertain or ambiguous and only then in cases where doubt appears on the face of the contract; that unless a court can to a certainty and with sureness, by a mere reading of the document, determine which is the correct interpretation, extrinsic evidence becomes admissible as an aid to its interpretation.

[4] According to the testimony of DeLucas the interpretation placed upon the lease by him was as follows: "The lease was contingent on the moneys being available to us from the insurance company"; that he and Crawford were to borrow the money and that "My understanding was that the moneys would be available to us from the life insurance, or this insurance company, and that the lessors were willing to hypothecate their land to allow us to borrow the money. That was my understanding of it." Plaintiff Crawford testified in this connection that before the lease was executed there was a discussion in Mr. Snell's office between the general partners, in his presence, and that "During the conversation a discussion was had by all present that there were certain encumbrances on the property of the Hub Ranch. * * * Also that certain portions of the land were not completely owned by the Hub Ranch." He testified further that he could not secure financing; that "The insurance company, that was the understanding when we made the deal with them, that Hub put up the land as security." It is apparent that Crawford and DeLucas were relying on the consummation of a loan with the insurance company to finance the development of the leased property and not on any loan or loans to be obtained by the Hub Ranch. Crawford was informed by Bray that the Hub Ranch had made an application for a loan from the insurance company in the sum of \$60,000 and he was clearly relying on the insurance company to make the loan to him. He discussed the loan with Mr. Herman and testified that Herman told him he would de-

liver a check to him within 30 days after water was "on top of the ground". However, he admitted that Herman told him it was necessary that the application be changed to his (Crawford's) name and sent back to the home office of the insurance company for approval. There is nothing in the record to indicate that Hub Ranch refused to execute any loan document in connection with this loan. Herman testified that he told Crawford that the loans had to be approved by the home office by the loan committee and it would take 10 days or 2 weeks after the application was submitted with his recommendation. He testified that he had not stated to Crawford that he would give him a check within 30 days after water was "on top of the ground" and the land leveled and stated that he sent the loan application into the home office on November 29, 1949; and that the loan was rejected by the committee in the following language:

"Generally, we consider the entire proposition to be of a speculative type, and we cannot quite bring ourselves to invest the company's money in this venture. Also, we are not so pressed for good investments that we need take any loans on which there is the slightest semblance of reluctance to approve, and the general feeling of the committee is that we can well afford not to make this loan. The application is therefore declined."

This language indicates that the loan was not rejected because of the existence of the Cordoza trust deed but because of the speculative type of the venture. Crawford was aware of the reasons for the rejection of the loan as shown by his letter to Bray dated December 9, 1949, in which he stated that the loan had been held up on the grounds that the organizational setup of the Hub Ranch prevented them from approving such a loan. It seems clear that Crawford's failure to secure the loan from the insurance company did not constitute a breach of the lease by the defendants and that the defendants were not liable for any damages which Crawford may have suffered by reason of his failure to obtain such a loan. Furthermore, the evidence

indicates that Crawford had planted his crop prior to May 5, 1950; that it was then two or three inches out of the ground and that the well had been drilled and a pump installed.

[5] Appellants contend that the damages awarded were excessive and totally unsupported by the evidence. Plaintiff claimed special damages in the sum of \$49,360 and general damages in the sum of \$250,000 and the sum of \$134,640 was awarded by the jury. In reference to his claimed special damages plaintiff testified that he had records to show that he had spent the sum of \$21,394.02 in his performance of the lease. However, the records were not produced in court. It was shown that total deposits and withdrawals in the bank accounts on which he drew during the time he was developing and occupying the leased premises was the sum of \$9,827.-65. He claimed special damages in the sum of \$25,000 for the loss of his barley crop on section 21. He bases this amount on the statement in the loan application filed by the Hub Ranch with the insurance company which contained a statement that Cordoza had produced 13,000 sacks of barley on the property and that it was sold for \$70 per ton. However, the application does not show what sections were farmed or the conditions under which the crop was produced. Mr. Cordoza was called as a witness and testified that he had raised a crop of barley on section 21 in 1953 but he did not testify as to the amount of grain produced as the trial court ruled out and excluded evidence of profits from future crops on the ground that it was too remote. Section 21 had not been farmed previous to the time Crawford commenced his operations. There was evidence in the record that the well on it would produce sufficient water to irrigate it if the land had been properly prepared; and that plaintiff was unable to irrigate more than a few acres. While plaintiff and DeLucas testified that the land would produce a minimum of 1½ tons of barley to the acre, with a net profit to them of \$27.50 per acre, the profits thus calculated would amount to only \$17,600 a section.

Respondent argues that the lessees under the lease had a right to expect and anticipate the acquisition of several thousand acres of valuable land under the rental purchase provisions of the lease. In this connection there is no evidence that plaintiff was or would have been able to exercise the option to purchase and an award of damages on the assumption that the option would have been exercised cannot be sustained. *Caspary v. Moore*, 21 Cal. App.2d 694, 699, 700, 70 P.2d 224. Since the trial court excluded all evidence of profits and potential profits from crops to be raised on the leased property after the first year, there was no evidence upon which the jury could award damages therefor. It is our conclusion that a large part of the damages awarded by the jury was not supported by the evidence and was improperly awarded.

The respondent's principal contention herein is that the defendants caused his damage by failing to remove the Cordoza trust deed so that he could obtain a loan; that by reason thereof he was unable to irrigate his crops and they therefore failed. As heretofore pointed out the defendants insisted that paragraph 21 be inserted in the lease to provide for the payment of the indebtedness secured by the trust deed and reference to this indebtedness was made in the loan application to the insurance company. The evidence further shows that on May 5, 1950, Crawford had planted his crop, the grain was out of the ground two or three inches and he admitted that it was not then suffering from lack of water. He also admitted that a pump was to be installed as soon as he needed it and the fact that it was obtainable whenever he asked for it is shown by Norris' testimony. Between May 5 and May 12, 1950, Crawford attempted to irrigate the crop but found that he could not irrigate more than a few acres. There was testimony that the land was not properly prepared for such irrigation but that the well produced an adequate supply of water. The evidence herein is insufficient to show that plaintiff suffered damages proximately caused by a breach of the lease by the de-

fendants. Furthermore, the damages awarded were excessive.

In view of what we have here said, it is not necessary to pass upon the other points raised by appellants.

The judgment is reversed and the order denying the motion for judgment notwithstanding the verdict is reversed as to appellant Eva M. Halliburton, executrix of the estate of Clair Emory Halliburton, deceased.

GRIFFIN, Acting P. J., concurs.

BARNARD, P. J., being disqualified to participate, takes no part in this decision.

Hearing denied; SHENK and CARTER, JJ., dissenting.



The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Robert S. VOGEL, also known as Robert S.
Nellsen, Defendant and Appellant.*

Cr. 1028.

District Court of Appeal, Fourth District,
California.

July 11, 1955.

Rehearing Denied July 25, 1955.

Hearing Granted Aug. 10, 1955.

Prosecution for bigamy. From an order of the Superior Court, San Diego County, John A. Hewicker, J., granting conditional probation, and from an order denying a new trial, the defendant appealed. The District Court of Appeal, Griffin, J., held that probation condition that defendant absolve his purported marriage with a certain woman within one year was improper when it appeared that no marriage ceremony had been performed, and if performed a proceeding to annul it by defendant might necessarily contain an admission of fact which would subject him to a further prosecution for bigamy.

Orders affirmed as modified.

Cal.Rep. 285-286 P.2d-23

* Opinion vacated 299 P.2d 850.

1. Bigamy ⇨7

In bigamy prosecution, burden is on prosecution to show that defendant's subsequent marriage has occurred during continuance of a prior marriage.

2. Bigamy ⇨7

In bigamy prosecution, where a former marriage is proved there is a rebuttable presumption of its validity.

3. Bigamy ⇨7

In bigamy prosecution instituted on complaint of second alleged wife, burden was upon defendant to show that first marriage had been dissolved. Pen.Code, § 282.

4. Criminal Law ⇨1173(2)

In prosecution for bigamy, defendant could not be heard to complain because court refused to instruct jury concerning burden of proof imposed upon him when there was no competent evidence that defendant's first marriage had been previously dissolved, court had instructed jury that burden of proof was on prosecution to show that first marriage was in force and effect when second one was consummated, and there was no instruction that any burden rested on defendant to prove anything. Pen.Code, §§ 281, 282, subd. 2.

5. Criminal Law ⇨1170(2)

In prosecution for bigamy, no prejudicial error resulted from exclusion of driver's license obtained by first wife in her maiden name prior to second marriage by husband when evidence of that fact was before the jury.

6. Bigamy ⇨2, 11

In prosecution for bigamy, proffered testimony that first wife had lived with another man and that they had held themselves out as husband and wife and that wife had been admitted to a hospital as wife of other man, would not alone prove that marriage to defendant had been dissolved and even if defendant had known of those facts at time he remarried, proffered testimony would not be a defense, even if true. West's Ann.Code Civ.Proc. § 1963.

7. Bigamy ⇨2

Good faith or a mistaken belief regarding existence of a previous marriage does not relieve one of, and is not a good

defense to, criminal responsibility for a bigamous marriage.

8. Criminal Law Ⓒ306

Presumption or inferences may not be based on other presumptions or inferences to prove a fact.

9. Witnesses Ⓒ383

Impeachment on immaterial facts is not allowable.

10. Criminal Law Ⓒ814(3)

In prosecution for bigamy, instruction to effect that a divorce could be obtained by service by publication and without party divorced ever knowing about it was properly refused in the absence of competent evidence that such a procedure had been followed. Pen.Code, § 1093, subd. 6.

11. Bigamy Ⓒ1

Intent involved in charge of bigamy is more or less limited to intent to do act of contracting the bigamous marriage, and not intent to violate the law.

12. Criminal Law Ⓒ1169(1)

In prosecution for bigamy based on alleged second marriage, no prejudicial error could be claimed as result of admission of evidence involving defendant and another woman in a subsequent Mexican marriage, since such evidence had no bearing on whether defendant's first marriage had been legally dissolved.

13. Criminal Law Ⓒ1186(4)

In prosecution for bigamy, wherein evidence of purported second marriage by defendant to his first wife in Catholic church was admitted as further evidence of defendant's civil marriage to his first wife, no prejudicial error resulted from use of that evidence to bolster first wife's testimony that she had not secured a divorce from defendant because of her religious belief. West's Ann.Const. art. 6, § 4½.

14. Criminal Law Ⓒ982

In prosecution for bigamy, condition of probation that defendant serve a portion of the period in county jail and support his minor children and not leave the state of California was not arbitrary and unreasonable.

15. Criminal Law Ⓒ982

Provision of probation that defendant, who had been convicted of bigamy, absolve purported marriage with a third woman within one year was not authorized when no ceremony had been performed, and if performed a proceeding to annul it by defendant might necessarily contain an admission of fact which would subject him to a further prosecution for bigamy. U.S. C.A.Const. Amend. 5.

Buttermore & Lightner, by Wesley B. Buttermore, Jr., San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

A jury convicted defendant of the charge of bigamy. The claim is that he married one Stelma Hayes, under the name of Stelma Roberts, at a time when he already had a lawful wife living, i. e., Peggy Vogel, who married defendant in 1944, in New Orleans, Louisiana, while defendant was in the military service. Apparently some form of second marriage was performed in the Catholic church on October 17, 1947, between the same parties. After the first marriage defendant left for overseas. After six months absence he returned and lived with Peggy as her husband in both California and New Orleans. He reported again for active duty in 1950, in St. Louis, Missouri, and after his discharge he moved to California in 1952. Peggy did not come with him. Between 1950 and 1951, the parties were not in contact with one another, but Peggy received allotment checks from the Government as defendant's wife. In April, 1952, Peggy was injured, and defendant drove to St. Louis, picked her up, and took her to New Orleans and lived with her until August 2nd, when he left her again to come to California. He called her on the telephone in November, 1952, and on January 19, 1953, wrote a most pleading letter endeavoring to effect a reconciliation, and implying that they were

still married. Defendant married Stelma Hayes on March 6, 1953, in San Diego. Defendant intimates that the letter written to his former wife was not delivered to her but was later found in defendant's belongings by Stelma. Defendant and Stelma lived together about two weeks and then she left him. On June 30th she obtained a divorce from him. She is the complaining witness in this case.

On February 15, 1954, defendant secured a "proxy marriage" to one Mildred Harrington, in Tijuana, Mexico, and gave as his name "Robert Neilsen". She testified that no ceremony was performed. Both parties knew he was not divorced from Stelma at the time, and Mildred considered this "more like an engagement".

As a defense, defendant admitted his marriages to Peggy and Stelma, and claimed Peggy had legally divorced him, but he could not say when or where this claimed divorce took place. He testified his marriage to Peggy was basically an unhappy one and that in 1950, Peggy told him she was going to secure a divorce from him but that she was going to do it in such a manner as to prevent him from knowing about it so he could not contest her right to the custody of the children. Peggy denied making such a statement. Defendant said he took Peggy to St. Louis in 1950, and went back into the service, and from that time until May, 1952, when he learned of her accident, he neither saw nor heard from her despite repeated efforts by him to communicate with her; that he went to St. Louis from San Diego, where he was working, and drove her to New Orleans, lived with her a few months, and then came back to California. He admitted he never secured a divorce from her, but claimed that Peggy was now married to one Heck, but that he could not prove this as to date or place. He admitted he was sending her the allotment as his lawful wife in 1950-51, although he thought she was obtaining a divorce at that time.

A motion for new trial was denied. Judgment was not pronounced. Defendant was granted probation for ten years upon certain conditions.

[1] The main contention raised on this appeal is that the trial court erred in refusing to admit certain evidence proffered by defendant pertaining to the marital status between Peggy and defendant at the time of defendant's second marriage. Peggy, while testifying for the prosecution, stated she had never been divorced from defendant, and related considerable testimony as bearing on this claim and to meet the burden imposed on the prosecution to show that defendant's second marriage took place "during perdurance of that status". *People v. LaMarr*, 20 Cal.2d 705, 709, 128 P.2d 345, 347; *People v. O'Neal*, 85 Cal.App.2d 226, 229, 192 P.2d 833; *People v. Huntley*, 93 Cal.App. 504, 506, 269 P. 750; *Commonwealth v. McGrath*, 140 Mass. 296, 297, 6 N.E. 515.

[2] It appears from the authorities that there are three requisites to the establishment of the offense: (1) The alleged prior marriage must have been in existence as a matter of law, or in legal existence. (2) The prior spouse must have been alive at the time of the alleged bigamous marriage. (3) The previous marriage must not have been dissolved or annulled prior to the defendant's remarriage. Certain disputable presumptions have been held sufficient to prove a fact in criminal proceedings. *Freeman v. Superior Court*, etc., 44 Cal.2d 533, 282 P.2d 857. Where a former marriage is proved in a bigamy case, there is a rebuttable presumption of its validity. Whether there is a presumption in a criminal case that the marriage status continues to exist thereafter, in view of the conflicting presumption of innocence, may be questioned. 8 Cal.Jur.2d p. 313, sec. 27. It is there said, at page 314:

"As a matter of abstract logic, the presumption of innocence would require the prosecution to make full proof of the existence of both marriages, including proof of the fact that the prior or legitimate marriage, relied upon in the charge, was not dissolved either by the death of one of the spouses or by an annulment or divorce prior to the defendant's remarriage. While this is the law with

regard to the proof that the prior spouse was alive, it is established that in criminal bigamy cases the prosecution need not prove the negative fact that the prior or legitimate marriage was not judicially dissolved or annulled before the defendant's remarriage. Any such dissolution or annulment must be raised as an affirmative defense and proved by the defendant."

[3] The purpose of this rule is well stated in *People v. Velasquez*, 70 Cal.App. 362, 367, 233 P. 359; and *People v. T. Wah Hing*, 47 Cal.App. 327, 190 P. 662. Under the circumstances of this case, as between the second alleged wife and defendant, the burden was upon the defendant to show that the first marriage had been dissolved. Section 282 Penal Code; 8 Cal.Jur.2d p. 292, sec. 12; 8 Cal.Jur.2d p. 313-314, sec. 27.

[4] Defendant raises some question as to the extent of the burden of proof that rests upon a defendant under section 282 of the Penal Code, i. e., whether defendant was called upon to prove the required facts by a preponderance of the evidence or whether there is imposed upon him the duty of going forward with evidence of such facts sufficient to raise a reasonable doubt in the minds of the jury as to the existence of these facts, citing *People v. Deloney*, 41 Cal.2d 832, 264 P.2d 532, a murder case where section 1105 of the Penal Code was being interpreted. The court said there that as to the burden being on the defendant to show mitigation, it was not the burden of persuasion but merely a duty of going forward with evidence of mitigating circumstances. See, also, *People v. Fitzgerald*, 14 Cal.App.2d 180, 195, 58 P.2d 718. Defendant in the instant case offered an instruction to this effect which was refused. Objection is made thereto. The court did read sections 281 and 282 of the Penal Code and instructed the jury in the general language of CALJIC No. 560 (modified) to the effect that:

"To prove a charge of bigamy, the prosecution must prove these facts:

"1. That the accused was twice married and that the two marriages were to different persons.

"2. That the wife of the first marriage was alive when the second marriage took place.

"3. That the first marriage was still in force and effect when the second one was consummated. * *

"5. * * * that if the second marriage was contracted under an erroneous assumption or belief by the accused that the first marriage was void or had been annulled or dissolved * * * that fact alone is not a defense to the charge." That

"It is not a defense to a charge of bigamy that the defendant believed that the alleged former marriage had been annulled, dissolved, terminated by death or otherwise, if the evidence shows that contrary to his belief such a marriage was in force and effect at the time he entered into a later and bigamous marriage.

"The only intent required by law as an element of the crime of bigamy is an intent to enter into the two marriages, the second of which is bigamous under the definition of the crime of bigamy previously stated to you."

The court then instructed the jury that there had been no evidence produced showing that the first marriage had been dissolved as set forth in subdivision 2 of section 282 of the Penal Code, and that accordingly that subdivision did not apply.

As far as the record indicates, there is no evidence of its dissolution. The prosecution offered no instruction and none was given indicating that the burden of proof was upon the defendant to prove any of the exceptions indicated. A general instruction on reasonable doubt was given to the effect that the defendant is presumed to be innocent until proved guilty beyond a reasonable doubt, and if not he is entitled to acquittal. Since there was no competent evidence that defendant's first marriage had been previously dissolved, and since the trial judge, in effect, either rightfully or wrongfully, told the jury that the burden of proof was on the prosecution to show that the first marriage was in force and effect when the second one was consummated, and refrained from instructing

the jury that any burden rested on the defendant to prove anything, the defendant cannot be heard to complain because the court refused to instruct the jury as indicated in defendant's proffered instruction in respect to the burden of proof imposed upon him to prove the exceptions. The exceptions were neither proved by him nor by the prosecution.

[5,6] The question then arises as to the correctness of the court's ruling on the proffered testimony which defendant claimed did bear on the question as to whether or not his first marriage had been dissolved. Two witnesses, husband and wife, who maintained an apartment house in St. Louis, were produced by defendant. The record shows that if they had been permitted to testify they would have said that between January and April, 1952, Peggy lived with one Earl Heck in one of their apartments as Mr. and Mrs. Heck, and they held themselves out as husband and wife, and that in April, Peggy had a severe automobile accident and was admitted to a hospital under the name of Mrs. Heck. Further proof was offered that Peggy obtained a driver's license in her maiden name in 1951. It is the contention of the defendant that this evidence, together with the allowable presumptions under section 1963 of the Code of Civil Procedure, showed that they were married and that accordingly it must be presumed that Peggy did not violate the law, and accordingly it must be presumed she secured a divorce from the defendant. It was also offered on the theory of impeachment, as being contradictory to Peggy's testimony that she never used any other name during this period except Peggy Vogel. As to the driver's license, Peggy testified, without objection, that she did obtain it under her maiden name. The court refused the license in evidence. The evidence of this fact was before the jury and no prejudicial error resulted from the ruling of the trial court.

[7] A more serious question arises as to the court's ruling with reference to the other proffered testimony. It does appear therefrom that Peggy did use another name in 1952, and held herself out as be-

ing Mrs. Heck. Of course this fact, even if admissible for impeachment purposes, would not, in and of itself, prove that her marriage to defendant had been dissolved. *People v. Huntley*, 93 Cal.App. 504, 269 P. 750; *People v. Van Wie*, 72 Cal.App.2d 227, 164 P.2d 290. There is no showing that defendant had any knowledge of or relied upon these facts at the time he remarried. The evidence conclusively shows that he left her and came to California in 1952. He knew where she was living with her children at that time. In fact when she was injured he returned to her, took her from the hospital to her parents' home in New Orleans, and they lived together as husband and wife for several months. Had defendant believed she was divorced at that time it would have been a most natural and opportune occasion to inquire into that fact. The letter he wrote thereafter, on January 19, 1953, which was properly received in evidence, clearly indicates he did not believe she was then divorced from him. Even had defendant known of these facts, in this jurisdiction, contrary to some jurisdictions, good faith or a mistaken belief regarding the existence of a previous marriage does not relieve one of, and is not a good defense to, criminal responsibility for a bigamous marriage. *People v. Kelly*, 32 Cal.App.2d 624, 90 P.2d 605; 27 Cal.Law Review 746; 8 Cal.Jur.2d 287, sec. 11. Our research indicates that the proffered evidence, even if true, would not be a defense to the charge. It was said in 10 C.J.S., Bigamy, § 7-e, page 368, under recognized defenses to such charges, that "It is no defense * * * that at the time a man contracted a second marriage his first wife had deserted him and gone to live with another man"; or "that the first wife of accused had also contracted a bigamous marriage with another man * * *", citing *United States v. Gaoiran*, 17 Philippine 404; and *Tanner v. State*, 116 Ark. 452, 173 S.W. 200. See also *People v. Kelly*, supra.

[8,9] Under this principle the trial court was justified in its ruling. Although the presumptions relied upon by defendant in the instant case were not discussed in those cases, it is a well known principle

of law that presumptions or inferences may not be based on other presumptions or inferences to prove a fact. *Walsh v. American Trust Company*, 7 Cal.App.2d 654, 659, 47 P.2d 323; 21 West's California Digest, Evidence, ¶54, page 116. Impeachment on immaterial facts is not allowable. *People v. Ansite*, 110 Cal. App.2d 38, 40, 241 P.2d 1036; *People v. Pollock*, 31 Cal.App.2d 747, 89 P.2d 128.

[10] Defendant proposed an instruction to the effect that a divorce could be obtained by service by publication and without the party divorced ever knowing about it. It was marked "Refused as is". There is no competent evidence in the instant case that such a procedure was followed, and accordingly there was no requirement that such an abstract statement of the law be given. *People v. Talbott*, 65 Cal.App.2d 654, 151 P.2d 317; *People v. Shannon*, 28 Cal.App.2d 677, 680, 83 P.2d 302; Penal Code, § 1093, subd. 6.

[11,12] Defendant complains because the court received evidence, over objection, of some "Tijuana transaction" involving defendant and a Mrs. Harrington. The full particulars of this transaction are not reported. The trial judge carefully protected the witness's right to refuse to testify in reference to it, and she exercised that right. Apparently this evidence was admitted upon the theory that it bore on the intent of the defendant in relation to his claimed bigamous marriage. There is some authority for it. *People v. Jacobs*, 11 Cal.App.2d 1, 14, 52 P.2d 945; *People v. Burke*, 43 Cal.App.2d 316, 110 P.2d 685. However, the intent involved in a charge of bigamy in this state is more or less limited to the intent to do the act of contracting the bigamous marriage, and not the intent to violate the law. *People v. Hartman*, 130 Cal. 487, 62 P. 823; 8 Cal. Jur.2d 287, sec. 11. After the jury returned for further instructions, apparently the trial judge considered that this evidence had been erroneously admitted or that the jury was not adequately informed of the purpose for which it was received, and ordered the jury to disregard it. This admonition came at a late hour since counsel for the People, in his argument to the

jury, dwelt somewhat on this evidence in his appraisal of defendant and his actions. Since this evidence did not bear on the real question involved, i.e., whether defendant's previous marriage had been legally dissolved, no prejudicial error could be claimed. *People v. McCalla*, 63 Cal. App. 783, 797, 220 P. 436.

[13] Complaint is made of the ruling of the trial court admitting, over objection, evidence of a purported second marriage by defendant to Peggy in the Catholic Church. It apparently was admitted, in the first instance in chief, as further evidence of defendant's first marriage to defendant, and no complaint could be made in this respect. However, before the trial was over, this evidence furnished ground for unauthorized argument to and by the jury as bolstering Peggy's testimony that she had not secured a divorce from defendant because of her religious belief. The trial court should have limited the argument to the purpose for which this evidence was admitted. However, it does not appear that prejudicial error resulted. Art. VI, § 4½ Const.

[14,15] The last objection is that the court inflicted arbitrary and unreasonable terms in granting defendant probation. The condition that he serve a portion of that period in the county jail and support his minor children and not leave the State of California is authorized by Section 1203.1 of the Penal Code. The condition that defendant "absolve" his purported marriage with Mildred Harrington within one year is not authorized by that section, particularly where it appears that no ceremony was performed, and if performed a proceeding to annul it by the defendant might necessarily contain an admission of fact which would subject him to a further prosecution for bigamy. 5th Amendment to the Constitution of the United States. This condition should be and is stricken as one of the conditions of probation. The order denying a new trial was proper.

Orders affirmed as modified.

BARNARD, P. J., and MUSSELL, J., concur.

134 Cal.App.2d 316

TORRANCE NATIONAL BANK, a national banking association, Plaintiff and Respondent,

v.

ENESCO FEDERAL CREDIT UNION, a cooperative association, Defendant and Appellant.

Civ. 20706.

District Court of Appeal, Second District,
Division 1, California.

July 11, 1955.

Rehearing Denied Aug. 1, 1955.

Hearing Denied Sept. 8, 1955.

Action by bank to recover from credit union on account of alleged overdraft. Credit union cross-complained. The Superior Court, Los Angeles County, Philbrick McCoy, J., rendered judgment and denied defendant's motion to vacate judgment and enter a different judgment, and defendant appealed. The District Court of Appeal, White, P. J., held that where treasurer of credit union, who had no actual authority to use credit union's money for his own business and who had no ostensible authority to make overdrafts on credit union's account, presented for payment a draft on credit union's account in excess of amount therein, and bank paid without questioning his authority, bank was not permitted to keep amount of union's deposit which it had applied in part payment of check.

Judgment reversed with directions.

1. Banks and Banking Ⓒ138

Numbers on checks, like notations of purpose for which checks are drawn, are memoranda for convenience of maker, and absence thereof does not restrict bank's right to charge maker's account with amount thereof.

2. Bills and Notes Ⓒ15

An essential characteristic of a check is that it be payable on demand. West's Ann.Civ.Code, § 3265a.

3. Banks and Banking Ⓒ138

Where officers of credit union had been given authority, expressed on bank signature card, to sign all checks and drafts, bank was warranted in cashing check even

though it was postdated and bore no number. 12 U.S.C.A. §§ 1758, 1761; West's Ann.Financial Code, § 953; West's Ann.Civ.Code, § 3265a.

4. Banks and Banking Ⓒ150

An overdraft is in legal effect a loan by bank to depositor.

5. Principal and Agent Ⓒ109(2)

That a principal authorizes agent to collect money and draw and indorse checks does not empower agent to create an overdraft.

6. Banks and Banking Ⓒ140(5)

Ordinarily, a bank is not obligated or expected to honor any check, draft or order of withdrawal for an amount greater than deposit against which it is drawn.

7. Building and Loan Associations Ⓒ23(4)

Neither signature card which expressed credit union officers' authority to sign all checks and drafts nor statute authorizing a bank to assume that any check drawn by an agent in authorized form or manner was drawn for purpose authorized by depositor and within scope of authority authorized bank to assume that officer was authorized to overdraw account or to borrow money for account. West's Ann.Financial Code, § 953.

8. Principal and Agent Ⓒ14(1), 25(1)

The doctrines of ostensible agency or agency by estoppel are not based upon representations of agent but upon representations of principal. West's Ann.Civ.Code, § 2317.

9. Principal and Agent Ⓒ19, 119(1), 147(2)

Persons dealing with an assumed agent, whether assumed agency be general or special, are bound at their peril, if they would hold principal, to ascertain not only fact of agency but nature and extent of authority, and in case either is controverted, burden of proof is upon them to establish it.

10. Appeal and Error Ⓒ931(1)

Principal and Agent Ⓒ124(1)

Question whether an agent was acting under an ostensible authority was one of fact, and, even though finding on issue appeared in conclusions of law, was entitled to weight usually given a finding of fact.

11. Building and Loan Associations Ⓒ23(4)

In action by bank to recover from credit union on account of allegedly overdrawn account, evidence whether credit union had made any representation which might have led bank to believe that treasurer had power to overdraw union's account, or to borrow money for it, was insufficient to support finding that treasurer, who had overdrawn account intending to use money for use in his own business, had had ostensible authority to make overdraft. 12 U.S.C.A. §§ 1758, 1761; West's Ann.Financial Code, § 953; West's Ann.Civ.Code, §§ 2317, 3265a.

12. Principal and Agent Ⓒ159(1)

A principal will ordinarily be held liable for acts of an agent acting within scope or apparent scope of authority when these acts cause loss to innocent persons, but where one acting for another not in, but contrary to, interest of principal, causes a loss, principal will not be held accountable for it to one who aided and abetted, was derelict in his own duty, negligent, in respect to wrongdoing, or who, by his silence when he should have spoken, prevented principal from ascertaining it in time to prevent loss.

13. Banks and Banking Ⓒ133

In paying out a deposit account of a corporation, bank must be satisfied that officer withdrawing deposit is authorized to do so, and if bank pays without question, it takes risk of being liable for any amount irregularly paid.

14. Building and Loan Associations Ⓒ23(4)

Where treasurer of credit union, who had no actual authority to use credit union's money for his own business and who had no ostensible authority to make overdrafts on credit union's account, presented for payment a draft on credit union's account in excess of amount therein, and bank paid without questioning his authority, bank was not permitted to keep amount of union's deposit which it had applied in part payment of check. West's Ann.Civ.Code, § 2333.

Donald Armstrong, Torrance, McLaughlin & Casey, Los Angeles, for respondent.

WHITE, Presiding Justice.

Defendant, Enesco Federal Credit Union, a corporation (hereinafter called Enesco), has appealed from a judgment for \$12,898.51 in favor of Torrance National Bank (hereinafter called the Bank).

The Bank sought to recover \$19,516.93, the amount by which Enesco's account with the Bank was allegedly overdrawn. Enesco cross-complained for \$7,628, the amount of a check made to its order, endorsed "Pay to the order of Torrance National Bank for Deposit to the account of Enesco Federal Credit Union", for which the Bank, upon its presentation by Joseph Alden, Enesco's treasurer, paid him the cash. Enesco cross-complained also for \$10,483.07, the amount of its deposit which was applied by the Bank toward the payment of a certain \$30,000 check to the Bank, drawn on Enesco's account, signed by said Alden, and presented by him to the Bank in exchange for \$30,000 cash. The amount of the judgment is the difference between \$19,516.93, with interest thereon from April 3, 1953, and \$7,628, with interest thereon from March 31, 1953.

No appeal having been taken by the Bank, we will not consider or further discuss the court's decision that the Bank "is indebted to defendant in the sum of \$7,628, together with interest on said sum from March 31, 1953, at the rate of 7 percent per annum".

Enesco is a credit union composed of some of the employees of National Supply Company (hereinafter called National), an industrial plant located in the City of Torrance. Enesco's office was in a small building on National's premises. Early in 1949, Joseph Alden became the treasurer of Enesco. The act under which Enesco was incorporated provided that "The Treasurer shall be the general manager * * * shall have custody of all funds * * * shall sign all checks, drafts, notes, and other obligations of the credit union * * *." Title 12 U.S.C.A. § 1761. Enesco's by-laws, Title 12 U.S.C.A. § 1758, provide that the treasurer shall be the general manager under the control and direction of the Board of Directors.

Spray, Gould & Bowers, Robert E. Ford, Los Angeles, for appellant.

On September 26, 1950, Enesco's board of directors passed a resolution and furnished a copy thereof to the Bank authorizing Joseph Alden or his wife, as treasurer and assistant treasurer, respectively, "to sign all checks and drafts of this corporation * * *."

Without conflict, the evidence is that at the close of business on Thursday, April 2, 1953, Enesco had on deposit with the Bank the sum of \$10,483.07; that after three o'clock that afternoon, while the Bank was closed, Alden left with the Bank's teller an unnumbered check, dated April 3, 1953, drawn on the account of Enesco for \$30,000, payable to the Bank, and its teller delivered to Alden \$30,000 in cash packed in his own valise; that a few minutes later, while Alden was on the way from the Bank to Enesco's office, he was robbed of the \$30,000; that on April 4, 1953, the check was charged by the Bank to the account of Enesco, creating an overdraft of \$19,516.93; that the \$30,000 was intended by Alden to be used in his own business of cashing pay checks and charging therefor; that Alden had been expressly directed by Enesco's board of directors not to use any of the corporation's funds for cashing pay checks; that the Bank knew Alden intended to use the \$30,000 for cashing pay checks, had made no inquiry as to his authority, but did not know that Alden had been directed not to use Enesco's money for that purpose; that the check had been left by Alden with the Bank's teller pursuant to his understanding with the Bank's vice president and the vice president's instructions to the teller, that the check would be held in the teller's cash drawer without entering it in the Bank's records to give Alden time to cash pay checks for National's employees, deposit them with the Bank in another account, and exchange his check on such other account for the Enesco check so held by the Bank.

The other facts will be stated in connection with the discussion of the questions to which they are pertinent.

The Bank has the right to assume that any "check, receipt, or order of withdrawal", drawn by an agent "in the authorized form or manner * * * was drawn for a

purpose authorized by the depositor and within the scope of the authority conferred upon such person." Financial Code, § 953.

Appellant contends that the paper involved was not drawn "in the authorized form or manner" for three reasons: (1) It was unnumbered; (2) It was postdated; and (3) It's amount was in excess of the balance of Enesco's deposit with the Bank.

[1] Numbers on checks, like notations of the purpose for which checks are drawn, are memoranda for the convenience of the maker and the absence thereof does not "restrict the bank's right to charge the maker's account with the amount thereof". 9 C.J.S., Banks and Banking, § 332, page 677; Boston Ins. Co. v. Wells Fargo Bank & Union Trust Co., 80 Cal.App.2d 59, 67, 181 P.2d 84.

[2,3] An essential characteristic of a check is that it be payable on demand. Civil Code, § 3265a; 7 Am.Jur. 794, § 10; Minturn v. Fisher, 4 Cal. 35. However, a postdated check is within the phrase "checks and drafts" used in the resolution on the signature card furnished the Bank by Enesco. It is also an "order of withdrawal" authorizing the Bank to assume authority as provided in Financial Code, § 953. Therefore, under the facts and circumstances of the instant action, the postdating of the check has no significance.

[4] An overdraft is in legal effect a loan by the bank to its depositor. 8 Cal.Jur.2d 108; Faulkner v. Bank of Italy, 69 Cal.App. 370, 231 P. 380, 383; Popp v. Exchange Bank, 189 Cal. 296, 208 P. 113.

[5] "Where a principal authorizes an agent to collect money and draw and indorse checks, the law is that such authorization does not empower the agent to create an overdraft". Faulkner v. Bank of Italy, supra, 69 Cal.App. 370, 376, 231 P. 380.

Respondent urges that the holding in the Faulkner case has no application to the case at bar because in the Faulkner case the written agreement on the signature card of joint tenants "authorized either * * * to withdraw * * * the entire sum represented by the account * * *"; the agreement did not authorize "either party to

overdraw the account"; and "there is nothing in the agreement by which either party guaranteed to pay any overdraft".

[6,7] Examining the signature card furnished the Bank by Enesco in the instant action, we find that Alden was authorized to sign "checks and drafts". Section 953 of the Financial Code gave the Bank the right to assume that "any check, receipt, or order of withdrawal" signed by Alden was within the scope of his authority. "The original and fundamental idea and purpose" of checks, drafts and orders of withdrawal is that "the drawer has funds or effects in the hands of the drawee", and orders drawee to pay a portion or all of such debt or deposit to payee. 7 Am.Jur. 790, § 6. Ordinarily, the bank is not obligated or expected to honor any check, draft or order of withdrawal for an amount greater than the deposit against which it is drawn. The resolution of Enesco, copy of which was furnished the Bank on its signature card, as was said in the Faulkner case, *supra*, was "at once an authorization and a limitation." It contains no language authorizing Alden to borrow from the Bank for the account of Enesco, and no agreement on the part of Enesco to repay to the Bank any overdraft created by Alden's check or draft. Nor, do we find any language in section 953 of the Financial Code which gives the Bank the right to assume that Alden was authorized to overdraw Enesco's account or to borrow money for its account.

Respondent urges that the instant action is further distinguished from the Faulkner case, *supra*, by the fact that "there was nothing in that case on which any ostensible agency could be predicated".

In the instant action, the court concluded "That Joseph Alden had ostensible authority from Enesco to withdraw the \$30,000 which he withdrew on April 2, 1953." That conclusion is based upon seven pages of detailed findings, most of which we will not repeat here. There is no finding, and no evidence in the record, to the effect that Enesco knew of or should have suspected the existence of the oral understanding between Alden and the Bank's vice president, or the custom which they had developed, pursuant to which, on the day before each

of National's paydays from October, 1950, to April, 1953, Alden had left an unnumbered, postdated check of Enesco with the Bank to be held without entry in its records and picked up by Alden the next day. There is no finding, and no evidence in the record, that Enesco's bank statement had ever shown an overdraft, except the one created on April 4, 1953, by the \$30,000 check involved on this appeal.

As we have hereinbefore indicated, in the absence of facts creating an estoppel as against the Bank, if Enesco had had \$30,000 on deposit with the Bank on April 3, 1953, the date of the check, or on April 4, 1953, the date of the presentation of the check by the Bank as payee for payment by the Bank as drawee, the Bank was expressly authorized, under the provisions of its signature card and of section 953 of the Financial Code, to charge said check against the account of Enesco; but, Alden's actual authority did not extend to the creation of an overdraft.

[8] "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." Civ.Code, § 2317. In the field of contracts, "the doctrines of ostensible agency or agency by estoppel are not based upon the representations of the agent but upon the representations of the principal." *Boren v. State Personnel Board*, 37 Cal.2d 634, 643, 234 P. 2d 981, 986. It was found that the Bank in the instant action never had or sought any communication from Enesco, except through Alden; and that Enesco's only communication with the Bank was the signature card authorizing Alden and his wife, as its treasurer and assistant treasurer, to sign its checks; and further that the Bank "never at any time had any knowledge or notice of any limitations upon the right of Joseph Alden to use monies of the defendant which were on deposit with plaintiff in connection with the check cashing activities described in these findings of fact."

There is no finding and no evidence in the record that the Bank had any knowledge that Enesco ever had engaged in the business of cashing pay checks for National's

employees. The Bank's vice president, testified as a witness for the Bank, as follows:

"Q. Did you know at any time prior to April 3rd of 1953, that Joseph Alden had any interest in any check cashing operation?

A. I knew he was check cashing. I didn't know what person or what it was.

"Q. Well, tell us what you did know about that. A. Well, that has to go back a long while when at one time some of the armored cars came down and were cashing checks at the National Supply. They ceased their operations and Mr. Alden came over and said— * * * I don't exactly know the exact date now. He said that unless he could make some arrangements to continue the check cashing business for the Federal Credit Union, they would have no way of operating. I don't know what he meant by it. That's the sum and substance—that's what he came over and told us.

* * * * *

"Q. Now you made arrangements with Joseph Alden where he could come in and obtain monies to cash checks with, didn't you? A. That's right.

"Q. And under those arrangements you told him that he could leave a check on the Credit Union with the girl at—the teller there—take the cash; and then when he returned the checks which he had cashed, that the check of the Credit Union would be returned to him? A. That's right."

The evidence is also without conflict and the court found that said practice of obtaining the money for Enesco's check to be so held without entry was commenced "at some time after the 17th day of August, 1950 and during the year of 1950". There is no finding as to the increasing amounts, but the evidence is without conflict that "he started out getting amounts of five thousand. And then they were increased to ten thousand, and so forth. And finally up to thirty thousand". The evidence also shows without conflict that for at least six months prior to April, 1953 the amount of said checks had been \$30,000 and that each of said \$30,000 checks would have overdrawn Enesco's account if it had been charged in the regular manner.

The evidence is also without conflict, and the court found that on the day after Na-

tional's pay day Alden would bring to the Bank the checks he had cashed, deposit them —*not in Enesco's account upon which he had drawn the \$30,000 check—but in another account, which would be charged upon the return of the Enesco check.*

The record is devoid of any showing that Enesco knew or had reason to suspect that its money or credit was being used in any way in Alden's check cashing business, or that Enesco was ever informed that the Bank was holding in its teller's cash drawer Enesco's check which, if presented for payment would create an overdraft.

There is no finding of any act or omission on the part of Enesco which could have led the Bank to erroneously assume that Alden had authority to overdraw the account of Enesco.

Respondent urges that "The fact that the check created an overdraft does not alter the position of the parties in any way; particularly where overdrafts were customary in connection with these transactions." None of the cases cited by appellant in this connection is determinative of the appeal now before this court. As stated by respondent, appellant's credit had been used in the same manner for a period of years; but not one of the unnumbered, postdated checks so drawn by Alden on Enesco's account and left in the Bank teller's cash drawer, which would have created an overdraft if charged to appellant's account, had ever appeared on any statement sent to Enesco. Enesco had no knowledge of such practice, and could not have acquiesced therein.

[9] In the case of *Hill v. Citizens National Trust & Savings Bank*, 9 Cal.2d 172, 69 P.2d 853, the plaintiff and appellant had purchased land on contract from a corporation, other than the Bank, had been told that the bank had title to the land and that seller was acting as the bank's agent. Appellants had made substantial payments on the purchase price to such assumed agent and had expended several thousand dollars in improving the lot, when the trust deed of the large tract of which said lot was a part was foreclosed. Up to the time of foreclosure, appellant had not communicated with the bank in any way. It

was there held that the seller was neither the actual nor ostensible agent of the bank. At page 177, of 9 Cal.2d at page 856 of 69 P.2d, the court said: "A third person, such as appellant, is not compelled to deal with an agent, but if he does so, he must take the risk. He takes the risk not only of ascertaining whether the person with whom he is dealing is the agent, but also of ascertaining the scope of his powers. The rule is cogently stated in 1 Mechem on Agency, (2d Ed.) § 743, p. 527, as follows: "An assumption of authority to act as agent for another of itself challenges inquiry. Like a railroad crossing, it should be in itself a sign of danger and suggest the duty to 'stop, look and listen.' It is therefore declared to be a fundamental rule, never to be lost sight of and not easily to be overestimated, that persons dealing with an assumed agent, whether the assumed agency be a general or special one, are bound at their peril, if they would hold the principal, to ascertain not only the fact of the agency but the nature and extent of the authority, and in case either is controverted, the burden of proof is upon them to establish it." Ernst v. Searle, 218 Cal. 233, 240, 22 P.2d 715, 717."

In the Hill case, supra, the purchaser built upon one of the lots in the subdivision to which the defendant had title, and, although the Bank posted a notice of nonresponsibility, it had no actual knowledge of the deal made between the assumed agent and the purchaser, and was held not to have been negligent in failing to inquire or to warn the purchaser of the agent's lack of authority. In the instant action, although Enesco had authorized Alden to *withdraw* its entire deposit, it had no knowledge of the Bank's custom of loaning money to Alden each pay day. It had made no representation which might lead the Bank to believe Alden had power to *overdraw* its account, or to borrow money for it. The Bank dealt with Alden, himself. It therefore remained for the Bank, as in the ordinary case, to inquire into the extent of Alden's authority. Such inquiry would have prevented the loss which occurred.

[10] The question whether an agent is acting under an ostensible authority is one of fact. 2 Cal.Jur.2d 708. Even though the finding of ostensible agency in the instant action appears in the conclusions of law, it is nevertheless entitled to the weight usually given a finding of fact, and if there is any substantial evidence in the record to sustain it as a finding of the trial court the question on appeal can go no farther.

Respondent's brief calls our attention to no evidence in the record tending to prove any act or omission on the part of Enesco upon which the Bank could reasonably have based its belief that Alden had authority to overdraw Enesco's account. We have carefully examined the entire record on appeal and there is none.

True, the court found "That the monies thus obtained by Joseph Alden were mingled with monies of the defendant in the defendant's office and place of business and were not kept separate and apart from other monies maintained by the defendant in its office and place of business for the purpose of making loans to its members and repaying deposits made by its members * * *." The only evidence we have been able to find in the record in this regard is the following testimony of Joseph Alden:

"A. I used whatever funds were in the office for cashing whatever checks were presented. There was no distinction made as to 'this money is for this and this money is for that.' Q. But you would then replenish the cash fund in the union. If you use their money temporarily, you'd replenish it? A. At the end of the day when I balanced my cash, the change fund was set up to its original figure."

The testimony and finding concerning that practice fall far short of showing that Enesco received or retained or benefited by the use of the moneys so loaned by the Bank to Joseph Alden. And, from Alden's description of his handling of the money, it is clear that at the end of the day when he balanced his cash, no trace of such practice remained in Enesco's office or records. None of the \$30,000 Alden received

for the check involved in this appeal ever reached Enesco's office.

Enesco's account with the Bank was at all times herein mentioned carried in its true corporate name, "Enesco Federal Credit Union".

Large portions of the reporter's transcript, the findings, and the briefs on appeal concern the opening of a bank account in October, 1950 by Alden and his wife. At that time, the Aldens signed and delivered to the Bank the signature card here quoted:

"Joseph R. Alden, president or Lila M. Alden, treasurer, of this Association are hereby authorized to sign all checks and drafts of this Association drawn on Torrance National Bank, Torrance, California, and that each of them is hereby authorized to endorse for deposit checks and drafts payable to this association.

"I hereby certify that the foregoing is a correct copy of a resolution duly adopted by the board of directors of the (1500) *Enesco Service Fund* at a regular meeting of said board held October 10, 1950, and that said resolution has not since been repealed or amended.

"Witness my hand and seal of said association.

"Dated: October 10, 1950 (signed)
Lila M. Alden, Secretary."

It was in this account that the payroll checks cashed by Alden were deposited and it was this account upon which the debit was made on each occasion when the Enesco check, held without entry in the teller's cash drawer, was returned to Alden.

The court found:

"That the statutes of the United States with respect to the formation and operation of federal credit unions describe such organizations as 'associations', and the signature card which Joseph Alden presented to plaintiff at the time that the account was opened in the name of Enesco Service Fund was in such form as to cause plaintiff to believe that Joseph Alden and Lila M. Alden were officers of such an association, and that the bank account opened under the name of 'Enesco Service Fund' was an auxiliary account of Enesco Federal Credit

Union. That plaintiff did believe at all times up to a date after April 3, 1953, that Joseph Alden, in withdrawing monies for his check cashing operations, including the \$30,000.00 described in the Findings of Fact herein, was acting for and in behalf of the defendant."

There is no finding, and not one iota of evidence, to the effect that Enesco ever heard of any bank account in the name of "Enesco Service Fund". The Bank did not so inform Enesco, or question Alden's authority to so use its name for his own personal account. Certainly, under these circumstances, Enesco cannot be held responsible for the Bank's erroneous belief. To know its depositors is one of the duties of the Bank—not of its depositors whose names happen to be similar.

[11] There is no substantial evidence in the record that Alden had either actual or ostensible authority to overdraw Enesco's account with the Bank. Further, the detailed findings of the trial court do not support its finding, in the conclusions of law, that Alden had such ostensible authority.

For the reasons above-stated, the judgment in favor of the Bank should be reversed.

A further reason for reversing the judgment is that, even if the evidence were otherwise sufficient to support a judgment based on Alden's ostensible authority to overdraw Enesco's account, the Bank was negligent in failing to heed the "stop, look and listen" warning when Alden requested that his checks upon Enesco's account be held without entry and returned to him.

[12] As said in *Citizens State Bank, Donna, Tex. v. Western Union Telegraph Co.*, 5 Cir., 172 F.2d 950, 952: "It is true that a principal will ordinarily be held liable for the acts of an agent acting within the scope or apparent scope of his authority when these acts cause loss to innocent persons. It is equally true, though, that where one acting for another not in, but contrary to, the interest of his principal, causes a loss, the principal will not be held accountable for it to one who aided and abetted, was derelict in his own duty,

negligent, in respect to the wrongdoing, or, by his silence when he should have spoken, prevented the principal from ascertaining it in time to prevent the loss."

The Bank had the right to charge to Enesco's account Alden's checks up to the amount of the deposit, and it did not have the right to so charge checks which would create an overdraft of Enesco's account. Did the Bank have the right to apply the amount of Enesco's deposit in part payment of the \$30,000 check drawn by Alden in excess of any actual or ostensible authority given to him?

[13,14] "In paying out a deposit account of a corporation, the bank must be satisfied that the officer withdrawing the deposit is authorized to do so; if it pays without question, it takes the risk of being held liable for the amount irregularly paid away." 7 Am.Jur. 361. In the transaction which gave rise to this litigation, the Bank was not only the payee who gave Alden the cash, but also the drawee of the check. The Bank knew at the time the cash was paid to Alden that the check, if presented for payment, would create an overdraft of the account of Enesco. The Bank knew that Alden had no express authority to overdraw the account of Enesco, and no act or omission on the part of Enesco could reasonably have caused the Bank to believe that Alden had such authority. Consequently, both at the time the Bank as payee cashed the check, and at the time the Bank as drawee charged the check to the account of Enesco, the Bank knew Alden had exceeded his authority in drawing a check on the account of Enesco for \$30,000. If the Bank had made any inquiry before paying out the cash, there would have been no loss. It therefore seems only fair that the

Bank should not be permitted to keep the amount of Enesco's deposit which it applied in part payment of said check; and Enesco should not be held responsible for payment of the whole or any part of the unauthorized check under the circumstances shown by the record on this appeal.

"When an agent exceeds his authority, his principal is bound by his authorized acts so far only as they can be plainly separated from those which are unauthorized." Section 2333, Civil Code.

The transaction now being considered involved only one check. It was unauthorized. The fact that any check for an amount less than or up to the amount of the deposit would have been authorized does not alter the fact that the check involved in the instant action was unauthorized. It is apparent, therefore, that to permit the deposit to be applied in part payment of the check would not only do violence to the intent of the legislature expressed in Section 2333 of the Civil Code, but would violate recognized principles of equity and justice.

The appeal from the order denying defendant's and cross-complainant's motion to vacate judgment and enter a different judgment is dismissed.

The judgment for plaintiff is reversed and the court below is directed to enter a judgment in favor of defendant on its cross-complaint for \$18,111.07 together with interest on \$7,628 thereof from March 31, 1953, and interest upon \$10,483.07 thereof from April 4, 1953.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; SHENK and TRAYNOR, JJ., dissenting.

45 Cal.2d 1

Joseph TANZOLA, Plaintiff and Respondent,
v.

**John DE RITA, Executor of Last Will and
Testament of Angelo Pipolo, deceased,**
Defendant and Appellant.

L. A. 23642.

Supreme Court of California.
In Bank.

July 12, 1955.

Action against executor for recovery of money allegedly loaned to testator as evidenced by two checks, one of which had been delivered by plaintiff to testator before testator's marriage and the other after his marriage. From judgment rendered by Superior Court, Los Angeles County, James G. Whyte, J., without a jury, in favor of plaintiff, the executor appealed. The Supreme Court, Schauer, J., held that testimony by widow that her husband placed last check on her desk at his place of business and that she endorsed it with his name and deposited it in his personal account did not involve a communication between husband and wife, and was properly admitted.

Judgment affirmed.

Opinion, 277 P.2d 515, vacated.

1. Witnesses ⇨190

In action against executor for recovery of money allegedly loaned to testator as evidenced by two checks, one of which had been delivered to testator before testator's marriage and one after his marriage, testimony by widow, that husband placed last check on her desk at his place of business and that she endorsed it with his name and deposited it in his personal account, did not involve a marital communication and was properly admitted. West's Ann.Code Civ. Proc. § 1881, and subd. 1.

2. Witnesses ⇨222

Party seeking to suppress evidence as confidential communication has burden to show that such evidence is within terms of statute. West's Ann.Code Civ.Proc. § 1881, and subd. 1.

3. Limitation of Actions ⇨25(3)

Action against executor for recovery of money allegedly loaned to testator by plaintiff, evidenced by two checks with the word "loan" written upon their faces and endorsed by testator's wife, who had full authority to make such endorsement on his behalf, was not an action founded on an oral agreement and was governed by four-year limitations' statute. West's Ann.Code Civ.Proc. §§ 337, 339, subd. 1.

4. New Trial ⇨151

In passing on a motion for new trial upon ground of newly discovered evidence, no abuse of discretion is shown from fact that trial court chose to decide motion in accordance with allegations of plaintiff's counter affidavits rather than affidavits submitted by defendant in support of his motion.

5. Affidavits ⇨18

Affidavits are competent evidence where authorized by statute or where they are not objected to on proper grounds by party against whom they are offered.

Arnerich, del Valle & Sinatra and Bernard J. del Valle, Los Angeles, for appellant.

George J. Tapper and Jack D. Most, Los Angeles, for respondent.

SCHAUER, Justice.

[1] Defendant executor appeals from a judgment rendered by the court without a jury, by which plaintiff was awarded recovery of money allegedly loaned to defendant's decedent, Angelo Pipolo, and evidenced by two checks. Plaintiff's claim therefor had been rejected by defendant executor. We have concluded that the trial court did not err in admitting certain testimony of decedent's surviving wife, claimed by defendant to be a privileged marital communication; that other claims of error are likewise without merit; and that the judgment should be affirmed.

Plaintiff alleged and the trial court found that on November 10, 1949, plaintiff loaned Pipolo \$6,000 by delivering plain-

tiff's personal check to Pipolo in that amount; on December 16, 1949, plaintiff loaned Pipolo another \$6,000 by delivery of a second check. Meanwhile, on November 26, 1949, Pipolo and his surviving wife, Olga, intermarried. She endorsed the two checks with Pipolo's name and deposited them in the Pipolo bank account.

At the trial Mrs. Pipolo, as plaintiff's witness, testified that the decedent, Pipolo, had operated two prescription pharmacies; that she had been his employe for some seven or eight years prior to their marriage and as such had done, among other duties, "all of his book work. * * * Shortly after I went to work for him, I should say in 1942 or '43 * * * He said he couldn't be bothered with the trivial book work and he wanted me to handle all of his deposits, all of the transactions pertaining to the bank. * * * [H]e gave me permission to [endorse his name and said that] * * * Rather than to trouble him when he was busy, he wanted me to sign his name and make his deposits for him." Thereafter "I handled all of his banking for him, and all of his book work," including "signing his name * * * On all occasions * * * Particularly in endorsing his name on checks and making his deposits. * * * [He said] That if he wasn't present at any time, I was to sign his name * * * [to] Anything pertaining to the pharmacy or anything pertaining to his personal business. * * *" The witness and decedent first became engaged to be married in 1945, and in 1949 they commenced building a home. Decedent lacked money to complete the home, and in October or November, 1949, before the marriage, decedent in the presence of the witness asked plaintiff "if he could lend him \$12,000 in order to complete the home, and Mr. Tanzola agreed. * * * He said he would lend it to him with the understanding that if he needed the money, that Mr. Pipolo would pay it back on demand, and Mr. Pipolo said he would then borrow the money on the completed home, if it became necessary. * * * Mr. Tanzola agreed to let him have it, when he needed it, which Mr. Pipolo explained would be very soon, in the next few weeks." Thereafter, on Novem-

ber 11 or 12, 1949, the first \$6,000 check from plaintiff arrived in the mail at one of the pharmacies. The check, payable to decedent, bore the word "loan" on its face, and after endorsing decedent's name on the back, the witness deposited the check in decedent's checking account at the bank.

Subsequently, on November 26, 1949, the witness became Mrs. Pipolo. Over objection by defendant on the ground that matters thereafter occurring constituted privileged communications between husband and wife within the provisions of subdivision 1 of section 1881 of the Code of Civil Procedure, the trial court permitted the witness to further testify as follows: "Mrs. Pipolo, did you see a check which I now show you, dated December 16, 1949, in the sum of \$6000? A. I did. * * *

"What and where did you see this particular check dated December 16, 1949? A. My husband brought it to me. He had called on Mr. Tanzola and picked it up * * *

"Q. By Mr. Most [Plaintiff's attorney]: Let me caution you to forget what your husband did. Where did you first see this check? A. It was placed on my desk at the pharmacy.

"Q. Approximately when? A. I believe on the same date that his check was picked up * * *

"Q. Where did you see this * * * [check] immediately before it came into your possession? A. In the hands of my husband * * * At the pharmacy * * *

"Q. I show you a signature on the back, 'Angelo Pipolo', and ask you who wrote that signature? A. I did. * * *

"Q. What did you do with that check after signing it? A. I took it to the Citizens National Bank and deposited it into Mr. Pipolo's [personal] account."

Mrs. Pipolo further stated that the word "loan" also appeared on the face of this second check when she first saw it; the check was payable to Angelo Pipolo.

Deposit of two \$6,000 items in the Pipolo checking account on approximately the dates of the two checks was confirmed by testimony of a bank employe; the employe also stated that on February 2, 1949, de-

cedent "gave a power of attorney to Olga Metrovitsch," the witness who later became Mrs. Pipolo. The power of attorney, addressed to the bank and signed by decedent, bore a sample signature of Olga Metrovitsch and stated that "with reference to my checking account" she "is hereby authorized to sign and endorse checks, notes and drafts, and transact all business with your bank in my name, as my attorney." There was no evidence that the power of attorney was revoked during Mr. Pipolo's lifetime. However, following the marriage and on December 7, 1949, the name of the account was changed from that of Angelo Pipolo only, to "Angelo or Olga Pipolo."

Defendant's first contention on appeal is that the testimony of Mrs. Pipolo concerning the check of December 16 (i. e., as to events occurring after the marriage) was admitted in violation of the provision of subdivision 1 of section 1881 of the Code of Civil Procedure that neither husband nor wife can, "during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage * * *." The view of the trial court as expressed in ruling upon defendant's objections to such testimony was that it was admissible so long as it did not involve a communication between husband and wife, and that the wife can testify to matters she knows of her own knowledge in the absence of communication. In this view the court was correct.

In discussing the attorney-client privilege, likewise found in section 1881 of the Code of Civil Procedure, this court observed in *City & County of San Francisco v. Superior Court* (1951), 37 Cal.2d 227, 234-235, 231 P.2d 26, 25 A.L.R.2d 1418, that "This privilege is strictly construed, since it suppresses relevant facts that may be necessary for a just decision. [Citations.] It cannot be invoked unless the client intended the communication to be confidential [citations] * * *"

"The privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from

the suppression of relevant evidence * * *

"The privilege embraces not only oral or written statements but actions, signs, or other means of communicating information by a client to his attorney. [Citations.] '(A)lmost any act, done by the client in the sight of the attorney and during the consultation, may conceivably be done by the client as the subject of a communication, and the only question will be whether, in the circumstances of the case, it was intended to be done as such. The client, supposedly, may make a specimen of his handwriting for the attorney's information, or may exhibit an identifying scar, or may show a secret token. If any of these acts are done as part of a communication to the attorney, and if further the communication is intended to be confidential * * *, the privilege comes into play.' (8 Wigmore, supra, § 2306, p. 590.)"

[2] It is further established that the burden is upon the party seeking to suppress the evidence to show that it is within the terms of the statute. (*Sharon v. Sharon* (1889), 79 Cal. 633, 677, 22 P. 26, 131; see also *Dwelly v. McReynolds* (1936), 6 Cal.2d 128, 131, 56 P.2d 1232; *Collette v. Sarrasin* (1920), 184 Cal. 283, 288-289, 193 P. 571; *Samish v. Superior Court* (1938), 28 Cal.App.2d 685, 695, 83 P.2d 305.) Any contrary implications found in *People v. Mullings* (1890), 83 Cal. 138, 140, 23 P. 229, must be deemed overruled.

As pointed out by defendant himself it was declared in *In re De Neef* (1941), 42 Cal.App.2d 691, 693-694, 109 P.2d 741, that "The privilege relating to testimony disclosing confidential communications between husband and wife is like that stated in the other subdivisions of section 1881 relating to attorney and client, physician and patient, and a clergyman and one making a confession. * * *"

It has also been held that the fact of communicating, as distinguished from the substance thereof, does not fall within the privilege. Thus, in *Poulson v. Stanley* (1898), 122 Cal. 655, 658, 55 P. 605, the court declared that "The delivery of a

deed is not a 'communication' within the meaning of" section 1881. A wife, however, may not testify as to her husband's intent or purpose in making a conveyance. (*Emmons v. Barton* (1895), 109 Cal. 662, 669, 42 P. 303; *Haller v. Haller* (1929), 102 Cal.App. 370, 374, 283 P. 94.) In *Estate of Pusey* (1919), 180 Cal. 368, 374, 181 P. 648, a wife's testimony as to conversations between herself and her husband before as well as after they were divorced was held admissible, with the comment by the court that "It is to be noted, however, that the point sought to be shown by the communications here in question was the act of communicating and not the nature or character of the communications themselves, the purpose of the inquiry being to show that the appellant Pusey knew the whereabouts of his wife. These circumstances present a proper case for the application of the rule stated in 4 Wigmore on Evidence, section 2337: 'The privilege has for its object the security from apprehension of disclosure, a security in consequence of which confidences will be freely given and not withheld. The protection therefore extends only to communications, i. e., utterances, not acts—the reasoning being analogous to that which establishes a similar limitation for communication between attorney and client * * *' We think, therefore, that the purpose of the inquiry being to show the act of communicating and not the disclosures involved in the communications, the testimony does not come within the inhibition of the statute." In *People v. Peak* (1944), 66 Cal.App.2d 894, 903, 153 P.2d 464, it was stated with respect to letters passing between a husband and wife that "The purpose of section 1881 of the Code of Civil Procedure is to hold intact the confidence which naturally arises from the relationship of husband and wife. It is not the act of communication but the substance thereof that is held legally inviolate."

In an annotation in 10 A.L.R.2d 1389, 1390 (see also 4 A.L.R.2d 835), it is stated that "The cases considering the privilege appear to be roughly divisible into two classes, (1) those which require that, in order to be protected by the privilege, the in-

formation must have been conveyed intentionally, by a spouse actively relying upon the marital confidence, and (2) those which extend the privilege to all information derived by either spouse as a result of the marriage relation, and which would not have been known in the absence of such relation. * * * [P. 1396] The rule excluding a spouse's testimony as to communications from the other spouse has generally been held to prohibit only testimony as to the substance of the matter communicated * * *

Thus, in *Sampson v. Sampson* (1916), 223 Mass. 451, 112 N.E. 84, it was held that the statutory exclusion of "private conversations" between husband and wife did not prevent the wife from testifying to the fact of such a conversation, as well as to the action which she took as a result of the conversation, and that the court might properly draw inferences from the testimony of the conversation and the action taken as a result thereof.

With reference to business transactions, it was held in *Lurty's Curator v. Lurty* (1907), 107 Va. 466, 59 S.E. 405, 407, that where the husband had acted for himself and his wife in selling their joint property, a communication from him to her if it could "in any proper sense" be regarded as privileged "comes within the exception 'that the rule of privilege does not apply to communications between husband and wife with regard to a business matter in which he is acting as her agent.' [Citations.]" The action was by the wife to recover her share of the sale proceeds from her deceased husband's estate, and the statute in question, which prohibited husband or wife, without the consent of the other, from being "examined in any case as to any communication made by the one to the other while married," provided no exception (such as is contained in the California statute) in case of a civil action by one against the other.

Applying the various rules laid down by the cases to the situation here presented, the conclusion is inescapable that defendant failed to sustain his burden of showing that the evidence to which he objected called for or entailed a disclosure of any

marital communication, either confidential or otherwise. The only testimony of Mrs. Pipolo which comes even close to the ambit of the privilege was that decedent brought the December 16 check to her and placed it on her desk at the pharmacy, that immediately before it came into her possession she saw it in the hands of her husband, and that except for bank stamps the check as produced at the trial was in the same form as when she first saw it—i. e., it was payable to Pipolo and bore the word “loan” on its face. From the facts that for a number of years before marriage Mrs. Pipolo had “handled all of his banking for him,” and that before the marriage took place arrangements for the \$12,000 loan had been made in Mrs. Pipolo’s presence and the first \$6,000 check had been received by her, endorsed with Pipolo’s name and deposited in his bank account, it seems apparent that she was already fully cognizant of the circumstances of the transaction, that in handling the second as well as the first of the two checks she was acting as his employe or business assistant, and that no communication from husband to wife as such was intended or effected when Pipolo placed the second check on her desk. Her subsequent endorsement of it with his name and deposit of it in the Pipolo bank account, pursuant to customary practice initiated and authorized by power of attorney long before the marriage, likewise clearly did not constitute a marital communication. No error appears in the admission of the testimony of which defendant complains.

[3] Defendant next contends that plaintiff’s causes of action were founded on an oral agreement rather than on written instruments, and so were barred by the two-year limitations’ statute found in subdivision 1 of section 339 of the Code of Civil Procedure. This contention is without merit. Defendant concedes that the evidence is without conflict. The action is based upon two written instruments, i. e., checks with the word “loan” written upon their faces and both endorsed in writing by one to whom the evidence establishes de-

cedent had given full authority, both oral and written, to make such endorsements on his behalf. Consequently, as held by the trial court, the four-year limitations’ statute applies. (Code Civ.Proc., § 337; see *Lawrence Barker, Inc. v. Briggs* (1952), 39 Cal.2d 654, 661, 248 P.2d 897; *O’Brien v. King* (1917), 174 Cal. 769, 773, 164 P. 631; *Tagus Ranch Co. v. Hughes* (1944), 64 Cal.App.2d 128, 148 P.2d 79; *Hester & Wise v. Chinn* (Tex.Civ.App.1942), 162 S.W.2d 450, 451.) The facts that plaintiff in his original complaint alleged that he and decedent “entered into an oral agreement whereby” plaintiff agreed to loan \$12,000 to decedent and that pursuant to such oral agreement plaintiff delivered the two \$6,000 checks to decedent does not establish this action as one upon an oral rather than written obligation; the oral agreement was obviously merely preliminary to the delivery of the written checks upon which the action is based, and by which, as plaintiff alleges in his amended complaint, the loan was made.

[4,5] Finally, defendant urges that the trial court abused its discretion in denying his motion for a new trial upon the ground of newly discovered evidence. Affidavits submitted by defendant in support of his motion were answered by counter affidavits filed by plaintiff, and no abuse of discretion is shown from the fact that the trial court chose to decide the motion in accordance with the allegations of plaintiff’s affidavits rather than those of defendant. Affidavits are competent evidence where authorized by statute or where they are not objected to on proper grounds by the party against whom they are offered (*Falk v. Falk* (1941), 48 Cal.App.2d 780, 789, 120 P.2d 724; *Soares v. Ghisletta* (1934), 1 Cal.App. 2d 402, 404, 36 P.2d 668; *Mercantile Trust Co. v. Sunset, etc., Co.* (1917), 176 Cal. 461, 466, 168 P. 1037; *Williams v. Hawley* (1904), 144 Cal. 97, 102, 77 P. 762.)

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER and TRAYNOR, JJ., concur.

44 Cal.2d 785

Andrew V. McDONALD, Plaintiff and Appellant,
v.

SHELL OIL COMPANY, Incorporated, a corporation, Charles E. Neuhaus, et al., Defendants and Respondents.

L. A. 23543.

Supreme Court of California.
In Bank.

July 1, 1955.

Action by employee of independent contractor against oil company to recover for personal injuries suffered in accident occurring while independent contractor was working on land leased by oil company. The Superior Court, Ventura County, Gordon L. Howden, J., granted judgment of nonsuit. Employee appealed. The Supreme Court, Spence, J., held that where oil company had retained no control over work being performed at time of accident, and no oil company employees or foremen were present at time of accident, and oil company's employees had no knowledge that independent contractor was using equipment in a dangerous manner, oil company was not liable to employee for his injuries.

Judgment affirmed.

Opinion, 275 P.2d 922, vacated.

1. Appeal and Error ⇨927(3), 989

On appeal from judgment of nonsuit, Supreme Court viewed the evidence in light most favorable to plaintiff, and disregarded conflicts in evidence.

2. Master and Servant ⇨5

An "independent contractor" is one who enters service in the course of an independent employment or occupation, following his employer's desires only as to results of the work, and not as to means whereby it is to be accomplished.

See publication Words and Phrases, for other judicial constructions and definitions of "Independent Contractor".

3. Master and Servant ⇨315

The general supervisory right of an employer to control work being performed by an independent contractor so as to insure

satisfactory completion in accordance with terms of contract does not make employer of independent contractor liable for the latter's negligent acts in performing details of work.

4. Master and Servant ⇨318(1)

An employer of an independent contractor is not liable for injuries resulting from defective appliances used unless he has supplied them to independent contractor or has the privilege of selecting them, or the materials out of which they are made, or unless employer exercises active control over the men employed or operations of equipment used by independent contractor.

5. Master and Servant ⇨318(2)

Owner may retain a broad general power of supervision and control as to results of work so as to insure satisfactory performance by independent contractor, including the right to inspect, the right to make suggestions or recommendations as to details of the work, the right to prescribe alterations or deviations in work, without changing the relationship from that of owner and independent contractor or the duties arising from that relationship.

6. Master and Servant ⇨321

Fact that oil company after accident in which employee of oil company's independent contractor was injured, recommended use by independent contractor of safety device, and that oil company's foreman criticized method of piling casings by independent contractor, did not change relationship from that of owner and independent contractor.

7. Master and Servant ⇨321

Where oil company had no control of work being performed by independent contractor at time employee of independent contractor was injured, no employees or foremen of oil company were present at time of accident, and oil company's employees had no knowledge that equipment was being used by independent contractor in dangerous manner, oil company was not liable to employee for his injuries.

James C. Hollingsworth, Edward Henderson and Margaret Keller, Ventura, for appellant.

Bauder, Gilbert, Thompson & Kelly, Bauder, Gilbert, Thompson, Kelly & Veatch, Los Angeles, Churchill & Teague, E. Perry Churchill, Ventura, and W. I. Gilbert, Los Angeles, for respondents.

SPENCE, Justice.

[1] Plaintiff appeals from a judgment of nonsuit granted at his third trial, the two previous trials having resulted in jury verdicts for plaintiff followed by the granting of motions for new trial. Viewing the evidence in the light most favorable to plaintiff and disregarding conflicts in accordance with the settled rules applicable in testing the propriety of nonsuits, *Huffman v. Lindquist*, 37 Cal.2d 465, 468, 234 P.2d 34, 29 A.L.R.2d 485; *Palmquist v. Mercer*, 43 Cal.2d 92, 95, 272 P.2d 26, it nevertheless appears that the law precludes plaintiff from recovering damages from defendants Shell Oil Company and Neuhaus.

Plaintiff was an employee of Owens, an independent contractor engaged by defendant Shell to recover certain casing and to abandon an oil well located upon a Shell lease near Ventura. Plaintiff was injured while working, with three other employees of Owens, on a well-pulling rig owned by Owens. The rig and the four-man crew were furnished by Owens pursuant to his contract with Shell. The rig had a cathead, which is a revolving spool, and a catline, which is a piece of manila rope about an inch and a half thick. The catline had a hook on one end, and the other end was wrapped around the cathead. The cathead and catline were used to pick up equipment and pipe joints, and lay them down around the rig. The cathead had no safety clamp or lock to stop the lowering or raising operation and leave a weight on the catline. Such safety clamp will keep the catline in place so that the revolving cathead need not hold the weight. If the revolving cathead has no safety clamp, the catline is likely to burn as a result of the friction, and the object attached to the catline will fall. That is what happened here. Steel elevators weighing approximately 1,200 pounds were suspended on the catline about 24 to 30 feet in the air at the top of the drill pipe. No one was stationed at the controls of the

cathead. The friction of the revolving cathead, which was worn and grooved, caused the catline to burn and break, so that the suspended elevators fell on plaintiff, resulting in his serious injury. This procedure was contrary to that customarily followed by Owens' employees and constituted a dangerous and unusual practice. It was adopted at the time in question under the order of Owens' driller, who was in charge of the crew's work. While under its contract with Owens, Shell had the right to have a foreman on the job at all times, neither its general production foreman, defendant Neuhaus, nor any other of its employees was present when the accident happened.

Shortly prior to the accident Owens' employees had obtained from Shell's warehouse a new rope, which was installed as a catline on the rig. There was no provision in the contract indicating that Shell should provide such items for Owens' use on the job, and it was simply borrowed for the time as other pieces of equipment had been borrowed on previous occasions. Plaintiff makes no claim that this new rope or catline was in any way defective or contributed to the cause of the accident. But plaintiff does contend that Shell and its agent Neuhaus had and exercised control over the operations of Owens and knew, or should have known, of the absence of the safety clamp, and the worn and grooved condition of the cathead. On the other hand, defendants maintain that they did not actively interfere with or direct Owens in his independent operations, that they had no duty to provide safe equipment or appliances for the use of plaintiff, who was the employee of Owens, the independent contractor, and that the sole proximate cause of plaintiff's injuries was the negligence of Owens and Owens' employees.

[2-4] An independent contractor is one who renders service in the course of an independent employment or occupation, following his employer's desires only as to the results of the work, and not as to the means whereby it is to be accomplished. *Moody v. Industrial Acc. Comm.*, 204 Cal. 668, 670, 269 P. 542, 60 A.L.R. 299; *S. A. Gerrard Co. v. Industrial Acc. Comm.*, 17 Cal.2d 411,

413, 110 P.2d 377. The general supervisory right to control the work so as to insure its satisfactory completion in accordance with the terms of the contract does not make the hirer of the independent contractor liable for the latter's negligent acts in performing the details of the work. *Green v. Soule*, 145 Cal. 96, 99-100, 78 P. 337. An owner is not liable for injuries resulting from defective appliances unless he has supplied them or has the privilege of selecting them or the materials out of which they are made, *Hard v. Hollywood Turf Club*, 112 Cal.App. 2d 263, 274-275, 246 P.2d 716, or unless he exercised active control over the men employed or the operations of the equipment used by the independent contractor. *Willis v. San Bernardino Lbr. & Box Co.*, 82 Cal. App. 751, 756, 256 P. 224.

Under the terms of his independent contract, Owens was obligated to furnish the well-pulling rig equipment and he did furnish it; the work which was being performed at the time of the accident was the very work which Owens was required to perform under his contract; no severable portion of the work over which Shell had retained control was being performed; there were no Shell employees or foremen present at the time of the accident, and they had no knowledge that the equipment was being used in such unusual and dangerous manner as it was when plaintiff was injured; and Shell at no time, under the evidence, affirmatively assumed control, interfered with or actively directed any details of the work being performed by Owens' crew.

Plaintiff argues that Shell retained control over the methods and manner of performance of the work by Owens' crew because defendant Neuhaus, its general production foreman, testified that he was in charge of the abandonment of the oil well in question and had the equipment under his observation; that Shell always had a working production foreman on the job, though he never gave any "orders or directions to any man on the job" but dealt directly with Owens' foreman; that the Shell foreman and Owens received the same work sheets; that Shell had authority under its contract to stop Owens if it considered the work

unsatisfactory in any respect; that after the accident Shell conducted an investigation and its committee recommended the use of a catline clamp to replace riding the rope on the cathead, which safety device was thereafter installed by Owens' employees. Plaintiff further cites this provision in the contract between Shell and Owens as to "Inspection": "Without in any manner affecting Contractor's duties and obligations hereunder, material and workmanship at all times shall be subject to the inspection of Shell's representative, who shall be the sole judge and final authority concerning materials furnished and work done hereunder." Finally, plaintiff cites his own testimony as to his personal observation of a visit made to Owens' well-pulling rig by a Shell foreman; that the latter criticized the way in which the casing had been piled, stating to Owens' driller, "You know better than that, how to stack that casing"; that the Shell foreman then procured a truck and moved the casing.

[5, 6] However, the owner may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract—including the right to inspect, *Callan v. Bull*, 113 Cal. 593, 598-599, 45 P. 1017, the right to stop the work, *Fay v. German General Ben. Soc.*, 163 Cal. 118, 122, 124 P. 844, the right to make suggestions or recommendations as to details of the work, *S. A. Gerrard Co. v. Industrial Acc. Comm.*, supra, 17 Cal.2d 411, 414, 110 P.2d 377, the right to prescribe alterations or deviations in the work, *Green v. Soule*, supra, 145 Cal. 96, 99-100, 78 P. 337—without changing the relationship from that of owner and independent contractor or the duties arising from that relationship. Accordingly, Shell under the above-quoted contract provision had the right to inspect; its foreman was given the same work sheets as Owens so it could keep account of the general progress of the work; and it could stop Owens' work if satisfactory results were not being produced. Shell's investigation after the accident merely followed its customary policy in such circumstances, and its committee's report was an intercompany communication rather than directed to the

independent contractor Owens. But regardless of these factors, Owens' subsequent installation of the recommended safety device on the well-pulling rig merely accorded with Shell's right to make suggestions without assuming to direct the manner of performing the work. Likewise, the incident of criticism voiced by one of Shell's foremen with respect to the piling of the casing illustrates the exercise of control as to only the results of the work; he merely objected to the stacking as such and moved the casing, but he did not undertake to direct Owens or his employees as to the details of the method to be employed in accomplishing such work. All of these rights retained by Shell in the exercise of its general supervisory control accord with its interest in the ultimate result of the work without undertaking to direct the "means whereby it is to be accomplished". *S. A. Gerrard Co. v. Industrial Acc. Comm.*, supra, 17 Cal.2d 411, 413, 110 P.2d 377, 378.

Various factual situations in which an owner may be liable for injuries to the employee of the independent contractor should be distinguished: (1) This is not a case where the employee of the independent contractor was injured by some condition of the owner's premises over which the owner remained in control, and where the owner's duties to the employee were those owing to a business invitee, *Austin v. Riverside Portland Cement Co.*, 44 Cal.2d 225, 282 P.2d 69; *La Malfa v. Piombo Bros.*, 70 Cal. App.2d 840, 161 P.2d 964; *Bondini v. Amship Corp.*, 81 Cal.App.2d 751, 185 P.2d 94; *Oldham v. Atchison, T. & S. F. Ry. Co.*, 85 Cal.App.2d 214, 192 P.2d 516; (2) Nor is this a case where the owner furnished the equipment or was obligated by contract to do so, and the equipment proved to be defective, causing injury to the employee of the independent contractor, *Moran v. Zenith Oil Co.*, 92 Cal.App.2d 236, 206 P.2d 679; *Martin v. Food Machinery Corp.*, 100 Cal. App.2d 244, 223 P.2d 293; (3) Finally, this is not a case where the owner actively interfered with or arbitrarily assumed to direct the employees of the independent contractor as to the manner and method of performing the work. *Majors v. Connor*, 162 Cal. 131, 121 P. 371; see annotation: 44 A.L.R. 932. Likewise distinguishable is *Snow v. Marian*

Realty Co., 212 Cal. 622, 299 P. 720, where the owner's liability for damages stemmed not from responsibility for the negligent acts of the independent contractors but from the allowance of work on its property constituting a nuisance.

Plaintiff particularly relies on *Hargrave v. Acme Tool & Tester Co.*, 125 Cal.App.2d 34, 269 P.2d 913, to support his claim. However, there the employee of the independent contractor sustained injury under wholly different circumstances. A particular water-testing operation was being conducted separate and apart from the work to be performed under the independent contract; the owner was obligated both by contract and by custom to select the testing company; the owner retained the right to control and instruct as to the details in manner and method of conducting the separate testing operation; and the owner actively participated with the testing company in allowing the employee of the independent contractor to use defective appliances, which resulted in the injury. In such situation it was deemed a question of fact whether the owner by "failure to supply the proper plugs and safety chains and by permitting [the injured workman] to use the makeshift plugs [was] guilty of negligence which was the proximate cause of the accident." 125 Cal.App.2d at page 40, 269 P.2d at page 917. But none of these determinative factors is present here.

[7] We conclude that the record before us shows no basis for establishing liability on the part of defendants Shell Oil Company or their agent Neuhaus; and that the trial court properly granted the motion for nonsuit of these defendants at the close of plaintiff's case. In view of this conclusion, it becomes unnecessary to consider the effect of plaintiff's receipt of a compensation award against Owens through the Industrial Accident Commission as a bar to his prosecution of the present action against Shell Oil Company because of his industrial injury. See *Popejoy v. Hannon*, 37 Cal.2d 159, 171-172, 231 P.2d 484.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAY-NOR and SCHAUER, JJ., concur.

CARTER, Justice (concurring).

I concur in the judgment of affirmance. This is clearly an orthodox case where the sole cause of the injury was the negligence of the independent contractor (plaintiff's employer) and it does not fall within any of the situations in which an owner may be liable for injury to the employee of his independent contractor. Under the contract between defendant and Owens (plaintiff's employer) the latter was to remove the casing from defendant's oil well which was to be abandoned. Defendant had no right to and did not exercise any control over the performance by Owens of the contract; it did not own or have any control over the equipment to be used on the job, that equipment being owned and furnished by Owens, while defendant owned the oil well and premises on which it was located; the injury was not caused by any condition of the well or the premises, it being caused solely by the equipment owned and furnished by Owens; the injury was as much removed from defendant's sphere of responsibility as it would have been, had the injury occurred to one of Owens' truck drivers because of a defective truck furnished by Owens while he was hauling the equipment to the job site. There is no question of any nondelegable duty as the factors for the application of that rule are not present.



45 Cal.2d 10

CENTRAL BANK, a corporation, Petitioner,
v.

SUPERIOR COURT of the State of California, In and for the COUNTY OF ALAMEDA, Respondent,

Sam Perry, a Minor, etc., Real Party In Interest.

S. F. 19176.

Supreme Court of California.

In Bank.

July 12, 1955.

Rehearing Denied Aug. 11, 1955.

Proceeding upon bank's application for writ prohibiting Superior Court from tak-

ing further action in guardianship proceeding in which court indicated that, in exercise of its probate jurisdiction, it would require bank to account for sum which minor's guardian had deposited in her personal account but which she was supposed to hold as trustee for minor until he was 21 or upon further order of court. The Supreme Court, *Shenk, P. J.*, held that controversy between bank and guardian was one which should properly be determined by the Superior Court in exercise of its general jurisdiction, and, therefore, upon making of timely objection, the Superior Court, sitting in probate, should have transferred cause for trial or have it tried as court sitting in exercise of its general jurisdiction, so that jury would be available and that appeal could be taken in usual course.

Peremptory writ issued.

Opinions, 273 P.2d 906, 274 P.2d 904, vacated.

1. Courts ⇨200½

Guardian and Ward ⇨144

Generally, Superior Court, while sitting in probate, is without power to decide a disputed claim between an estate and a stranger thereto, and the same rule applies to guardianship proceedings under the Probate Code. Probate Code, § 1552.

2. Courts ⇨200½

If controversy is between an estate and those not strangers to the probate proceedings relating to the estate, the Superior Court, sitting in probate, has power to entertain the action and adjudicate the conflicting claims. Probate Code, §§ 613-615, 1431, 1552.

3. Courts ⇨198

Controversies, which are properly within an estate proceeding, should be adjudicated therein as necessary incidents of the proceeding.

4. Courts ⇨201

Controversy between estate or those acting in its behalf and the executor or administrator thereof acting in his personal capacity has sufficient connection with pending probate proceeding to be properly litigated therein.

5. Courts ⇨200½

The Superior Court, sitting in probate, is proper tribunal in which to determine controversies involving particular property claimed by estate and others where property is conceded by both parties to be or to have been acquired by claimant in course of the probate proceedings. Probate Code, § 202.

6. Guardian and Ward ⇨33

Power conferred, by Probate Code provisions pertaining to discovery and recovery of concealed or embezzled property of ward, upon the Superior Court, sitting in probate, ends with discovery of property and enforcement of the remedial powers of the statutes, and, where persons cited to appear and account in such proceedings are strangers to the estate, controversy must be determined by the Superior Court in exercise of its general jurisdiction. Probate Code, §§ 613-615.

7. Guardian and Ward ⇨123

Where minor's mother, who was guardian of his person and estate, had, without authority, deposited to her personal bank account check which stated that it was to be deposited in account of minor, with mother as trustee, and there to remain until minor became of age or upon further order of court, controversy between bank and mother, in her capacity as guardian, whether bank should be compelled to pay into an account for benefit of minor amount which mother had converted was one which should have been determined by the Superior Court in exercise of its general jurisdiction, not as court sitting in probate. Probate Code, §§ 613-615, 1552; West's Ann.Const. art. 1, § 7.

8. Jury ⇨14(1)

Action against bank, in which plaintiff alleged that bank had concealed and converted to its own use certain money due and owing plaintiff, bore earmarks of action in conversion and, as such, was one at law and subject to demand by either party for jury trial. West's Ann.Const. art. 1, § 7.

Lew M. Warden, Jr., Oakland, for real party in interest.

SHENK, Presiding Justice.

This is an application for the writ of prohibition to prevent the respondent superior court from taking further action in a guardianship matter in which it indicated that in the exercise of its probate jurisdiction it would require the petitioner Central Bank to account for \$4,011.71, deposited therein by the guardian in her personal account.

In 1949 in a regular proceeding in the respondent court sitting in probate, Bennie L. Perry, the mother of Sam Perry, a minor, was duly appointed and qualified as the guardian of his person and estate, and furnished the required bond. Thereafter the court approved the compromise of a claim of the minor in an action for damages for personal injuries and entered the following order pursuant to section 1431 of the Probate Code: "It is further ordered that the net sum remaining, to wit, \$4,011.71, be deposited in the Central Bank, * * * in a savings account in the name of said minor with the petitioner [Bennie L. Perry] as trustee thereof, without bond, and there to remain until said minor attains the age of twenty-one years, or upon further order of this court."

A copy of that order was not delivered to the Central Bank and there is no evidence that the Bank had knowledge of it prior to the present proceeding. A check in the amount of \$4,011.71 made payable to the bank was delivered to the mother, Bennie L. Perry. On the back of the check the following notation had been typed: "To be deposited to the account of Sam Perry, a minor, with Benny L. Perry, as Trustee, said funds to remain until Sam Perry attains the age of twenty-one years, or upon further order of Court." The mother, without authority of court or otherwise, presented the check to the Central Bank for deposit in her own personal account and the amount thereof was so credited. On the reverse side of the check are two obviously rubber stamp endorsements, the first being, "Credited account of within named payee, absence of endorsement guaranteed by Central Bank,

Fitzgerald, Abbott & Beardsley and Robert S. Rutledge, Oakland, for petitioner.
No appearance for respondent.

Oakland, Calif.", and the second, "Pay to the order of any Bank, Banker or Trust Co. All prior endorsements guaranteed. Apr. 20 '49, 4001. Central Bank, Oakland, Calif." The check bears the notation "Paid" by perforation.

Thereafter the mother withdrew those funds (with the exception of \$5 or less) from her personal account and converted them to her own use. The father of the minor child, who is the divorced husband of the mother, obtained information of the defalcation on the part of the mother and prepared to take proceedings against her to compel her to restore and preserve the funds for the benefit of the minor. The mother then, in her capacity as guardian of the minor and in his behalf, brought an action against the bank to compel it to pay into an account for the benefit of the minor the amount of money which she had converted to her own use from the proceeds of the check. The complaint stated facts above set forth and further alleged that "plaintiff is informed and believes and therefore alleges that the defendant has concealed and converted to its own use the aforesaid sum of money due and owing to the plaintiff." The prayer was that a citation issue, and the following citation was issued and directed to the bank: "You are hereby cited and required to appear in the above entitled proceeding * * *, then and there to show cause, if any you have, why you should not be required to be examined and to do the acts as prayed for in plaintiff's complaint herein."

Section 1552 of the Probate Code, relating to guardianship proceedings authorizes a court to cite a suspected person and to "examine and proceed against him on such charge in the manner provided in this code * * *." The court purported to proceed under that section and sections 613, 614 and 615 of the Probate Code. These latter sections relate to probate proceedings and as applicable here provide for the citation and examination of one to whom assets of an estate have been entrusted. The court may require such a person "to render a full account, on oath, of any moneys, accounts, or other property or papers belonging to the estate, which have come to his possession,

and of his proceedings thereon * * *." § 615, Probate Code.

A hearing was had on the citation at which testimony was taken. The court later filed a memorandum in which it announced its intention of making a finding that the bank had notice of a trust impressed upon it and that it held the sum of \$4,011.71 for the account of the minor. Thereupon the bank commenced the present proceeding and an alternative writ was issued.

[1, 2] The primary question is whether the respondent court sitting in probate can adjudicate a controversy between the bank and the guardianship estate under the undisputed facts, or whether the controversy must be decided by the court in the exercise of its general jurisdiction. It is the general rule that the superior court while sitting in probate is without power to decide a disputed claim between an estate and a stranger thereto. *Schlyen v. Schlyen*, 43 Cal.2d 361, 372, 273 P.2d 897; *In re Estate of Dabney*, 37 Cal.2d 672, 234 P.2d 962. The same rule applies to guardianship proceedings under the Probate Code. § 1552, Probate Code. But if the controversy is between an estate and those not strangers to probate proceedings relating to the estate, the court sitting in probate has power to entertain the action and adjudicate the conflicting claims. In such a case the contest is often referred to as between those in "privity" with the estate. In the *Schlyen* case, *Schlyen v. Schlyen*, supra, 43 Cal.2d 361, at page 373, 273 P.2d 897, at page 903, it is said: "The reasons for the * * * rule run through the numerous cases on the subject and are many. The determination of such a controversy is an incident to the proper settlement of the estate. *Stevens v. Superior Court*, supra, 155 Cal. 148, 99 P. 512. All of the parties to the proceedings are in privity with the estate and it is their distributive rights that are affected by the proceeding in probate. * * * It is because of the foregoing and perhaps other reasons that the courts have said that a controversy of this nature should be adjudicated in probate. It is certainly true that the court in a probate proceeding is concerned with the settlement of the estate and not with controversies between the estate and strangers, the

adjudication of which is the function of the court in the exercise of its general jurisdiction."

[3] From the foregoing it follows that controversies properly within an estate proceeding should be adjudicated therein, that is, as necessary incidents of the proceeding. The question then is whether the bank in this case is in "privity" with the guardianship estate in the sense that the term has been employed in the decisional law on the subject.

[4] A review of the decisions reveals that in those cases where a controversy has been held to have a sufficient connection with a pending probate proceeding to be properly litigated therein the controversy is one of two particular types. The first and most common is that between the estate or those acting in its behalf and the executor or administrator thereof acting in his personal capacity. *Schlyen v. Schlyen*, supra, 43 Cal.2d 361, 273 P.2d 897; *In re Estate of Roach*, 208 Cal. 394, 281 P. 607; *Bauer v. Bauer*, 201 Cal. 267, 256 P. 820; *In re Estate of Fulton*, 188 Cal. 489, 205 P. 681; *Stevens v. Superior Court*, 155 Cal. 148, 99 P. 512; *In re cf. Estate of Klumpke*, 167 Cal. 415, 139 P. 1062, where the court apparently overlooked the fact that the surviving spouse was also the personal representative. The propriety of the determination by the court sitting in probate in such a situation is said to be "implied in the power to settle the final account" and the "power to determine as against an executor what property in his hands belongs to the estate." *Stevens v. Superior Court*, supra, 155 Cal. 148, 151, 99 P. 512, 517; see also *In re Estate and Guardianship of Vucinich*, 3 Cal.2d 235, 243, 44 P.2d 567; cf. *Estate of Haas*, 97 Cal. 232, 31 P. 893, 32 P. 327, distinguished and limited by *Stevens v. Superior Court*, supra, 155 Cal. at page 152, 99 P. 512 and by *Estate of Burdick*, 112 Cal. 387, 391, 44 P. 734. The essential privity in those cases is that arising out of the nature of the relationship existing between the parties to the controversy. It is often stated that the power of the court in such situations is limited to those cases "where the executor or other personal representative claims the

property in his individual capacity." *In re Estate and Guardianship of Vucinich*, supra, 3 Cal.2d 235, 243, 44 P.2d 567, 570; see also *Wilkerson v. Seib*, 20 Cal.2d 556, 562, 127 P. 2d 904. In any event we are referred to no case wherein the essential relationship of the parties to an estate has been extended to include any other than an executor or administrator except perhaps in the case of one purporting to assert a personal right derived through the executor's or administrator's official capacity. Thus in *Re Estate of Troy*, 92 Cal.App. 352, 268 P. 426, the rule was applied to the claim of an attorney of the representative of the estate into whose hands property of the estate had come, and in *Re Estate of De Barry*, 43 Cal. App.2d 715, 111 P.2d 728, it was held that where the attorney was deceased the court sitting in probate could properly determine the validity of a similar claim asserted by the attorney's estate. See also *In re Estate of Kafitz*, 51 Cal.App. 325, 196 P. 790. But the rule has not been extended to include others, as for example, a surviving spouse of a decedent, where he or she was not also the representative of the estate although such surviving spouse may or may not also have been an heir of the estate with respect to other property than that involved in the immediate controversy. See *In re Estate of Niccolls*, 164 Cal. 368, 373, 129 P. 278; *Merola v. Superior Court*, 125 Cal.App.2d 1, 4, 269 P.2d 664; *Wilson v. Superior Court*, 101 Cal.App.2d 592, 225 P.2d 1002; *In re Estate of Kurt*, 83 Cal.App. 2d 681, 683, 189 P.2d 528. And it has been held that where one claims all the assets of an estate undergoing probate proceedings to be his property by virtue of a partnership agreement with the decedent he is a stranger to the estate and cannot be heard to assert such claim in those proceedings. *In re Estate of King*, 199 Cal. 113, 248 P. 519; *In re Estate of Abdallah*, 80 Cal.App.2d 634, 182 P.2d 596.

[5] The other situation in which the court sitting in probate has been held to be the proper tribunal in which to determine controversies involving particular property claimed by the estate and others is that where the property involved is conceded by both parties to be or to have been acquired

by the claimant in the course of probate proceedings. The essential element of privity in such cases arises out of the nature of the claim to the property, rather than the nature of the relationship of the parties involved as in the first situation. Thus in *Heydenfeldt v. Superior Court*, 117 Cal. 348, 49 P. 210, the rule was applied to a distributee who had received property of the estate under a decree afterwards set aside. And in *Re Estate of Troy*, supra, 92 Cal.App. 352, 268 P. 426 and *In re Estate of De Barry*, supra, 43 Cal.App.2d 715, 111 P.2d 728, the attorneys for the representatives of the estates admittedly withheld assets of the estate but claimed they were entitled to do so as set-offs against their purported claims for fees due them. Privity of this nature is also recognized in a line of cases involving the transfer of community property upon the death of one spouse. It is stated that the surviving husband's claim to his share of community property is adverse to the estate as it is not subject to administration and does not pass through probate proceedings. *Makeig v. United Security Bank & Trust Co.*, 112 Cal.App. 138, 296 P. 673. As such he is not claiming in privity with the estate but adversely to it since his community interest does not pass through the probate proceedings and his claim cannot be litigated therein if objection be made. *In re Estate of Klumpke*, supra, 167 Cal. 415, 421, 139 P. 1062; *In re Estate of Kurt*, supra, 83 Cal.App.2d 681, 683, 189 P.2d 528; see also *In re Estate of King*, supra, 199 Cal. 113, 117-118, 248 P. 519. But a surviving wife's claim to her share of the community property is said to come to her through probate, Probate Code, § 202, so that her claim is in privity with the estate and should be litigated therein. *In re Burdick's Estate*, supra, 112 Cal. 387, 44 P. 734; *In re Estate of Kurt*, supra, 83 Cal.App.2d 681, 684, 189 P. 2d 528; *Colden v. Costello*, 50 Cal.App.2d 363, 122 P.2d 959.

In the present case there is no relationship between the bank and the estate such as would bring the bank into privity similar to that of the representative of the estate, and no reason appears why the doctrine should be broadened to include one who stands in the position of the bank. Nor does

privity attach by the nature of the claims asserted to particular property conceded to be or to have been derived through the guardianship proceedings. It is claimed by the guardian but vigorously denied by the bank that it had notice of the trust condition imposed on the fund or that the money thereof was deposited as an asset of the guardianship estate. It is without question that the \$4,011.71 represented by the check was deposited in the personal account of Bennie L. Perry and has been dissipated by withdrawals by her to the point where for all practical purposes that particular fund no longer exists. The bank refuses to concede that the money now sought was derived through the guardianship estate. Its claim of right to title to the fund sought by the plaintiff is entirely independent of the guardianship proceedings and does not fall, therefore, into that class of privity with estate proceedings arising out of the nature of the claims asserted by the parties.

[6] As stated, the proceedings in the respondent court purport to have been commenced under the authority of sections 613-615 and 1552 of the Probate Code. Where the persons cited to appear and account in such proceedings are strangers to the estate the code sections create no exception to the rule requiring that the controversy be determined by the court in the exercise of its general jurisdiction. The power which they confer on the court sitting in probate ends with the discovery of the property and the enforcement of the remedial powers of the statute. Pursuant to such authority the court cannot determine issues of title nor order property to be deposited or delivered to the executor or administrator. *Ex parte Casey*, 71 Cal. 269, 271, 12 P. 118; *Merola v. Superior Court*, supra, 125 Cal.App.2d 1, 4, 269 P.2d 664; *McCarthy v. Superior Court*, 64 Cal.App.2d 468, 472, 149 P.2d 55.

[7] From the foregoing it follows that the controversy in the present case is one which properly should be determined by the court in the exercise of its general jurisdiction. The bank does not deny that as a stranger to the estate a claim against it may be adjudicated independently of the guardianship proceeding. Such an action was in fact commenced against the bank in the re-

spondent Superior Court on March 8, 1954, by Sam Perry, through his mother as his guardian. That action is now pending and summons has been issued. Its purpose is the recovery of the identical fund sought in the guardianship proceeding.

[8] Not only is the foregoing conclusion compelled by an analysis of the decisional law, but also it is the better rule for practical reasons and in fairness and justice to the parties. The only allegation as to the liability of the bank is that it has "concealed and converted to its own use the aforesaid money due and owing the plaintiff." The action is one in which issues of fact have been joined and bears all the earmarks of an action in conversion. See *Lowe v. Ozmun*, 137 Cal. 257, 260, 70 P. 87; *Perkins v. Maier & Zobelein Brewery*, 134 Cal. 372, 375, 66 P. 482; 24 Cal. Jur. 1038 and cases there cited. As such it is an action at law (24 Cal. Jur. 1034) and subject to a demand by either party for a trial by jury Const. art. I, § 7; See *Vallejo & N. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 556, 147 P. 238; *Koppikus v. State Capitol Com'rs*, 16 Cal. 249; 15 Cal. Jur. 323, 325, and to the right of an appeal from a judgment on issues properly framed. In *Ex parte Casey*, supra, 71 Cal. 269, 12 P. 118, the court sitting in probate had ordered Mrs. Casey to pay over to an estate certain monies which she claimed to have come to her independently of the probate proceedings. She refused to obey the order on the ground that the court lacked authority to make it in a proceeding pursuant to sections 1459, 1460 and 1461 of the Code of Civil Procedure (now §§ 613, 614 and 615 of the Probate Code), and was cited for contempt. On appeal this court held that the trial court could not hold Mrs. Casey in contempt unless it could properly determine title to the property, which it could not do in a probate proceeding. As reason for its decision the court stated, 71 Cal. at page 270, 12 P. 118: "The title upon which his adverse claim was founded may be invalid. It may have been obtained by fraud-

ulent and corrupt practices. It is a principle which underlies all institutions and forms of government that no man can be deprived of his property, except in proceedings according to law, unless it be confiscated for the necessities or good of the public. If his title is claimed to be invalid or fraudulent and void, he is entitled to be heard according to the forms of law. Proceedings to punish him for contempt, for not delivering it up without a trial according to law, to another who claims it, are not the appropriate proceedings for the trial of an issue of title. The issue as to such title should be tried in an appropriate action, in which the verdict of a jury or the findings of the court may be had upon issues properly framed for the purpose of definitely determining the question of title." *Ex parte Hollis*, 59 Cal. [405] 406-413." See also *Wilson v. Superior Court*, supra, 101 Cal. App. 2d 592, 225 P. 2d 1002. It is to be noted, of course, that had the bank in the present case refused to obey the threatened order of the respondent court it would have found itself in the same position as Mrs. Casey. The same reasons are here present for requiring that title to the fund involved be tried in the court in the exercise of its general jurisdiction.

It is concluded that the respondent court sitting in probate could not properly adjudicate the rights of the claimants to the fund in the guardianship proceedings, and that it was the duty of the court, when objection to its jurisdiction was, as here, timely made, to have transferred the cause for trial or to have tried it as a court sitting in the exercise of its general jurisdiction where a jury could be made available and an appeal taken from the judgment in the usual course.

Let the peremptory writ issue for the limited purpose of prohibiting the respondent court from adjudicating the pending cause in the exercise of its probate jurisdiction.

GIBSON, C. J., and CARTER, TRAYNOR, and SCHAUER, JJ., concur.

44 Cal.2d 793

Vernon LeRoy SNYDER, Plaintiff and
Appellant,
v.

SOUTHERN CALIFORNIA EDISON CO.,
Defendant and Respondent.

Steve James GRADICH, Plaintiff and
Appellant,
v.

SOUTHERN CALIFORNIA EDISON CO.,
Defendant and Respondent.

L. A. 23566, 23567.

Supreme Court of California.
In Bank.

July 1, 1955.

Actions by linemen employees of an independent contractor against the power company for injuries caused by fall of power pole negligently set by contractor for company. From judgment for defendant in Superior Court, Los Angeles County, H. S. Farrell, J. pro tem., the employees appealed. The Supreme Court, Carter, J., held that order of Public Utilities Commission requiring that power poles be set in soil to a minimum depth imposed a non-delegable duty upon power company and question of whether company had complied with statutory requirement of doing everything necessary or proper to see that rules of Commission were complied with should have been submitted to the jury.

Reversed.

Opinion, 276 P.2d 638, vacated.

1. Electricity ⚡17

Where statute required that public utility do everything necessary or proper to see that rules of Public Utilities Commission are complied with and the rule of such Commission required the setting of power poles at a minimum depth, statute imposed upon the public utility a duty which could not be delegated to an independent contractor and did not relieve utility from liability for contractor's failure to comply with such rule. Public Utilities Code, §§ 702, 2106, 2107.

2. Public Service Commissions ⚡8

Rules of Public Utilities Commission are promulgated for safety of workmen as well as public.

3. Public Service Commissions ⚡6.6

Utilities may not operate except by permission of Public Utilities Commission.

4. Public Service Commissions ⚡8

Statute requiring utility to do everything necessary or proper to secure compliance with rules of Public Utilities Commission does not mean that utility may evade the duty by hiring an independent contractor. Public Utilities Code, §§ 702, 2106, 2107.

5. Electricity ⚡19(6)

In action by linemen employees of independent contractor against utility company for injuries caused by falling of power pole set by contractor for utility at less than required minimum depth, question of whether utility did everything necessary or proper, as required by statute, to secure contractor's compliance with rule respecting minimum depth for poles, presented a factual question for jury. Public Utilities Code, § 702.

6. Electricity ⚡19(13)

In actions by linemen employees of an independent contractor against power company for injuries caused by fall of power pole which had been set by contractor for company at less than required depth, requested instructions that it was power company's duty to do everything necessary and proper to secure compliance with rule respecting minimum depth at which power pole was set and if it failed to do so it was negligent as a matter of law and that it was not sufficient discharge of such duty by company to merely enter into a contract with independent contractor to do job, should have been given. Public Utilities Code, § 702.

Alex D. Fred, Edward Feldman and Bodle & Landye, Los Angeles, for appellants.

Crider, Tilson & Ruppe, Los Angeles, and E. Spurgeon Rothrock, Corona, for respondents.

CARTER, Justice.

Plaintiffs, Snyder and Gradich, appeal from judgments entered upon verdicts by a jury for defendant, Southern California Edison Company, in consolidated actions, to recover damages for personal injuries alleged to have been caused by defendant's negligence.

Defendant is a public utility engaged in the manufacture, sale and distribution of electricity to the public. It entered into a contract with the J. W. Wilson Company under which that company as independent contractor was to repair and construct power lines for defendant on its premises along Latigo road and agreed to comply with all the rules and regulations of the Public Utilities Commission and all the laws pertaining to public utilities in carrying out the contract and to be liable for failure to do so. About 99% of Wilson Company's work was for defendant. Wilson furnished the men and equipment, and defendant the material such as poles. In connection with the work defendant employed an inspector whose duty it was to see that the work complied with the contract and specifications.

In the instant case Wilson was engaged, under the contract, in the Santa Monica Mountains in installing a new feeder power line and replacing deteriorated poles in a 16,000-volt line. Plaintiffs were two of its employees on that project.

While plaintiffs, as linemen, were installing switches at the top of a wire-supporting pole on the feeder line which had been installed earlier that day, the pole began to lean toward the 16,000-volt line. The workmen below endeavored successfully to prevent its contact with the 16,000-volt line but the pole fell to the ground injuring plaintiffs. The 50-foot pole had been installed by Wilson under its contract. The upper part of the soil at the point of installation was loose shale. The pole was less than 6½ feet in the ground. Rule 49.1C of General Order No. 95 of the Public Utilities Commission requires that 50-foot poles be placed in firm

soil at a minimum depth of 6½ feet and that "deeper settings or special methods of pole setting * * * be resorted to" where the soil is not firm. Defendant's inspector was on the job in the general area but was not near the pole in question. The record shows that it was not his policy to examine the pole setting depths. In adopting Order 95 the commission stated: "Rules of the character here before the Commission, for modification and revision, find a wide application in public utility operation and service. In these respects, the rules not only provide a standard of safety, *both to the workman and to the public*, but likewise materially contribute to the standard of service rendered and also afford a means of coordination between different types of lines, such as power and communication." (Emphasis added; 43 C.R.C. 872, 874.) Rule 95 itself provides that the purpose of the rules "** * * is to formulate * * * uniform requirements for overhead line construction, the application of which will * * * secure safety to persons engaged in the construction, maintenance, operation, or use of overhead electrical lines and to the public in general.*" (Emphasis added.)

The public utilities law¹ provides: "Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission in the matters specified in this part, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees." Pub.Util.Code, § 702; formerly Public Utilities Act, Stats. 1915, p. 115, § 30. "Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom. If the court finds that the act or omission was

1. We refer to that law as appearing in the Public Utilities Code although at the time here involved that code had not

been adopted but the prior statute was the same.

wilful, it may, in addition to the actual damages, award exemplary damages. An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person.

"No recovery as provided in this section shall in any manner affect a recovery by the State of the penalties provided in this part or the exercise by the commission of its power to punish for contempt." Pub.Util. Code, § 2106; formerly Public Utilities Act, *supra*, § 73. "Any public utility which violates or fails to comply with any provision of the Constitution of this State or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars (\$500) nor more than two thousand dollars (\$2,000) for each offense." Pub.Util.Code, § 2107; formerly Public Utilities Act, *supra*, § 76. "Every officer, agent, or employee of any public utility, who violates or fails to comply with, or who procures, aids, or abets any violation by any public utility of any provision of the Constitution of this State or of this part, or who fails to comply with any part of any order, decision, rule, direction, demand, or requirement of the commission, or who procures, aids, or abets any public utility in such violation or non-compliance in a case in which a penalty has not otherwise been provided for such officer, agent, or employee, is guilty of a misdemeanor and is punishable by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment." Pub.Util.Code, § 2110; formerly Public Utilities Act, *supra*, § 77.

The jury was instructed at defendant's request that rule 49.1C of Order 95 and sections 702 and 2106 of the Public Utilities Code contained the provisions heretofore set forth but was also instructed that if the pole was set in violation of the rule by Wilson, an independent contractor, and if

defendant did not instruct or order Wilson to so set it defendant was not negligent. Plaintiffs' requested instructions that if the rule was violated defendant would be negligent as its duty under the rule and statute could not be delegated to an independent contractor, were refused. The main question presented, therefore, is whether the duty imposed upon defendant by the statute and commission could be delegated to an independent contractor so as to insulate defendant from liability because of the failure of the contractor to perform the duties.

This court recently stated: "The general rule of nonliability of an employer for the acts of an independent contractor is subject to numerous exceptions. See *Brown v. George Pepperdine Foundation*, 23 Cal.2d 256, 143 P.2d 929; *McCordic v. Crawford*, 23 Cal.2d 1, 142 P.2d 7; *Taylor v. Oakland Scavenger Co.*, 17 Cal.2d 594, 110 P.2d 1044; *Snow v. Marian Realty Co.*, 212 Cal. 622, 299 P. 720; *Luce v. Holloway*, 156 Cal. 162, 103 P. 886; Rest., Torts, §§ 410-429; *Prosser on Torts*, 1941, p. 486 et seq.; *Harper on Torts*, 1933, p. 645 et seq.; [*Drennen Co. v. Jordan*, 181 Ala. 570, 61 So. 938], 23 A.L.R. 984. * * *

"It is well settled that the possessor of land is answerable for the negligent failure of an independent contractor to put or maintain buildings and structures thereon in reasonably safe condition. See Rest., Torts, § 422." *Knell v. Morris*, 39 Cal.2d 450, 456, 247 P.2d 352, 354. The rule was specifically applied to the operation by a highway common carrier, a public utility, of some of its trucks through an independent contractor. The court stated: "Plaintiffs, on the other hand, contend that under both the common law and certain regulations of the Public Utilities Commission, C.M.T., as a highway common carrier, could not delegate its duties to an independent contractor so as to escape liability for their negligent performance.

"The common law principle upon which plaintiffs rely has been enunciated in section 428 of the Restatement of Torts,² and has

2. "An individual or a corporation carrying on an activity which can be law-

fully carried on only under a franchise granted by public authority and which

frequently been applied to impose liability upon franchised common carriers who have engaged independent contractors to transport goods over the public highways. * *

"C.M.T., operating as a highway common carrier, is engaged in a 'business attended with very considerable risk' * * * and the Legislature has subjected it and similar carriers to the full regulatory power of the Public Utilities Commission to protect the safety of the general public. * * * The effectiveness of safety regulations is necessarily impaired if a carrier conducts its business by engaging independent contractors over whom it exercises no control. If by the same device it could escape liability for the negligent conduct of its contractors, not only would the incentive for careful supervision of its business be reduced, but members of the public who are injured would be deprived of the financial responsibility of those who had been granted the privilege of conducting their business over the public highways. Accordingly, both to protect the public from financially irresponsible contractors, and to strengthen safety regulations, it is necessary to treat the carrier's duties as nondelegable." *Eli v. Murphy*, 39 Cal.2d 598, 599-600, 248 P.2d 756, 757. The rule of nondelegable duty has been applied to the maintenance of premises by a landlord through an independent contractor with respect to his tenants or their employees, *Brown v. George Pepperdine Foundation*, 23 Cal.2d 256, 143 P.2d 929; *Finnegan v. Royal Realty Co.*, 35 Cal. 2d 409, 218 P.2d 17; to the owner of an amusement concession operated by an independent contractor when a patron was injured, *McCordic v. Crawford*, 23 Cal.2d 1, 142 P.2d 7; *Bayse v. Craft's Golden State Shows*, 43 Cal.App.2d 782, 111 P.2d 746; to the owner of property who, through an independent contractor, so repaired part of the premises as to cause damage to the one occupying the floor below. *Knell v. Morris*, supra, 39 Cal.2d 450, 247 P.2d 352. Where an activity involving possible danger to the public is carried on under public franchise or authority the one engaging in the activity

may not delegate to an independent contractor the duties or liabilities imposed on him by the public authority, *Eli v. Murphy*, supra, 39 Cal.2d 598, 248 P.2d 756; *Finnegan v. Royal Realty Co.*, supra, 35 Cal.2d 409, 218 P.2d 17; *Taylor v. Oakland Scavenger Co.*, 17 Cal.2d 594, 110 P.2d 1044; *Snow v. Marian Realty Co.*, 212 Cal. 622, 299 P. 720; *Luce v. Holloway*, 156 Cal. 162, 103 P. 886; *Colgrove v. Smith*, 102 Cal. 220, 36 P. 411, 27 L.R.A. 590; *Spence v. Schultz*, 103 Cal. 208, 37 P. 220; *Lehman v. Robertson Truck-A-Way*, 122 Cal.App.2d 82, 264 P.2d 653; *Smith v. San Joaquin etc. Power Corp.*, 59 Cal.App. 647, 211 P. 843; *Kirk v. Santa Barbara Ice Co.*, 157 Cal. 591, 108 P. 509; *Barrabee v. Crescenta Mutual Water Co.*, 88 Cal.App.2d 192, 198 P.2d 558; *Gilbert v. Rogers*, 117 Cal.App.2d 712, 256 P.2d 574, and generally speaking there are many situations in which the person cannot absolve himself from liability by delegating his duties to an independent contractor. 27 Am.Jur., Independent Contractors, §§ 48-50; 23 A.L.R. 985; 29 A.L.R. 736; 20 A.L.R.2d 868; Rest., Torts, §§ 410-429; Prosser on Torts, p. 486 et seq.; Harper, Law of Torts (1933) § 292. The matter is discussed by Harper, as follows: " * * * one who employs an independent contractor is, as a general rule, not liable for the misconduct of the latter or of his servants while acting within the scope of the contract. The idea responsible for this general rule of nonliability is the want of control and authority of the employer over the work, and the consequent apparent harshness of a rule which would hold one responsible for the manner of conducting an enterprise over which he wants the authority to direct the operations. Again, so far as the activity immediately causing the injury is concerned, it is the contractor rather than the contractee who is the entrepreneur and who should ordinarily carry the risk. * * *

"[There are] certain exceptions and apparent exceptions which, with increasing tendency, seem likely to overshadow in importance and scope the rule itself. * *

involves an unreasonable risk of harm to others, is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity.'"

Cal.Rep. 285-286 P.2d-25

A number of situations exist, however, which are actual cases of vicarious liability, that is, liability for the misconduct of the independent contractor and his servants although the contractee has himself been free from personal fault. A number of factors concur to constitute the grounds of policy for such allocation of risk from the immediate to the general entrepreneur. These considerations, in fact, constitute such a powerful argument for the liability of the employer of an independent contractor that it would seem highly desirable for the courts to adopt the rule of liability and confine nonliability to a few exceptional cases. This, the American courts, at least, have not yet done, but there is every reason to believe that sound social policy will induce the courts to make further inroads upon the rule of nonliability in this class of cases.

"The first genuine case of liability for misconduct of an independent contractor or his employees is the case of the so-called 'nondelegable' duty. Where the law imposes a definite, affirmative duty upon one by reason of his relationship with others, whether as an owner or proprietor of land or chattels or in some other capacity, such persons can not escape liability for a failure to perform the duty thus imposed by entrusting it to an independent contractor. * * * It is immaterial whether the duty thus regarded as 'nondelegable' be imposed by statute, charter or by common law. Thus where a railroad company was required by statute to construct fences along its right of way and it employed a contractor to construct the fences, the company was liable for the loss of a cow killed by reason of the contractor's failure to build the fences as required by the statute. The same rule applies to the duty imposed upon railroads to erect gates at crossings, to construct cattle guards, and to maintain crossings in good condition. So, too, the owner of land is liable for the failure of an independent contractor to perform affirmative duties toward invitees and others to whom the occupier is bound to keep his premises in a reasonably safe condition. * * *

"Another large group of cases predicate liability on the part of the employer of an independent contractor for the misconduct

of the latter in the performance of certain 'intrinsically dangerous' work. The policy of allocating to the general entrepreneur the risks incident to his activity is obvious when the activity carries with it extraordinary hazards to third persons. * * * [T]he principle may be generalized that one who employs an independent contractor to perform work which is either extra-hazardous unless special precautions are taken or which is inherently dangerous in any event is liable for negligence on the part of the independent contractor or his servants in the improper performance of the work or for their negligent failure to take the necessary precautions. This broad principle has been applied not only to excavations on private property, but on the public highway as well, to blasting operations, to the construction of a dam, to the use of fire in clearing land, to the demolition of walls and old buildings, and to several other types of intrinsically dangerous enterprises.

"In both of the above types of situation in which the employer of an independent contractor is liable for the negligence of the contractor or his servants, there is the limitation that such liability extends only to negligence in the failing to take the necessary precautions, failing to adopt a reasonably safe method, or in failing to produce a result which it is the duty of the employer—contractee to have attained. Such liability does not ordinarily extend to so-called 'collateral' or 'casual' negligence on the part of the contractor or his servants in the performance of the operative detail of the work. The negligence for which the employer is liable, as general entrepreneur, must be such as is intimately connected with the work authorized and such as is reasonably likely from its nature. Negligence in the doing of ordinary acts, not necessarily incidental, but only accidentally connected with the work, do not fall within the policy of the law which imposes the extraordinary liability upon the employer.

"The distinction between 'collateral' or 'casual' negligence and negligence of the contractor so intimately connected with the work to be done that the employer-contractee is liable therefor is a shadowy one

at best." (Harper, Law of Torts (1933), § 292.)

[1-3] Contrary to defendant's contention the statutes and rules of the commission do impose a direct and positive duty on the operator of a utility. This is evident from the regulations heretofore quoted. The rules were promulgated for the safety of workmen as well as the public and civil penalties are imposed on the utility for failure to comply with them and criminal penalties are imposed on the officers and employees of the utility. Utilities may not operate except by permission of the commission which imposes the duties heretofore set forth together with other regulations pertinent to the operation of such organizations.

[4] Utility companies, either electric, telephone, or telegraph, are responsible for nearly all pole installations. In the law relating to such utilities there is no express provision that such duties may be delegated. The requirement in section 702 of the Utilities Code, *supra*, that the utility must do everything necessary to secure compliance with the law and rules by its agents and officers is nothing more than an additional precautionary measure to prompt the utilities with regard to compliance by those persons. It does not mean that it may evade the duty by the independent contractor device or limit the scope of its duties thereby. It does not negate the existence of a non-delegable duty. The case of *Hard v. Hollywood Turf Club*, 112 Cal.App.2d 263, 246 P.2d 716, while containing some dictum concerning the delegability of duties, holds that the Labor Code provisions requiring a safe place to work for employees did not apply to an independent contractor where a subcontractor's employees were concerned because the word "employer," as used in the Labor Code, was interpreted to include only the one who had employees and not contractors. Thus it is readily distinguishable from the case at bar for here there is no doubt that the duty was imposed on the defendant.

Defendant contends that the rules set forth in *Eli v. Murphy*, *supra*, 39 Cal.2d 598, 248 P.2d 756, and *Knell v. Morris*, *supra*, 39 Cal.2d 450, 247 P.2d 352, as well as other

authorities heretofore cited are not in point because they involved either the duty imposed on a landlord to comply with certain laws with respect to permanent conditions on the leased property where no activity by a contractor was involved or that the activity of defendant utility here involved was merely incidental and not a part of the business authorized by its franchise, the production, transmission and sale of electricity, and that such incidental duties are delegable. If by incidental action of the independent contractor it is meant that the activity in question is not necessarily part of the duty imposed, we do not have such a situation here where the duty to install the poles in a certain manner was squarely imposed. The construction and maintenance of lines, which includes poles, is a necessary part of the utilities' business. It needs them to transmit electricity, the commodity in which it deals. The duty imposed expressly includes the placing of poles and states that their placement involves the safety of both the workmen and public, indicating that unless they are properly installed "considerable risk" or danger will exist. Whether we speak of the existence of a nondelegable duty as arising from defendant's franchise to do business or a special duty imposed by statute or rule or as a common law principle is not important as indicated by the above discussion. If a common law principle is involved, defendant, as the possessor of land, is answerable for the negligent failure of Wilson the independent contractor to put or maintain structures, the pole, in reasonably safe condition. *Knell v. Morris*, *supra*, 39 Cal.2d 450, 456, 247 P.2d 352.

The cases relied on by defendant are not controlling. In *Neubar v. Royal Realty Co.*, 86 Cal.App.2d 596, 195 P.2d 501; *Scholey v. Steele*, 59 Cal.App.2d 402, 138 P.2d 733; *Singer v. Eastern Columbia, Inc.*, 72 Cal. App.2d 402, 164 P.2d 531, and *Runyon v. City of Los Angeles*, 40 Cal.App. 383, 180 P. 837, the court was concerned with the question of the duty of a landlord with respect to the condition of the premises, liability for the lessee's activity or the landlord's duty to repair. *Donahoo v. Kress House Moving Corp.*, 25 Cal.2d 237, 153

P.2d 349, merely involved the liability of an independent contractor to the tenant of a house he was moving for the landlord and which was occupied by the tenant. *Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 500, 93 P. 82, 14 L.R.A.,N.S., 913, involved the liability of the owner of land in an uninhabited area for blasting done thereon for him by an independent contractor and it was held the owner was not liable for the contractor's negligence. The court seems to imply that there must be a nuisance or absolute liability before a nondelegable duty exists, but this is contrary to the later cases. The same comment applies to *Louthan v. Hewes*, 138 Cal. 116, 70 P. 1065; *Barrabee v. Crescenta Mutual Water Co.*, 88 Cal.App. 2d 192, 198 P.2d 558, held the independent contractor insulated the owner from liability because no duty was imposed on the owner and no peril was inherent in the work. That is not true here. Moreover, the case is of doubtful authority in view of the authorities heretofore cited, especially the case of *Knell v. Morris*, supra, 39 Cal.2d 450, 247 P.2d 352.

Another point is made by plaintiffs. They claim that inasmuch as under section 702 of the Public Utilities Code, supra, defendant is required to "do everything necessary or proper" to secure compliance with the statutes and rules of the commission by its "employees" it should have been left to the jury to determine whether defendant did everything necessary and proper to secure compliance by its employees, such as its inspector, as distinguished from its independent contractor. It will be recalled that there is evidence that defendant's inspector did not inspect the installation of the pole in question and that it was not customary for him to inspect the depth at which poles were set. The jury, plaintiffs argue, should decide whether defendant gave its inspector duties sufficiently broad to assure compliance with the rules.

Defendant contends that as a matter of law it did everything proper and necessary to secure compliance with the rules and

refers to the maintenance by it of an inspector on the job; that Wilson was given detailed plans and specifications for the work; and the competency of Wilson for the job. It concedes, however, that whether everything necessary and proper was done was "a factual question for the jury."

[5, 6] It would seem the question should have been submitted to the jury, but defendant asserts plaintiffs' instruction, which was given, advised the jury on the subject. That instruction did not cover the subject since it told the jury that any negligence on the part of Wilson would be imputed to defendant if defendant had instructed Wilson to set the pole at less than the minimum depth. It also refers to an instruction in the language of section 702 of the Utilities Code but that instruction did not contain elements of what was meant by doing everything necessary and proper except as it appeared in section 702 and it was followed by instructions which told the jury that the duty could be delegated. Plaintiffs offered, but were refused, instructions that under the law (public utilities law) just mentioned it was defendant's duty to do everything necessary and proper to secure compliance with rule 49.1C and if it failed to do so it was negligent as a matter of law; that it was not sufficient for defendant, in that respect, to have done nothing more than enter into the contract it made with Wilson. Defendant criticizes those offered instructions as intimating that defendant did nothing toward doing everything necessary and proper other than make the contract with Wilson. The instructions do not so state or indicate.

From the foregoing it appears the judgments must be reversed for both reasons mentioned.

The judgments are reversed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

44 Cal.2d 839

John M. LYNCH, Jr., a minor, by his guardian ad litem, John M. Lynch, Sr., and John M. Lynch, Sr., individually, Plaintiffs and Respondents,

v.

Jack Wayne BIRDWELL, C. W. Birdwell, and Geraldine Birdwell, Defendants and Appellants.

S. F. 19252.

Supreme Court of California,

In Bank.

July 5, 1955.

Personal injury action arising out of accident, occurring while minor plaintiff was guest in automobile driven by minor defendant. The Superior Court, Contra Costa County, Hugh H. Donovan, J., entered judgment adverse to defendants and they appealed. The Supreme Court, Schauer, J., held that giving of instructions confusing negligence and wilful misconduct, although action was based on wilful misconduct only, was not prejudicial, where it was presumed that defendants requested instructions, since record did not reveal source of request, and where jury was told that negligence alone would not support verdict for plaintiffs.

Judgment affirmed.

Opinion, 278 P.2d 36, vacated.

1. Appeal and Error ⇨1032(3)

In personal injury action arising out of automobile accident, failure of defendants to show source of instructions given comparing negligence and willful misconduct, was insufficient to meet burden assumed by defendants, as appellants, of establishing error prejudicial to them in such instructions.

2. Appeal and Error ⇨900

Error will not be presumed in favor of reversing a judgment.

3. Appeal and Error ⇨882(1)

Invited error cannot be complained of on appeal.

4. Trial ⇨269

Each instruction should be identified by a number and should indicate by whom it was requested or that it was given by

court of its own motion, and on each requested instruction the trial judge should endorse fact as to whether it was given or refused or given as modified, with modification, if any, clearly indicated.

5. Appeal and Error ⇨928(4)

In personal injury action arising out of automobile accident where record failed to show who requested given instructions which compared negligence with willful misconduct, it must be presumed by reviewing court that instructions were given at appellants' own request.

6. Negligence ⇨1, 11

Negligence and willful misconduct are mutually exclusive.

7. Appeal and Error ⇨882(12)

Trial ⇨296(3)

In personal injury action by guest involved in automobile collision, giving of instructions confusing negligence and willful misconduct, although action was based on willful misconduct only, was not prejudicial, where it was presumed that defendants requested instruction, since record did not reveal source of request, and where jury was told that negligence alone would not support verdict for plaintiff.

8. Appeal and Error ⇨930(2)

Where jury was cautioned that they were to consider all instructions as a whole and to regard each in light of all others, it must be presumed that they did so.

9. Automobiles ⇨168(1)

Isolated act of driving automobile at an excessive speed does not constitute willful misconduct.

10. Trial ⇨296(3)

In personal injury action by guest involved in automobile accident, defendants were not prejudiced by trial court's instruction that excessive speed under certain circumstances may amount to willful misconduct, where such instruction was immediately followed by further instruction, that all circumstances, including speed, must be considered in determining defendant's willful misconduct.

11. Evidence ⇨546

In action to recover for personal injuries sustained by minor plaintiff who was

guest in automobile driven by minor defendant, trial court did not abuse its discretion in permitting expert witness to testify as to his conclusions drawn from skid marks on road.

12. Appeal and Error ⚡971(2)

Evidence ⚡546

It is for trial court to determine, in exercise of sound discretion, competency and qualification of expert witness to give his opinion in evidence, and its ruling will not be disturbed upon appeal unless a manifest abuse of that discretion is shown.

13. Appeal and Error ⚡207, 237(1)

In personal injury action, witness' mention of insurance was not reversible error, where no objection had been made and where there had been no motion to strike.

14. Appeal and Error ⚡1060(2)

In action to recover for injuries sustained by minor plaintiff who was riding as guest in automobile driven by minor defendant, defendants were not prejudiced by plaintiffs' attempt to introduce evidence of prima facie speed limit on mountain road on which automobile was traveling, since prima facie speed limit was a factor for consideration with other pertinent facts in determining issue of willful misconduct. Vehicle Code, § 403.

15. Appeal and Error ⚡1060(1)

In personal injury action, defendants were not prejudiced by argument of counsel for plaintiffs regarding defendants' objection to having jury view scene of accident, where trial court thereupon again read to jury stipulation between parties concerning condition of road at time of automobile accident, and changes to it thereafter, and where trial court ruled that stipulation took the place of viewing scene of accident.

16. Appeal and Error ⚡1060(1)

In personal injury action, reference in plaintiffs' closing argument to fact that doctor had examined minor plaintiff on behalf of defendants but had not been called to testify was not prejudicial to defendants, where no claim was made concerning ex-

tent of injuries or that verdict was excessive with respect thereto.

17. Trial ⚡345

In action by minor plaintiff to recover damages for personal injuries sustained in automobile accident, defendants waived any right to complain as to form of verdict where record indicated that blank forms of possible verdicts were shown to counsel for both parties before case went to jury, and that when jury returned its verdict court conferred at bench without both counsel concerning it and defendants made no objection on either occasion.

18. Damages ⚡220

In action by minor plaintiff and his father against minor defendant and his parents for personal injuries in which minor plaintiff's father sought award of \$3,354.16, as special damages incurred by such father, award of \$13,354.16 to minor plaintiff as general damages did not show on its face that jury gave special damages claimed by father also to son.

19. Appeal and Error ⚡1070(1), 1073(1)

In action by minor plaintiff and his father against minor defendant and his parent for personal injuries, where parents of minor defendant were not entitled to any right of subrogation against minor defendant, there was no prejudice to them from separate verdicts and judgments. West's Ann.Code Civ.Proc. § 664; Vehicle Code, §§ 352, 402.

Weinmann, Rode, Burnhill & Moffitt, Oakland, and Cyril Viadro, San Francisco, for appellants.

Evans, O'Gara & McGuire and E. James McGuire, San Francisco, for respondents.

SCHAUER, Justice.

In this action to recover for personal injuries resulting from an automobile accident, defendants appeal from an adverse judgment entered upon a jury verdict. We have concluded that defendants suffered no prejudice from various asserted errors upon which they rely, and that the judgment should be affirmed.

The minor plaintiff, John M. Lynch, Jr., was injured when an automobile in which he was riding as a guest and which was being driven by the minor defendant, Jack Wayne Birdwell, plunged off the highway while descending Mount Diablo. The action is based on alleged wilful misconduct of the minor defendant (Veh.Code, § 403), and was brought to recover both general damages of the minor plaintiff and special damages of his father, consisting of the costs of treatment of his injured son. Recovery is also sought against the parents of the minor defendant, who had signed and verified his application for a driver's license. (Veh. Code, § 352.)

There is evidence, although conflicting, sufficient to establish that the car went off the road because defendant driver with wanton disregard for the probable consequences of his conduct persisted after warnings in driving too fast down and around the sharp curves of the mountain road; that he entered the curve where the car finally left the road at 40 or 45 miles an hour; that nearer the top of Mount Diablo he had driven as fast as 58 or 60 miles an hour; that he was warned on the way down and before the accident occurred that he was going too fast, but instead of slowing down he laughed and speeded up.

Defendants first contend that since the action is based on a charge of wilful mis-

conduct, the court erred to their prejudice in giving a lengthy jury instruction defining negligence,¹ "without making it clear that negligence was not an issue in the case." Following the instruction of which defendants complain, the court defined proximate cause to the jury, and then proceeded: "In a case as here presented, there is no legal presumption of wilful misconduct on the part of the defendant * * *. [T]he mere happening of an accident, or the filing of a complaint and answer, or the fact that injuries have been sustained, raises no presumption of wilful misconduct * * *." The nature of direct and indirect evidence, of presumptions and inferences, and of expert testimony, was next explained. It was then stated that the minor plaintiff was a guest in the automobile and that "the host is not legally obligated to his guest to exercise ordinary care in the operation of the vehicle. The driver's only legal obligation to the guest is to refrain from being intoxicated and from wilful misconduct.

"No issue of intoxication being involved in this case, you may award damages to plaintiffs only in the event that you should find that said plaintiffs have suffered injury, of which some wilful misconduct on the part of the defendant * * * was a proximate cause.

"The words 'wilful misconduct' have a meaning in the law, additional to that which

1. Such instruction, given on the court's own motion, reads as follows:

"Negligence as that term is used in these instructions means, and is defined to be, the omission to do something which an ordinarily reasonable and prudent person guided by those considerations which usually regulate the conduct of human affairs, would have done, or the doing of something which such a person would not have done in the same situation.

"It is not absolute or intrinsic or to be measured in all cases in accordance with some precise standard, but always relates to some circumstance of time, place or person. Its application depends upon the situation and the knowledge of the parties, the attendant circumstances and the degree of care and prudence which the circumstances of the case reasonably impose.

"The conduct must be compared to that of an assumed person of ordinary

prudence and must be considered with relation to all the circumstances attending the occasion which might reasonably be taken into consideration by such a person of ordinary prudence in determining what his conduct should be.

"The circumstances to be considered are those which the evidence shows may reasonably be supposed to have been known to such person whose negligence is in question and to have influenced his mind and actions at the time, and are not such circumstances which afterwards, in the retrospective light of the event, can be seen should have been known to him and should have influenced his conduct.

"By the term 'ordinary care' is meant such care, effort, diligence, and caution as would have been exercised by a person of ordinary sense or prudence under the same or similar circumstances as those disclosed by the evidence."

they have in common usage. If we were to use the words in their ordinary sense, they would mean simply the indulging in wrongful conduct by conscious choice. Such conduct might consist of doing something that ought not to be done or in failing to do something that ought to be done. But in order to be a basis for liability to a guest under our law, the misconduct must be something more than intentional and wrongful; it must be done under circumstances which show either knowledge that serious injury to the guest probably will result, or a wanton and reckless disregard of the possible results.

"You will note from the foregoing that although wilful misconduct is a form of negligence [a patently erroneous concept hereinafter discussed], it is something more than negligence; more even than what might be called gross negligence. A guest may not recover against his host-driver for negligence, however it might be classified, unless that negligence amounted to wilful misconduct, and that means intentional, wrongful conduct, done either with knowledge that serious injury to the guest probably will result, or with a wanton and reckless disregard of the possible results. [Paragraph No. 42 of instructions.]

"In determining the question as to whether the defendant, Jack Wayne Birdwell, conducted himself with knowledge that serious injury to the plaintiff, John M. Lynch, Jr., would result from said defendant's conduct, proof of such knowledge does not have to be by direct evidence. You have a right to *infer* that the defendant, Jack Wayne Birdwell, had such knowledge if such an inference may reasonably be drawn from facts in evidence and if your judgment so directs.

"It follows, therefore, that if you should find that defendant was negligent, and if you should find that he intentionally did something that was wrongful and which was a proximate cause of injury to plaintiff, still a case of wilful misconduct is not established unless you further find that defendant's conduct was characterized by the element of wantonness as heretofore described. But if it was, then defendant is liable. [Paragraph No. 44 of instructions.]

"Said defendant Jack Birdwell's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that his conduct not only creates an unreasonable risk of bodily harm to the other, but also involves a high degree of probability that substantial harm will result to the other person.

"In determining whether the circumstances in this case are sufficient to disclose implied knowledge on the part of the defendant, Jack Wayne Birdwell, as to the probability of injury resulting to the minor plaintiff, John M. Lynch, Jr., by reason of the conduct of said defendant, an external standard is applied. That is to say, it is not necessary that the defendant, Jack Wayne Birdwell, himself have recognized his conduct as being extremely dangerous. It is sufficient that he knew or had reason to know of circumstances which would bring home to the realization of the ordinary, reasonable man the highly dangerous character of his conduct."

[1-4] Although the record shows that defendants themselves proposed several refused instructions comparing negligence and wilful misconduct, there is no indication in the record as to whether the various instructions which were given were proposed by plaintiffs or by defendants or were given on the court's own motion. The parties did stipulate, when this case was before the District Court of Appeal, that the instruction set forth hereinabove in footnote No. 1 was given on the court's own motion and that instructions on the subject of speed, hereinafter discussed, were proposed by plaintiffs. But showing the source of only a portion of the instructions given or requested is obviously insufficient to meet the burden assumed by an appellant; i. e., the burden of establishing error prejudicial to him. Error, it is elementary, will not be presumed in favor of reversing a judgment (*Brokaw v. Black-Foxe Military Institute* (1951), 37 Cal.2d 274, 280, 231 P.2d 816; *Philbrook v. Randall* (1924), 195 Cal. 95, 104, 231 P. 739; *Bacon v. Grosse* (1913), 165 Cal. 481, 490, 132 P. 1027; *Cutting*

Fruit Packing Co. v. Canty (1904), 141 Cal. 692, 695-696, 75 P. 564; 4 Cal.Jur.2d 426, § 559, and cases there cited) and invited error cannot be complained of by the appellant (*Nevis v. Pacific Gas & Electric Co.* (1954), 43 Cal.2d 626, 630, 275 P.2d 761; *Jentick v. Pacific Gas & Elec. Co.* (1941), 18 Cal.2d 117, 114 P.2d 343; see also 4 Cal. Jur.2d 420-424 and 3 Cal.Jur.2d 821, and cases there cited). As declared in *Vaughn v. Jonas* (1948), 31 Cal.2d 586, 596, 191 P.2d 432, in making up the record on appeal "Each instruction should be identified by a number and should indicate by whom it was requested or that it was given by the court of its own motion; on each requested instruction the trial judge should endorse the fact as to whether it was given or refused or given as modified, with the modification, if any, clearly indicated." (See also 4 Cal.Jur.2d 101-102.)

[5-8] As in the *Vaughn* case, the reporter's transcript here sets forth in the form of a single instruction, covering approximately twenty-five pages, a congeries of propositions of law which made up the entire charge given to the jury, and there is no indication as to who requested statement of any of the various legal principles contained therein. Thereafter there is set forth a group of "Instructions Requested by Defendants but Refused by the Court," each of which bears a number; in no other respect is any portion of the instructions appearing in the record designated by an identifying number or source. Since the record fails to show who requested the instructions which were given it must be presumed by a reviewing court (except as to the matters covered by stipulation as hereinabove noted) that the instructions which for convenience we have designated as paragraphs 42 and 44 (and which compare negligence with wilful misconduct) were given at appellants' (defendants') own request. (See *Deevy v. Tassi* (1942), 21 Cal.2d 109, 124, 130 P.2d 389; 4 Cal.Jur.2d 441-442, § 569, and cases there cited.) The most egregious errors in the instructions appear in those two paragraphs, in which the concepts of negligence on the one hand and of wilful misconduct on the other are extensively confused. It will be noted, how-

ever, that the error in paragraph number 44 is mitigated by telling the jury that a case of wilful misconduct is not established by a finding of negligence plus a finding of an intentional wrongful act by plaintiff, unless the element of wantonness was also found to characterize defendant's conduct. Although this instruction is far from being a model it tends to rectify some of the error already invited by defendants and its objectionable features cannot be complained of by defendants, who, we must presume, requested it. (See *Nevis v. Pacific Gas & Electric Co.* (1954), supra, 43 Cal.2d 626, 630, 275 P.2d 761; see also 4 Cal.Jur.2d 422, 423, § 557, and cases there cited; 3 Cal.Jur.2d 820-821, § 276.) Also the jury were told that plaintiff was a guest in defendant's car and that a guest may not recover for negligence, but only for wilful misconduct. Although the statements in paragraph number 42 that "wilful misconduct is a form of negligence," and that a "guest may not recover against his host-driver for negligence, however it might be classified, unless that negligence amounted to wilful misconduct," erroneously suggested to the jury that negligence is included in wilful misconduct, whereas in truth "the two types of behavior are mutually exclusive" (see *Mercer-Fraser Co. v. Industrial Acc. Comm.* (1953), 40 Cal.2d 102, 120, 251 P.2d 955; *Hawaiian Pineapple Co. v. Industrial Acc. Comm.* (1953), 40 Cal.2d 656, 663, 255 P.2d 431), nevertheless, since we must presume that defendants requested the instruction, it cannot be held to have prejudiced them. Nor, inasmuch as the word "negligence" appeared in various of the instructions explaining to the jury the nature of wilful misconduct, was there error in defining the term to them, especially since they were plainly told that negligence alone would not support a verdict for plaintiffs. (See *Burrell v. Southern California C. Co.* (1917), 35 Cal.App. 162, 166, 169 P. 405.) The jury were cautioned that they were to consider all the instructions as a whole and to regard each in the light of all the others, and it must be presumed that they did so. (*Kimic v. San Jose-Los Gatos, etc., Ry. Co.* (1909), 156 Cal. 273, 276, 104 P. 312; *Zuckerman v. Underwriters at*

Lloyd's (1954), 42 Cal.2d 460, 478-479, 267 P.2d 777.)

[9, 10] Defendants also complain of an instruction (stipulated to have been requested by plaintiffs) that "excessive speed, under certain conditions, may amount to wilful misconduct." This statement, however, was immediately followed by the further instruction that "all of the circumstances, including the speed at which the defendant * * * was driving, may be considered by you when determining the question of whether said defendant was guilty of wilful misconduct." Although it is of course true that the isolated act of driving at an excessive speed does not constitute wilful misconduct (*Robertson v. Brown* (1940), 37 Cal.App.2d 189, 193, 99 P.2d 288; *Stacey v. Hayes* (1939), 31 Cal. App.2d 422, 427, 88 P.2d 165; *McLeod v. Dutton* (1936), 13 Cal.App.2d 545, 549, 57 P.2d 189), nevertheless, since the court's statement was modified by the phrase "under certain conditions," and by telling the jury also that "all of the circumstances, including the speed" may be considered, no prejudice to defendants appears. As already shown, the jury were instructed on the essential elements of wilful misconduct.

[11, 12] Defendants next make various charges of prejudicial rulings of the trial judge as well as prejudicial conduct on the part of counsel for plaintiffs, all of which they contend denied them a fair trial. No merit appears in this contention. First, no error is shown in permitting Mr. Bassett, Chief Ranger of Mount Diablo State Park for the past seven years, to testify that in his opinion, on the basis of the "skid marks" which he found on the road, the car "was already going sidewise before the brakes were applied." The witness testified that he had been a police officer in the city of Santa Barbara where he was traffic officer for two years and lieutenant of traffic for six years more; his duties included investigating all vehicle accidents in that city. He had made approximately 1,000 road tests to determine the length of "skid marks." As Chief Ranger he has charge of roadways in the park, including investigating accidents and observing "skid marks." Although he had not made speed

tests for some twenty years, it was not with reference to speed that defendants complain he was improperly permitted to testify. "It is for the trial court to determine, in the exercise of a sound discretion, the competency and qualification of an expert witness to give his opinion in evidence [citation], and its ruling will not be disturbed upon appeal unless a manifest abuse of that discretion is shown." (*Huffman v. Lindquist* (1951), 37 Cal.2d 465, 476, 234 P.2d 34, 29 A.L.R.2d 485.) No such abuse appears here.

[13] Besides plaintiff and the minor defendant, there were four other boys in the car, one of whom was plaintiff's brother. Of the remaining three, two of them testified for plaintiff and one for defendant. The incidental reference to insurance, made by the two boys who testified for plaintiff, provides no ground for reversal. The first reference was made by the witness on redirect examination, in response to a request to recount a conversation which occurred between four of the boys immediately after the accident, and the witness volunteered that one of the boys "said something about having good insurance," and one of the others "said something about the insurance is going to have to pay for everything and all." Defendant interposed no objection or motion to strike. Near the end of the trial, on cross-examination, the other boy who testified for plaintiff volunteered that defendants' insurance "had failed to pay off." Although defendants neither objected to nor moved to strike this testimony, they did immediately bring out by further cross-examination supplemented by questions from the court that the witness did not know "whether there's any insurance or not." In addition it may be noted that the trial court denied defendants' motion for new trial. There appears to have been no deliberate effort by plaintiffs to elicit the fact of insurance and no prejudicial misconduct is shown by the incidental references to which defendants point. (See *Speck v. Sarver* (1942), 20 Cal.2d 585, 589-590, 128 P.2d 16.)

[14-16] Early in the trial plaintiffs' counsel sought to introduce evidence of the prima facie speed limit on the Mount Diablo

road, and argument was had before the jury, after which the court ruled that such a violation "probably would be negligence, but not necessarily wilful misconduct," refused to admit the evidence, and admonished the jury to disregard the discussion on the matter. Since a prima facie speed limit "is a factor proper for consideration with other pertinent factors, in determining the issue of wilful misconduct" (Anderson v. Newkirch (1950), 101 Cal.App.2d 171, 178, 225 P.2d 247), no error to defendants' prejudice is shown. During closing argument counsel for plaintiffs commented on the fact that defendants had objected, because of changed circumstances, to having the jury view the scene of the accident. The court thereupon again read to the jury a stipulation between the parties concerning the condition of the road at the time of the accident, and changes to it thereafter, and stated that "The Court has ruled that this stipulation takes the place of viewing the scene of the accident." No prejudice appears to defendants from this occurrence in view of the court's prompt comments to the jury. Nor would the reference in plaintiffs' closing argument to the fact (although not in evidence) that a doctor had examined the minor plaintiff on behalf of defendants but had not been called to testify prejudice defendants, since no claim is made concerning the extent of the injuries or that the verdict is excessive with respect thereto.

Defendants' final contention is that the judgment in favor of the minor plaintiff is erroneous because it includes an award of \$3,354.16, the stipulated amount of special damages sustained by plaintiff father, and in that it awards \$1,645.84 against the parents of the defendant minor over and above the award against the minor. The court instructed the jury that the liability of defendant parents was joint and several with that of their minor son for any claim against him and that "your award must be in the same amount as against all," with the exception that any verdict against the parents must not exceed the statutory limit of \$5,000 (Veh.Code, § 352), even though a greater or additional amount might be awarded against the son. Further instruc-

tions were that the claims of the minor plaintiff and that of plaintiff father should be considered as separate and distinct from each other, that any verdict in favor of the father should cover only the special damages consisting of the costs of treatment, that any verdict in favor of the minor plaintiff should include compensation for various items of damage mentioned by the court but not including the treatment costs. Forms of verdict were provided for and read to the jury, who returned a verdict by simply filling in the amounts which had been left blank on one of such forms. As so completed, the verdict reads: "We, the Jury * * *, find for the plaintiff John M. Lynch, Jr. [minor], and against the defendants and assess said plaintiff's damages against defendant Jack Wayne Birdwell [minor] in the sum of \$13,354.16 and against defendants C. W. Birdwell and Geraldine Birdwell [parents] in the sum of \$1,645.84.

"And we further find for the plaintiff John M. Lynch, Sr., as and for his special damages herein and against the defendants and assess said plaintiff's damages against Jack Wayne Birdwell in the sum of \$0.00 and against defendants C. W. Birdwell and Geraldine Birdwell in the sum of \$3,354.16."

Judgment was thereupon entered (see Code Civ.Proc. § 664), following the language of the verdicts, that the minor plaintiff recover from the minor defendant the sum of \$13,354.16 and from the defendant parents the sum of \$1,645.84 and that plaintiff father "recover for his special damages of and from" the parent defendants the sum of \$3,354.16.

[17, 18] Although the record indicates that the blank forms of possible verdicts were shown to counsel for both sides before the case went to the jury, and that when the jury returned with its verdict the court conferred at the bench with both counsel concerning it, defendants do not suggest and the record does not show that they offered any objection on either occasion. Under such circumstances it appears to be the settled rule that they have waived any right to complain as to its form. (See Crowe v. Sacks (1955), 44 Cal.2d 590, 283

P.2d 689; *Brown v. Regan* (1938), 10 Cal. 2d 519, 523, 75 P.2d 1063; *Broome v. Kern Valley Packing Co.* (1935), 6 Cal.App.2d 256, 261-262, 44 P.2d 430; *Brand v. Norris* (1953), 121 Cal.App.2d 367, 369, 263 P.2d 456.) Defendants assert, nevertheless, that they do not object to the form of the verdict, but only that the award in favor of the minor plaintiff "was not supported by the evidence since it included an award of special damages * * * although such an award could have been made only in favor of his father and in fact was made in" the father's favor. Nothing in the record necessarily establishes, however, that the \$13,354.16 award in favor of the minor plaintiff did include the special damages. It may further be noted that the sums awarded against the defendant parents (\$1,645.84 in favor of the minor plaintiff and \$3,354.16 in favor of his father) exactly total the \$5,000 limitation imposed by Vehicle Code, section 352, as to which the jury were instructed, and plaintiffs have not objected to the division thus made. Likewise, the sums awarded the minor plaintiff (\$13,354.16 against the minor defendant and \$1,645.84 against the defendant parents) total \$15,000, which so far as appears from the record the jury may have intended as general damages to the minor plaintiff.

[19] In reliance upon *Aynes v. Winans* (1948), 33 Cal.2d 206, 200 P.2d 533, defendants also urge that an objection to a judgment entered upon the verdict can be made for the first time by a motion for new trial. Although the present record shows the making by defendants of such a motion and the denial thereof by the court, there is no showing that the form or amounts of either the verdict or the judgment were mentioned during the proceedings. Further, in the cited case, in which the judgment entered by the court after construing the verdict was reversed and remanded for a new trial on the issue of damages alone, the court was dealing with the statutory liability of a motor vehicle owner under the imputed negligence provisions of section 402 of the Vehicle Code. That section provides, in favor of the owner, that upon "recovery of judgment, re-

course shall first be had against the property of * * * [the] operator * * * [who has been] served," and also that an owner against whom recovery is had is subrogated to all the rights of the person injured and may recover from the operator the amount of any judgment and costs recovered against the owner. No such provisions in favor of parents, who, as here, are held liable under section 352 by reason of signing and verifying a minor's application for a license, are contained in that section, and consequently no prejudice to them from separate verdicts and judgments, as was held to exist in the *Aynes* case, is shown.

For the reasons stated, the judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, and TRAYNOR, JJ., concur.



44 Cal.2d 861

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Mary PENNY, Defendant and Appellant.

Cr. 5722.

Supreme Court of California.

In Bank.

July 8, 1955.

Defendant was convicted of manslaughter. The Superior Court, Los Angeles County, Burdette J. Daniels, J., rendered judgment, and defendant appealed. The Supreme Court, Carter, J., held that instructions on negligent homicide were defective for failure to include an instruction defining criminal negligence as negligence greater than that required in a civil case.

Judgment reversed.

Opinion, 281 P.2d 337, vacated.

1. Homicide Ⓒ236(3)

Evidence in prosecution for homicide by face rejuvenator as alleged result of an application of solution of phenol to face of deceased sustained finding that victim had died of phenol poisoning.

2. Criminal Law Ⓒ479

Doctor who testified for prosecution in prosecution for homicide by face rejuvenator as alleged result of application of phenol solution to victim's face was qualified to give opinion based on his reading on subject, his own observation of victim, and his previous experiences.

3. Criminal Law Ⓒ481, 494

Qualifications of an expert witness are for trial court, and any question as to degree of his knowledge goes to weight of his testimony rather than to its admissibility.

4. Homicide Ⓒ309(6)

In prosecution of unlicensed face rejuvenator for homicide as alleged result of application of phenol solution to victim's face, instruction that any licensed cosmetologist who applies a solution of phenol greater than 10 per cent is guilty of a misdemeanor was subject to claimed objection of allowing jury to infer that rejuvenator was guilty of crime by reasoning that even a licensed cosmetologist could not use a solution containing more than 10 per cent phenol. Pen.Code, § 192, subd. 2; West's Ann.Bus. & Prof.Code, § 7415.

5. Licenses Ⓒ40

Person who was engaged in face rejuvenation was practicing "cosmetology" within statute providing that one practicing cosmetology without a license is guilty of a misdemeanor. West's Ann.Bus. & Prof.Code, §§ 7321(b), 7325.

See publication Words and Phrases, for other judicial constructions and definitions of "Cosmetology".

6. Criminal Law Ⓒ814(2)

In prosecution of face rejuvenator for homicide as alleged result of application of phenol solution to face of victim, evidence warranted instruction on statute providing that practice of cosmetology without a license is a misdemeanor. Pen.Code, § 192, subd. 2; West's Ann.Bus. & Prof.Code, §§ 7321(b), 7325.

7. Homicide Ⓒ62

A licensed cosmetologist who uses a phenol solution greater than 10 per cent on any human being is guilty of a misdemeanor, and, if subject dies therefrom, subject to prosecution for manslaughter. Pen.Code, § 192, subd. 2; West's Ann.Bus. & Prof.Code, § 7415.

8. Homicide Ⓒ74

"Due caution and circumspection", within negligent homicide statute, are equivalent to "criminal negligence". Pen.Code, §§ 20, 192, subd. 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Due Caution and Circumspection".

9. Homicide Ⓒ74

In order to impose criminal liability for negligent homicide, in cases other than vehicle cases, there must be higher degree of negligence than is required to establish negligent default on a civil issue, and negligence must be aggravated, culpable, gross or reckless, disclosing lack of proper regard for human life or indifference to consequences. Pen.Code, §§ 20, 192, subd. 2.

10. Homicide Ⓒ309(1)

In prosecution of face rejuvenator for homicide as alleged result of application of phenol solution to face of victim, instructions on negligent homicide were defective for failure to include an instruction defining criminal negligence as negligence greater than that required in a civil case. Pen.Code, §§ 7, subd. 2, 20, 192, subds. 2, 3(a, b), 193; West's Ann.Bus. & Prof.Code, §§ 7321(b), 7325, 7415.

D. Brandon Bernstein, Beverly Hills, and Robert P. Dockeray, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow and William E. James, Deputy Attys. Gen., for respondent.

CARTER, Justice.

Appeal by defendant Mary Penny from a judgment of conviction of involuntary manslaughter.

Defendant was charged with a violation of section 192, subdivision 2, of the Penal Code. That section provides that manslaughter is the unlawful killing of a human being, without malice. "2. Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection; provided that this subdivision shall not apply to acts committed in the driving of a vehicle."

For seven years defendant had been engaged in "face rejuvenation" in the city of Los Angeles. It is conceded that she had no license from either the Cosmetology Board or the Medical Board of this state; she did have a business license from the city of Los Angeles for the business of "Face Rejuvenation."

Defendant had a year's training with a Madame Bergeron (now deceased) in Los Angeles and approximately three months training with one Geraldine Gorman in New York. In New York, she received the formula which she used in her work. The formula consisted of one ounce of water, a heaping tablespoon of resorcinol (of the same chemical group) and sixteen drops of phenol (carbolic acid).

Kay Stanley, the victim, had consulted with defendant some seven months earlier about having her face treated to remove wrinkles and pock marks, but did not have the money to do it at that time. Around Easter time of 1953, she again asked defendant to treat her face, but defendant was to be away and could not do it then. On the morning of May 4, 1953, Kay Stanley arrived at about ten in the morning at defendant's home where she was to stay during the treatment. Kay's face was first washed with warm water and soda; the formula was then applied with a cotton wrapped wooden applicator to Kay's cheeks, a square inch at a time. After each application, the area was pressed with sterile gauze to remove excess moisture. The entire forehead was covered as well as the eyelids, the process taking about two hours. The treated area was then covered with gauze and taped with small pieces of tape which overlapped and covered the area; regular

waterproof adhesive tape was then put on over the other tape; this formed a mask over the upper portion of the patient's face. After the taping had been completed, Kay walked to an adjoining room where she had lunch, listened to the radio and looked at magazines. At approximately six in the evening, defendant proceeded to treat the lower half of Kay's face in the same manner as she had treated the upper portion which took about three quarters of an hour. When the treatment was completed, Kay asked defendant if she could sit up for awhile before the taping was started; she sounded sleepy. The defendant told her she could and said she would get her a glass of water. When defendant returned with the water, Kay said, "I feel a little bit faint" and lay back as though in a faint. Defendant asked her how she felt but received no answer. When defendant tried to lift her she found she was dead weight and felt that she had fainted. Defendant tried unsuccessfully to call a Dr. Wallace and left a message for him; she then called a nurse-an aesthetist who arrived at the house about ten or fifteen minutes later. Mrs. Jevne, the nurse, tried to take the patient's pulse without success; there was no respiration. She then administered Coramine, a heart stimulant by hypodermic needle, in the arm; she then gave a hypodermic injection of Metrazol, another stimulant; she then tried artificial respiration and caffeine benzoate. She told defendant to call the doctor again. Dr. Wallace arrived about an hour after Mrs. Jevne did and examined the lady whom he found lying on the treatment table. He was able to feel no pulse and there was no respiration. He noticed signs indicating death had existed for some period of time.

Defendant called her attorney who called the police.

The finding, after an autopsy had been had, was that the immediate cause of death was phenol (carbolic acid) poisoning and edema of the glottis due to "application of phenol-containing mixture to the face and neck." Other findings were that 5.1 milligrams of phenol per 100 grams were found in the liver and 2.9 milligrams of phenol per 100 grams were found in the blood of

the victim. It was the opinion of Dr. Newbarr, prosecution witness and Chief Autopsy Surgeon for the Los Angeles coroner's office, that these findings were the result of the application of a solution containing more than 10% phenol to the face and neck of the victim. It was the opinion of Mr. Abernathy, the toxicologist, that the reddish-brown discoloration of the victim's face was a third degree burn caused by phenol, and that the normal finding of phenol in a normal human being would be practically zero.

There was evidence in the record which showed that the victim had been taking reducing pills prescribed by a Texas doctor; that in order to obtain replacement of the pills, it was necessary for her to have her heart examined and blood pressure taken by a local doctor; that prior to going to the defendant's home for the face rejuvenation treatment she had had her heart and pulse examined and her blood pressure taken and that all findings were normal.

[1] The defendant testified that when she first received the formula for face rejuvenation she had it analyzed and that it contained only 3.1% phenol. The defense also took the position that the victim may have had an allergy to phenol which was the cause of death. Dr. Newbarr testified for the prosecution and gave, as his opinion, that the solution contained over 10% phenol and that the findings were not consistent with the theory of allergy. Dr. Johnstone testified for the defense and it was his opinion that the solution contained approximately 3% phenol; that when applied to the skin it would not cause death; that all autopsy findings were consistent with the theory that the victim was allergic to phenol. Without going into great detail, it seems sufficient to note that the medical testimony was in direct conflict. Defendant's argument that the evidence is insufficient to support the judgment insofar as the cause of death is concerned is without merit. The testimony is ample to show that the victim died of phenol poisoning.

[2, 3] Defendant's argument that Dr. Newbarr was "allowed" to give an "unsupported and incompetent opinion" that

the solution contained more than 10% phenol is also without merit. Dr. Newbarr was found to be qualified by the trial court; his opinion was based on his reading on the subject, his own observation of the victim, and his own previous experiences. The qualifications of an expert witness are for the trial court, *People v. Pacific Gas & Electric Co.*, 27 Cal.App.2d 725, 81 P.2d 584, and any question as to the degree of his knowledge goes to the weight of his testimony rather than as to its admissibility. *Howland v. Oakland Consol. St. Ry. Co.*, 110 Cal. 513, 42 P. 983; *Pfingsten v. Westenhaver*, 39 Cal.2d 12, 244 P.2d 395; *In re Estate of Johnson*, 100 Cal.App.2d 73, 223 P.2d 105. Defendant's argument that the testimony of her witness, Dr. Johnstone, was uncontradicted is also without merit. Dr. Johnstone's testimony merely created a conflict in the evidence and it was the function of the trier of fact to resolve that conflict.

Instructions:

Defendant contends that the following instruction was without basis in the evidence. "Any *licensed* cosmetologist who applies to any human being a solution of phenol greater than ten per cent is guilty of a misdemeanor.

"This is an unlawful act not amounting to a felony. Business & Professions Code, Section 7415." (Emphasis added.)

As heretofore pointed out, it is admitted that defendant was not licensed as a cosmetologist.

It is contended that the just quoted instruction was calculated to mislead and confuse the jury when considered with the following instruction: "Every person who engages in, or attempts to engage in, the practice of cosmetology or any branch thereof without a license therefore issued by the State Board of Cosmetology or in an establishment other than one licensed by the State Board of Cosmetology is guilty of a misdemeanor.

"The art of cosmetology includes the beautifying of the face, neck, arms, bust or upper part of the human body, by the use of cosmetic preparations, antiseptics, tonics, lotions or creams.

"A violation of this law is an unlawful act not amounting to a felony. Business & Professions Code, Section 7325; Business & Professions Code, Section 7321(b) [sic] [c]."

It is argued that under these two instructions defendant could have been convicted (1) if the jury believed she used a solution containing more than 10% phenol and had a license; or (2) that she was guilty because she was required to have a license and had none.

[4-6] There can be no doubt but that the instruction concerning a "licensed" cosmetologist was erroneous and that it had no foundation in the evidence. On the issue of defendant's guilt, the jury could well have inferred that she was guilty of the crime by reasoning that *even* a licensed cosmetologist could not use a solution containing more than 10% phenol. So far as the second instruction is concerned, it is supported by the evidence and correctly stated the law as it relates to those practicing cosmetology and the persons considered engaged in that practice. It appears to us that as a matter of law, defendant was engaged in the practice of cosmetology and the jury should have been so instructed.

We said in *People v. Thomas*, 25 Cal.2d 880, 897, 156 P.2d 7, that the responsibility of statutory construction should not be left to the jury; that the interpretation of a statute and the question of its applicability to any given set of facts are exclusively the province of the court.

[7] The next question which presents itself is whether defendant's lack of a license (and the fact that she was, therefore, guilty of a misdemeanor) was the cause of Mrs. Stanley's death. Section 192, subd. 2 of the Penal Code provides that a person is guilty of involuntary manslaughter if a human being is unlawfully killed "in the commission of an unlawful act, not amounting to felony; * * *." The jury was instructed that defendant's conduct must have been the proximate cause of the death. The People argue that the law requiring licensing of those practicing cosmetology was designed to prevent injury to others and that one who violates such a law may be guilty of manslaughter if death is caused

thereby, citing *People v. Mitchell*, 27 Cal.2d 678, 683, 166 P.2d 10, 13. The *Mitchell* case involved section 500 of the Vehicle Code which provided "When the death of any person ensues within one year as the *proximate result* of injuries caused by the driving of any vehicle with reckless disregard * * *," and is not applicable here. Moreover, in the *Mitchell* case it was specifically noted that the provisions of the Penal Code, § 192, defining involuntary manslaughter should not apply to homicide caused by the driving of any vehicle. In *People v. Kerrick*, 86 Cal.App. 542, 548, 261 P. 756, 758, a case factually dissimilar to the one under consideration, the court said: "We cannot ignore the element of causation in the unlawful act necessary to connect it with the offense. In our ordinary phraseology we refer to the result of this element by saying it must be the probable consequence naturally flowing from the commission of the unlawful act." A causal connection was also held essential in *People v. Goodale*, 33 Cal.App.2d 80, 83, 91 P.2d 163, *People v. Hurley*, 13 Cal.App.2d 208, 56 P.2d 978, and *People v. Freudenberg*, 121 Cal. App.2d 564, 263 P.2d 875. It is extremely dubious that defendant's lack of a license had any causal connection with Mrs. Stanley's death and yet it should be noted that the statute, Bus. & Prof.Code, § 7415, provides that if a *licensed* cosmetologist uses a solution of phenol greater than 10% on any human being, he, or she, is guilty of a misdemeanor. *Had* defendant been a licensed cosmetologist, under the evidence she would have been guilty of a misdemeanor, and, as a result, the first clause of section 192, subd. 2 of the Penal Code would have been directly applicable.

Another question which presents itself is whether defendant was guilty of an unlawful act in applying a solution containing phenol and resorcinol to the human face and neck with the knowledge that both chemicals were poisonous. The statute providing that a licensed cosmetologist may not use a solution containing greater than 10% phenol without being guilty of a misdemeanor sets the standard for licensed persons in that profession or occupation. In discussing the violation of a criminal statute as a basis for a suit for civil damages, we

said in *Clinkscales v. Carver*, 22 Cal.2d 72, 75, 136 P.2d 777, 778, "When a legislative body has generalized a standard from the experience of the community and prohibits conduct that is likely to cause harm, the court accepts the formulated standards and applies them [citations], except where they would serve to impose liability without fault." Is defendant, who was as a matter of law, practicing cosmetology, to be judged by the same standards as a *licensed* cosmetologist? The record shows that face rejuvenation, as practiced by defendant, was done to make the face look younger and fresher. The "art of cosmetology" is defined as that which beautifies the face, or neck, by the use of "cosmetic preparations, antiseptics, tonics, lotions or creams." It would appear that the legislative standard set for licensed cosmetologists in the interest of the public health and safety, could, conceivably, be considered applicable to defendant had the jury been so instructed.

Due Caution and Circumspection:

The second clause of section 192, subd. 2 of the Penal Code provides that one is guilty of manslaughter if a human being is killed in the commission of a "lawful act which might produce death, in an unlawful manner, or without due caution and circumspection * * *." It has been held that without "due caution and circumspection" is the equivalent of "criminal negligence", *People v. Driggs*, 111 Cal.App. 42, 295 P. 51; *People v. Hurley*, supra, 13 Cal.App.2d 208, 56 P.2d 978, and the jury was so instructed. However, the jury was also instructed that "Due caution and circumspection * * * mean such caution and circumspection as are reasonably appropriate to avoid injury to one's self and others, under the conditions at hand as they would be viewed by an ordinarily reasonable person in the same situation as the person whose conduct is in question. To exercise due care and circumspection is to take those proper precautions which a person of ordinary prudence would use in the same circumstances." Defendant contends this instruction was prejudicially erroneous in that it gave

the jury the civil standard of negligence as a guide in a case where criminal negligence was involved.

If we assume that a treatment aimed at removing wrinkles from the human face is a "lawful act," it must next be determined whether such act was one which "might cause death." Defendant admitted she knew the substances used were poisons; that they were dangerous substances; that their indiscriminate use could be dangerous. Inasmuch as defendant was knowingly using poison in her treatment solution, the jury could have concluded that her treatment was one which could have caused death.

The jury was also instructed that "The doing of an act ordinarily lawful which results in the death of a human being may be manslaughter where the act, being one which might cause death, is performed in an unlawful manner or without due caution and circumspection. When a person is doing anything dangerous in itself or has charge of anything dangerous in its use and acts with reference thereto without taking those proper precautions which a person of ordinary prudence would have used under the circumstances and the death of another results therefrom, his act or neglect is a criminal act against the person so killed." The People contend that these two instructions harmonize with the case of *People v. Pociask*, 14 Cal.2d 679, 683-684, 96 P.2d 788. The *Pociask* case involved a death resulting from a violation of section 500 of the Vehicle Code then in effect which referred to the driving of any vehicle in a "negligent manner." The court there said in answering the question of what constitutes criminal negligence, that the court is bound to apply an appropriate definition enacted by the Legislature and that section 500 of the Vehicle Code had made criminal the negligent driving of a vehicle which caused injuries to another proximately resulting in death within the time specified in the section.

While the last quoted instruction was substantially¹ that which was used in *People*

1. The following words were omitted from the instruction in the instant case: "even though his negligence does not

amount to a wanton or reckless disregard of human safety or life."

v. Wilson, 193 Cal. 512, 226 P. 5 (an automobile case) and approved in the Pociask case, the court specifically noted that what might "amount to a lack of 'due caution and circumspection' in cases of involuntary manslaughter committed in the doing of a lawful act, or what may constitute the driving of a vehicle 'in a negligent manner', are questions to be decided by the jury according to the particular facts in each case guided by appropriate instructions from the court." [14 Cal.2d 679, 96 P.2d 792.]

Defendant relies on the rules set forth in *People v. Driggs*, supra, 111 Cal.App. 42, 295 P. 51, and *People v. Hurley*, supra, 13 Cal.App.2d 208, 56 P.2d 978, wherein the rule was said to be: "In order to constitute criminal negligence, there must enter into the act some measure of wantonness or flagrant or reckless disregard of the safety of others, or willful indifference. If no one of these elements enter into the act, the person charged cannot be held guilty of criminal negligence." *People v. Driggs*, 111 Cal. App. at page 47, 295 P. at page 53. As we read the Pociask case which approved the instruction given in *People v. Wilson*, supra, 193 Cal. 512, 226 P. 5, which was almost² the same as that here given, wherein it is said, 14 Cal.2d at page 684, 96 P.2d at page 792, "Anything in the *Driggs* and *Hurley* cases inconsistent therewith must be deemed to be disapproved" it appears that the requirement of wantonness, flagrant or reckless disregard of the safety of others, or wilful indifference, was deleted from the definition of criminal negligence or lack of due care and circumspection.

The law in California as to what constitutes "criminal negligence" or a lack of "due caution and circumspection" is confused.

The cases of *People v. Driggs*, supra, 111 Cal.App. 42, 295 P. 51, and *People v. Hurley*, supra, 13 Cal.App.2d 208, 56 P.2d 978, which held that some measure of wantonness or flagrant or reckless disregard of the safety of others must enter into defendant's conduct before he could be held guilty of criminal negligence, were disapproved in *People v. Pociask*, supra. The

Driggs case involved assault with intent to commit murder; the *Hurley* case involved death caused by the driving of an automobile. The Pociask case which disapproved them involved the negligent driving of an automobile and the interpretation of a statute (former section 500, Vehicle Code) which specifically made criminal the negligent driving of a vehicle. The instruction in *People v. Wilson*, supra, 193 Cal. 512, 226 P. 5) which is substantially the same as the one here involved) was approved by the Pociask case. The Wilson case was a manslaughter conviction arising out of the negligent driving of a motor vehicle. The court in the Pociask case, supra, comments on the opinion of the Supreme Court in denying a hearing in the case of *People v. Seiler*, 57 Cal.App. 195, 207 P. 396, 399, wherein it was said: "The statute (Pen. Code, § 192, subd. 2) defines involuntary manslaughter of this specific character as the unlawful killing of a human being, involuntarily, but 'in the commission of a lawful act which might produce death * * * without due caution and circumspection.' In order to constitute this kind of manslaughter the act may be lawful, but it must be one which might produce death, and which does produce death, and it must be committed without due caution and circumspection. The lack of due caution and circumspection *need not go to the extent of being wanton or reckless, although it might possibly be such as would be defined as culpable.*" (Emphasis added.) In 1941 the negligent homicide statute, Veh.Code, § 500, was amended by deleting the words "in a negligent manner or in the commission of an unlawful act not amounting to felony" and substituting therefor "with reckless disregard of, or wilful indifference to, the safety of others". In *People v. Young*, 20 Cal.2d 832, 129 P.2d 353, the court concluded that in amending the statute the Legislature intended that something more than ordinary negligence was to be required as a basis for criminal liability thereunder and that the phrase used in the amendment must be considered as being similar in meaning to wilful misconduct. *People v. Murray*, 58 Cal.App.2d 239, 136 P.2d 389; *People v.*

2. See previous footnote.

Freeman, 61 Cal.App.2d 110, 142 P.2d 435. In 1943, the negligent homicide statute, Veh.Code, § 500, was repealed, Stats.1943, ch. 421, § 1. At the same time, the Legislature, Stats.1943, ch. 421, § 2, amended the Penal Code, section 193, so that it provided a smaller penalty for involuntary manslaughter resulting from the operation of a vehicle. In 1945, Penal Code section 192 was amended, Stats.1945, ch. 1006, pp. 1942-1943, to its present form. At present, different standards are set forth for deaths caused through the operation of a vehicle and deaths otherwise caused. We are here concerned with a death occurring other than by vehicle and with the meaning of the words "due caution and circumspection". It would appear that a definite line should be drawn as to the meaning to be given the words "due caution and circumspection" and the words "gross negligence" as used in the sections involving vehicles, 192, subd. 3(a, b), and that a workable and usable rule of law should be formulated for the future. A resume of the cases will show the confusion which exists with respect to the proper definition of criminal negligence or lack of due caution and circumspection as it relates to involuntary manslaughter.

People v. Driggs, supra, 111 Cal.App. 42, 47, 295 P. 51, 53, involved an assault with intent to commit murder. The rule was said to be: "In order to constitute criminal negligence [lack of due caution and circumspection], there must enter into the act some measure of wantonness or flagrant or reckless disregard of the safety of others, or willful indifference. If no one of these elements enter into the act, the person charged cannot be held guilty of criminal negligence." This rule was erroneously, 28 Cal. L.Rev. 418, 520, disapproved in People v. Pociask, supra, 14 Cal.2d 679, 684, 96 P.2d 788. The Pociask case involved the interpretation of former section 500 of the Vehicle Code which made mere negligent driving a criminal offense.

In People v. Anderson, 58 Cal.App. 267, 208 P. 324, there are no facts set forth from which it can be ascertained how the homicide was accomplished, but it is obvious that it was not by motor vehicle. The

court there held, citing a motor vehicle case (denial of petition for hearing, opinion by Supreme Court, People v. Seiler, supra, 57 Cal.App. 195, 207 P. 396), that the lack of due caution and circumspection need not go to the extent of being wanton or reckless, although it might possibly be such as would be defined as culpable. The court concluded it was not necessary to instruct the jury on the meaning of due caution and circumspection.

In People v. Sidwell, 29 Cal.App. 12, 154 P. 290, defendant was charged with involuntary manslaughter; the death occurred through the medium of a revolver. It was there held, 29 Cal.App. at page 17, 154 P. at page 292, that "it will be observed that, while involuntary manslaughter may be committed in two different ways, the Legislature has not recognized, as between those two ways [192.2], any distinction in the degree of turpitude characterizing that crime. In other words, the crime is that of involuntary manslaughter whether the killing be committed in the execution of an unlawful act, etc., or in the execution of a lawful act, etc., or where death, not willfully or intentionally produced, is, nevertheless, caused by the *gross or culpable negligence* of the defendant—negligence which, in degree, goes so far beyond that negligence merely which suffices to impose a civil liability for damages as to constitute it criminal negligence for which the party guilty of it may be held criminally liable." (Emphasis added.)

In People v. Sica, 76 Cal.App. 648, 651, 245 P. 461, 462, it was held that the "reckless" handling of firearms so as to cause death constituted manslaughter committed in the commission of a lawful act, which might produce death, "without due caution and circumspection".

In People v. Searle, 33 Cal.App. 228, 231, 164 P. 819, 820, the homicide was committed through criminal negligence in handling a gun. The court said, "An unintentional homicide committed through the negligent handling of a firearm in a way indicating a reckless disregard of life is manslaughter. It is negligence to point a firearm at another without examining to see whether or not it is loaded, or to han-

dle or use it in a place where a discharge is likely to injure another, as in a highway.' Michie on Homicide, vol. 1, p. 253."

In *People v. Mount*, 93 Cal.App. 81, 269 P. 177, 180, a death resulted because of an abortion and defendant was convicted of manslaughter. It was noted that the deceased came to her death by reason of the "gross negligence" of defendant and his "negligence" and "careless and incompetent treatment".

In *People v. Montecino*, 66 Cal.App.2d 85, 102, 152 P.2d 5, 14, which involved the death of an elderly, bedridden woman by reason of the brutal treatment and lack of care on the part of defendant, the court held that "it is established in the State of California that involuntary manslaughter may result even though the conduct of the offender is not wanton or reckless. See comment by the Supreme Court in denying a hearing in *People v. Seiler*, 1922, 57 Cal.App. 195, 201, 207 P. 396, 399 * * *." The *Seiler* case, as heretofore noted, was a negligent driving case.

In *People v. Chavez*, 77 Cal.App.2d 621, 628, 176 P.2d 92, 96, defendant was convicted of involuntary manslaughter because she failed to use "due care" or "any of the care" necessary for the welfare of her newborn baby. It was said: "While it is conceivable that in some such cases the mental and physical condition of a mother, at the time, might prevent her from exercising that *reasonable care* which would ordinarily be required * * *" that such was not the case at hand. (Emphasis added.)

In *People v. Neff*, 117 Cal.App.2d 772, 257 P.2d 47, death occurred by reason of carbon monoxide escaping from a badly vented gas heater. The court there cited the automobile-manslaughter cases, particularly *People v. Pociask*, supra, 14 Cal.2d 679, 96 P.2d 788, and *People v. Seiler*, supra, 57 Cal.App. 195, 207 P. 396, in discussing the instructions given. The following instruction was given there [117 Cal.App.2d 772, 257 P.2d 53]: "Due caution and circumspection, as those words are used in the instruction just given, mean such caution

and circumspection as are reasonably appropriate to avoid injury to one's self and others, under the conditions at hand as they would be viewed by an ordinarily reasonable person in the same situation as the person whose conduct is in question. To exercise due care and circumspection is to take those proper precautions which a person of ordinary prudence would use in the same circumstances. [*Conduct does not need to amount to wantonness or to recklessness to show and to constitute a lack of due care and circumspection.*]" The District Court of Appeal there held: "The court should not have included in its instructions the statement to the effect that [a lack of] due caution and circumspection need not amount to wantonness or recklessness. People's instruction No. 16, except for the statement therein in brackets (to the effect that the conduct need not amount to wantonness or recklessness), was a proper instruction." 117 Cal.App.2d at page 785, 257 P.2d at page 55. This statement could mean an approval of former decisions that wantonness or recklessness was necessary, or just an attempt to satisfy former decisions as they related to vehicle-manslaughter.

In *People v. Freudenberg*, supra, 121 Cal. App.2d 564, 580, 263 P.2d 875, 885, where death resulted from a firearm, the jury was held properly instructed as follows: "The doing of an act ordinarily lawful which results in the death of a human being may be manslaughter where the act, being one which might cause death, is performed in an unlawful manner or without due caution or circumspection. When a person is doing anything dangerous in itself or has charge of anything dangerous in its use and acts with reference thereto without taking those proper precautions which a person of ordinary prudence would have used under the circumstances, and the death of another results therefrom, his act or neglect is a criminal act against the person so killed *even though his negligence does not amount to a wanton or reckless disregard of human safety or life.*"³ (Emphasis added.)

In *People v. Mahoney*, 201 Cal. 618, 629, 258 P. 607, defectively constructed grand-

3. Emphasized portion is not found in instruction in present case.

stands collapsed and a woman was killed as a result thereof. While very few facts appear in the opinion, the court said: "The prosecution of the appellant was had under section 192 of the Penal Code, defining the crime of manslaughter, and upon the theory that in the erection and construction of the stands the appellant did not exercise due caution and circumspection. We deem it unnecessary to review the nearly 2,000 pages of testimony taken in the court below. It suffices to say that there is evidence from which the jury might well conclude that the grandstand which collapsed was so *negligently* constructed as to be unable to carry the tremendous load placed upon it." (Emphasis added.) It would appear that in this particular case, "negligence" and "due caution and circumspection" were considered synonymous.

In *People v. McGee*, 31 Cal.2d 229, 238, 187 P.2d 706, 712, which involved a manslaughter conviction it was held proper to give the code definition of involuntary manslaughter, Pen.Code, § 192, subd. 2, because "If defendant, as he testified, discharged the pistol with intent only to frighten and not to shoot, deceased, and such act was not done in the exercise of defendant's right of self-defense, he could be found guilty of involuntary manslaughter. (See *Davis v. Commonwealth*, 193 Ky. 597, 237 S.W. 24, 23 A.L.R. 1551, 1554; *Hamilton Fire Ins. Co. v. Greger*, 246 N.Y. 162, 158 N.E. 60, 55 A.L.R. 921.) The instruction appropriately covers evidence which the jury could—and may—have found true."

In *People v. Southack*, 39 Cal.2d 578, 584, 248 P.2d 12, 15, a manslaughter case involving a gun the court said: "The above summarized evidence is sufficient to support a finding of manslaughter, either voluntary in 'heat of passion', Pen.Code, § 192, subd. 1, or involuntary. The involuntary manslaughter might be 'in the commission of an unlawful act, not amounting to felony' (Pen.Code, § 192, subd. 2), for it could be found that defendant unlawfully exhibited the gun in an angry manner, a misdemeanor (Pen.Code, § 417), or it might be 'in the commission of a lawful act which might produce death, in an unlawful manner, or

without due caution and circumspection' (Pen.Code, § 192, subd. 2), for it could be found that defendant was simply holding the gun but that he was *negligent* in so doing. (See *People v. McGee* (1947), 31 Cal.2d 229, 238, 187 P.2d 706; *People v. Carmen* (1951), 36 Cal.2d 768, 774, 228 P.2d 281.)" (Emphasis added.)

We have here endeavored to set forth as many cases involving involuntary manslaughter by means *other* than vehicle as could be found in the California Reports to show the earliest and latest pronouncements of this court and any appellate court on the subject. The earliest case found on the subject was *People v. Keefer*, 1861, 18 Cal. 636, wherein the court said: "We know nothing of the facts of the case, and intimate no opinion as to the merits of the controversy." It was also said, by way of discussion, that "No doubt exists that a man may be guilty of manslaughter under some circumstances by his *mere carelessness*. But this rule has no application to a statutory offense like that of which the defendant was convicted." (Emphasis added.) The *Driggs* case, *supra*, since overruled, pointed out that some measure of wantonness, recklessness, or the like must enter the picture before one could be guilty of criminal negligence, or a lack of due caution and circumspection. So far as the latest cases are concerned, it appears that mere negligence is sufficient to constitute a lack of due caution and circumspection under the manslaughter statute, Pen.Code, § 192, subd. 2. This does not appear to be a correct rule. Something more, in our opinion, is needed to constitute the criminal negligence required for a conviction of manslaughter.

A note in 161 A.L.R. 10, entitled "Homicide Through Culpable Negligence" seeks to reconcile the California cases. It is suggested, at page 50, that section 20 of the Penal Code provides that "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence"; that section 7, subdivision 2, of the Penal Code provides that "The words 'neglect,' 'negligence,' 'negligent,' and 'negligently' import a want of such attention to the nature or probable

consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns;" and that these two sections have "perhaps" influenced the California courts' interpretation of "criminal negligence." It is pointed out that the *general rule is that something more than ordinary negligence is needed to constitute either culpable negligence or criminal negligence under involuntary manslaughter statutes.*

Two law review notes, 25 Cal.L.Rev. 1; 28 Cal.L.Rev. 518, seek to harmonize the negligent homicide decisions (under the Vehicle Code) with the involuntary manslaughter ones in California. It should be noted that these articles were both written prior to 1945 when the involuntary manslaughter statute was enacted in its present form.

It is pointed out in 28 Cal.L.Rev. 518, 519, that a review of the available authority of the half century prior to 1872 (when section 20 of the Penal Code was enacted) supports the conclusion that "criminal negligence" had a common-law meaning at that time which must be referred to in determining the effect of its inclusion in section 20. The English reports of the period reveal a well-established rule that gross negligence is necessary in criminal prosecutions, and that the term "criminal negligence" was used along with many others to characterize the degree of neglect required. It is said that there was nothing to show that the Legislature intended to except section 192 of the Penal Code from the operation of section 20 of the same code. In speaking of *People v. Pociask*, 14 Cal.2d 679, 96 P.2d 788, it was noted that "having disposed of the defendant's argument by holding that 'criminal negligence' was not necessary under section 500 of the Vehicle Code, it was not necessary for the court to resolve the conflict between the *Driggs* and *Hurley* cases, requiring an element of wantonness as contended by defendant, and previous cases holding that deliberate disregard of the safety of others is not necessary to a prosecution for manslaughter; yet the court took the occasion to repudiate the two cases relied upon by defendant. Neither the

previous authority nor the principal case hold that civil negligence is sufficient in manslaughter cases, but only that offered definitions of 'due caution and circumspection' were incorrect or else did not add anything. Still other California cases, never overruled, require a degree of negligence beyond that necessary to civil liability, so there is still room for doubt as to how the court conceives 'criminal negligence' to be defined in section 192." It is concluded that an instruction that a defendant should *not* be convicted of manslaughter for the usual lack of ordinary care would be much more favorable to the defendant, more understandable and more in accord with the established practice in most other jurisdictions than the supposedly self-explanatory "due caution and circumspection".

In the other note, 25 Cal.L.Rev. 1, 30, is found this statement: "The main question is, therefore, what does 'without due caution and circumspection' mean; what degree of culpability is required? The law on this point seems in California to be less settled and less clear than in other jurisdictions." After quoting an instruction identical with the one in the present case except for the words "even though his negligence does not amount to a wanton or reckless disregard of human safety or life" which are not present in our case, the writer notes that "It is not easy to understand the true significance of this rule. Did the supreme court therein formulate the proposition that ordinary (civil) negligence would suffice to constitute manslaughter? Certainly California has widened the concept of criminal negligence necessary to constitute manslaughter further than most of the other jurisdictions. But it does not seem correct to say that the quoted passages from *People v. Seiler* and *People v. Wilson* [both automobile-manslaughter cases] are authority for the proposition that the negligence which suffices as the basis for civil liability and the negligence which is the foundation for criminal liability under the manslaughter statute are of the same degree. To be sure the language of the court contains a term which is customarily used in the

definition of civil negligence, namely, the following: 'precautions which a person of ordinary prudence could have used under the circumstances.' But as a whole the definition differs from that of ordinary negligence, including, as it does, the element of something dangerous in itself or in its use. Furthermore, the court admitted in the quoted passage from *People v. Seiler* that the lack of due caution and circumspection might be such as would be defined as culpable, even though this word was not considered to be a proper term to convey the significance of due caution and circumspection."

In the two most recently filed civil liability cases before this court, *Jensen v. Minard*, 44 Cal.2d 325, 282 P.2d 7, and *Warner v. Santa Catalina Island Co.*, 44 Cal.2d 310, 282 P.2d 12, we were concerned with personal injuries occurring because of the negligent handling of dangerous instrumentalities (a gun, and shooting gallery cartridges). We concluded, in both cases, that the standard of care in such cases was so great that a slight deviation therefrom would constitute negligence. In the case at hand, the jury was instructed in part that "When a person is doing anything dangerous in itself or has charge of anything dangerous in its use and acts with reference thereto without taking those proper precautions which a person of ordinary prudence would have used under the circumstances and the death of another results therefrom, his act or neglect is a criminal act against the person so killed." It appears that this instruction is the same principle we have so recently applied in *civil* liability cases.

[8,9] The statute, Pen.Code, § 192, subd. 2, provides (in part) that in order to convict a person of involuntary manslaughter, there shall be an unlawful killing of a human being in the commission of a lawful act which might produce death without due caution and circumspection. The words lack of "due caution and circumspection" have been heretofore held to be the equivalent of "criminal negligence", Pen.Code, § 20. The general rule is set forth in 26 Am.Jur., Homicide, § 210, p.

299, as follows: "The authorities are agreed, in the absence of statutory regulations denouncing certain acts as criminal, that in order to impose criminal liability for a homicide caused by negligence, there must be a higher degree of negligence than is required to establish negligent default on a mere civil issue. The negligence must be aggravated, culpable, gross, or reckless, that is, the conduct of the accused must be such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to consequences." The article continues thus: "Aside from the facts that a more culpable degree of negligence is required in order to establish a criminal homicide than is required in a civil action for damages and that contributory negligence is not a defense, criminal responsibility for a negligent homicide is ordinarily to be determined pursuant to the general principles of negligence, the fundamental of which is knowledge, actual or imputed, that the act of the slayer tended to endanger life. The facts must be such that the fatal consequence of the negligent act could reasonably have been foreseen. It must appear that the death was not the result of misadventure, but the natural and probable result of a reckless or culpably negligent act."

[10] We hold, therefore, that the general rule just quoted, sets forth the standard to be used in California for negligent homicide, Pen.Code, § 192, subd. 2, in other than vehicle cases. Defendant here was charged with a violation of section 192, subdivision 2, of the Penal Code. The jury should have been instructed according to the rule which generally prevails in this country as to what constitutes criminal negligence, or lack of due caution and circumspection so that her guilt or innocence might be determined in accord therewith.

Because of the errors heretofore noted, the judgment is reversed.

GIBSON, C. J., and TRAYNOR and SCHAUER, JJ., concur.

134 Cal.App.2d 377

**The PEOPLE of the State of California,
Plaintiff and Appellant**

v.

**Robert Chase MISNER, Defendant and
Respondent.**

Cr. 989.

District Court of Appeal, Fourth District,
California.

July 13, 1955.

Prosecution for leaving the scene of an accident without complying with requirements of law. The Superior Court, San Bernardino County, Jesse W. Curtis, Jr., J., granted motion to dismiss information. State appealed. The District Court of Appeal, Mussell, J., held that evidence that accused was driver of vehicle involved in accident resulting in injury to another driver, and that accused did not comply with requirements of statute providing for identification and rendering assistance to injured, was sufficient to support information.

Order reversed.

1. Indictment and Information ☞10.2(8)

In prosecution for leaving the scene of an accident without making proper identification and rendering assistance to injured, evidence that accused was driver of automobile involved in accident that resulted in injury to other driver, and that accused failed to comply with requirements of law was sufficient to support information. Vehicle Code, §§ 480, 482(a).

2. Criminal Law ☞412(1)

In prosecution for leaving the scene of an accident without complying with requirements of law, evidence of statements of accused made to officer at time accused filed accident report were admissible, although report itself was not admissible. Vehicle Code, §§ 480, 482(a), 488.

County, and Edward F. Taylor, Deputy Dist. Atty., San Bernardino, for appellant.

Julius J. Novack, San Bernardino, for respondent.

MUSSELL, Justice.

Defendant was charged with the crime of violation of section 480 of the California Vehicle Code. It was alleged in the Information that Robert Chase Misner "On or about the 1st day of October, 1954, in the said County of San Bernardino, State of California, being then and there the driver of a vehicle upon a public highway, which said vehicle was then and there involved in an accident resulting in injury to a human being, to wit: Wayne Edwin Ledyard, did then and there wilfully, unlawfully and feloniously fail to fulfill the requirements of section 482(a) of the California Vehicle Code.

Section 480 of the Vehicle Code provides as follows:

"Accidents Involving Death or Personal Injuries. The driver of any vehicle involved in an accident resulting in injury to * * * or death of any person shall immediately stop such vehicle at the scene of such accident and shall fulfill the requirements of section 482(a) hereof and any person failing to stop or to comply with said requirements under such circumstances is guilty of a public offense and upon conviction thereof shall be punished by imprisonment in the state prison for not less than one year nor more than five years or in the county jail for not to exceed one year or by fine of not to exceed five thousand (\$5000) dollars or by both."

Section 482(a) of said code provides as follows:

"[Accident resulting in injury to or death of person.] The driver of any vehicle involved in an accident resulting in injury to or death of any person shall also give his name, address and the registration number of the vehicle he is driving, the name of the owner, and shall upon request and if available exhibit his operator's or chauffeur's

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., Lowell E. Lathrop, Dist. Atty., of San Bernardino

license to the person struck or the driver or occupants of any vehicle collided with or shall give such information and exhibit such license to any traffic or police officer at the scene of the accident and shall render to any person injured in such accident reasonable assistance, including the carrying or the making arrangements for the carrying of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person."

Defendant was arraigned in the Superior Court and moved to dismiss the information upon the ground that he had been committed without reasonable or probable cause. The motion to dismiss was granted, the court holding that "The transcript does not show or give reasonable suspicion of an offense having been committed." The People appeal from this order.

The transcript of the preliminary examination shows that at about 10:00 o'clock p. m. on October 1, 1954, W. E. Ledyard was driving his automobile in an easterly direction on Kendall Drive near the city of San Bernardino. Kendall Drive runs generally east and west and intersects Devil's Canyon Road, which runs north and south. When Ledyard was about 200 feet from this intersection he observed a car approaching it from the south on Devil's Canyon Road. The driver of the northbound car did not stop his car at the boulevard stop sign as he entered the intersection and his car struck the eastbound car on the right side. Ledyard's eastbound car came to rest facing in a westerly direction in the westbound lane of Kendall Drive and at a point approximately 100 feet east of the intersection. Ledyard was thrown to the floor boards of his car, his back was injured and his head was cut. He crawled out of the door on the righthand side of his car and went over to the other car involved in the collision. He observed that the motor was still running in the Chrysler sedan and that there was no driver in it. He turned off the ignition, and then noticed a Ford automobile on the south side of Kendall Drive and a man standing beside it. He

talked with this man (W. B. Murrel) and told him that the fellow who was driving the Chrysler was probably thrown out and that they should walk around the car a couple of times to make sure. Ledyard testified that they circled the Chrysler and found no one there; that he walked back to his car; and that he was not "feeling too good at the time."

Walter Baker Murrel, who was a passenger in the Ford car, testified that he observed the two cars collide; that he saw the Chrysler "run the stop sign"; that he saw Ledyard "cut the switch off at the Chrysler"; that he and Ledyard walked back to the Chrysler to see if they could find the driver; that he observed a man, whom he could not identify, lying on the ground about 20 feet from the Chrysler; that this man "got up and took off across the field", apparently staggering.

Sergeant Hickey of the California Highway Patrol testified that he saw the defendant on October 2, 1954, in the Highway Patrol office in San Bernardino; that Misner asked him if the form on the office counter was the report he had to fill out to report an accident; that he told Misner it was and at the same time asked him his name and the location of the accident; that Misner then told him that the accident had occurred at Devil's Canyon Road and Kendall Drive and that his name was Robert Misner; that he told Misner that in addition to the report which Misner had begun to fill out that he, Hickey, had some information he wanted to obtain from him for their own police report; that he asked Misner for his driver's license and also asked him how the accident occurred; that Misner stated he was driving north on Devil's Canyon Road and that his brakes had failed when he applied them at the stop sign at the entrance to Kendall Drive; that he asked him about running away from the accident and Misner stated that he "had not run, he had walked"; that the information he received from Misner was written into a Highway Patrol report separate from that written out by Misner.

[1] Appellant contends that the order of the trial court dismissing the information

is unsupported by the record. We are in accord with this contention.

In *Bompensiero v. Superior Court, etc.*, 44 Cal.2d 178, 183, 281 P.2d 250, 254, the court said:

"Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused. *People v. Nagle*, 25 Cal.2d 216, 222, 153 P.2d 344. An indictment will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it. *Lorenson v. Superior Court*, 35 Cal.2d 49, 56, 59, 216 P.2d 859; cf. *Greenberg v. Superior Court*, 19 Cal.2d 319, 322, 121 P.2d 713."

In *People v. Wisecarver*, 67 Cal.App.2d 203, 209, 153 P.2d 778, 781, it was held:

"In a criminal action the sovereign has the same right to have the truth of its accusation against the defendant determined by a trial court to the same extent and in the same degree as is the accused. *People v. Stoll*, 143 Cal. 689, 696, 77 P. 818; *People v. Pruitt*, 55 Cal. App.2d 272, 275, 130 P.2d 767; *People v. Borrego*, 211 Cal. 759, 765, 297 P. 17. It is as much a technical breach of the rules of procedure to deny the People a trial upon an information based upon such facts as might reasonably convince a jury of defendant's guilt as it would be to convict a defendant upon the mere filing of an indictment. It is the duty of the magistrate to commit the accused 'if it appears from the examination that a public offense has been committed.' The question of guilt is utterly one for the determination of the superior court. Penal Code, § 872."

Applying the rules set forth in the foregoing decisions it is apparent that there was ample evidence to support the information and that as a result, the order setting it aside must be reversed. *People v. Platt*, 124 Cal.App.2d 123, 134, 268 P.2d 529. Misner was the driver of a vehicle involved in an

accident resulting in injury to another driver (Ledyard) and failed to comply with the requirements of section 482(a) of the Vehicle Code. In *People v. Green*, 96 Cal.App.2d 283, 288, 215 P.2d 127, 130, this court held that the purpose of the "hit and run" statute is to prevent the driver of an automobile from leaving the scene of an accident in which he participates or is involved without proper identification and to compel necessary assistance to those who have been injured.

[2] It is the contention of respondent that there was no evidence other than the admission of Misner to officer Hickey to show that respondent was the driver of the Chrysler automobile and that the testimony of the officer concerning respondent's admission that he was the driver was inadmissible under the provisions of section 488 of the Vehicle Code. However, as was said in *Stroud v. Hansen*, 48 Cal.App.2d 556, 559, 560, 120 P.2d 102, 104:

"* * * Section 488 provides that no such report shall be used as evidence in any trial arising out of such accident. But it was not a report so provided to be made that was offered but rather the testimony of the officer as to the statements made by the driver to him. No evidence of the facts that occurred at the time of a vehicular accident is privileged. Only those reports are confidential which are so made by section 488 of the Vehicle Code. To make a statement privileged and inadmissible it must come within the express terms of the section. *Dwelly v. McReynolds*, 6 Cal.2d 128, 131, 56 P.2d 1232; *Inouye v. McCall*, 35 Cal.App.2d 634, 636, 96 P.2d 386." See also *Carroll v. Beavers*, 126 Cal. App.2d 828, 836, 273 P.2d 56.

In the *Stroud* case, as here, it was not a report which was received in evidence but rather the testimony of the officer that Misner had told him he was driving the Chrysler at the time of the accident.

The order dismissing the information is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

134 Cal.App.2d 582

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Mark C. LAMB, Defendant and Appellant.
Cr. 5385.

District Court of Appeal, Second District,
Division 1, California.

July 26, 1955.

Prosecution for selling marihuana cigarettes in violation of Section 11500 of the Health and Safety Code. From a judgment of conviction and order denying motion for new trial of the Superior Court, Los Angeles County, Charles W. Fricke, J., the defendant appealed. The District Court of Appeal, White, P. J., held that where witness had only been interested in the purchase of the marihuana and received no compensation from accused by reason of the sale, witness was not an accomplice as he was not liable to prosecution for identical offense charged against accused, and refusal of defendant's requested instructions in regard to an accomplice was not error.

Judgment and order denying motion for new trial affirmed.

1. Criminal Law §507(1)

An accomplice must stand in the same relation to the crime as the person charged therewith and must approach it from the same direction and similarity of offenses is not the same as identity.

2. Criminal Law §507(1)

To be an accomplice one must knowingly, voluntarily, and with common intent unite with the principal offender in the commission of the crime.

3. Criminal Law §780(1)

In prosecution for selling marihuana cigarettes, witness who had only been interested in the purchase of the marihuana and had received no compensation from accused by reason of the sale was not an accomplice as he was not liable for prosecution for identical offense charged against accused, and refusal of defendant's instructions in regard to an accomplice was not

error. Health and Safety Code, § 11500; Pen.Code, § 1111.

4. Criminal Law §742(2)

Where facts with respect to the participation of a witness in the crime for which the accused is on trial were clear and not disputed, it was for the trial court to determine whether witness was an accomplice.

5. Criminal Law §742(2)

Where there is evidence tending to connect the witness with a crime, but the facts are disputed or susceptible of different inferences, then the question of complicity should be submitted to the jury.

Stanley R. Malone, Jr., Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Marvin Gross, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused of a violation of section 11500 of the Health and Safety Code of California, in that on or about September 18, 1954, he sold, furnished and gave away a quantity of marihuana cigarettes. Following entry of a plea of not guilty the cause proceeded to trial before a jury which returned a verdict finding defendant guilty as charged. Motion for a new trial was denied. From the judgment of conviction and the order denying his motion for a new trial defendant prosecutes this appeal.

We consider the following a fair statement of the evidence given in this prosecution. Defendant was employed as a parking lot attendant at a cafe in the City of Los Angeles on the night of September 18, 1954. Barney Kessel, employed as a musician at the above mentioned cafe testified that as he was passing through the parking lot on his way to work that night, defendant Lamb asked him to tell Robert Shevak that Lamb wanted to see him, and that at or about 10:30 p. m. on the same night, Kessel informed Shevak of this message.

Robert Shevak, also employed as a musician at the same cafe, testified that he received the above message from Kessel and

that shortly thereafter, went out to the parking lot; that Lamb showed him a bundle of about 28 cigarettes and gave him one to try. Shevak testified he told Lamb there were too many and that he couldn't take them all, but that Geordie would probably like to look at them.

Shevak further testified that he shared the one cigarette with Geordie Hormel; that after another "set" (of music) was played, Hormel and Shevak went to the parking lot where Hormel gave Shevak \$20 which Shevak in turn handed to Lamb; that a minute or so later while all three were still together, Lamb handed Shevak a rubber band-wrapped bundle of about 28 cigarettes; that at Hormel's suggestion, Shevak took about half, handing the remaining approximately 13 or 14 cigarettes to Hormel. Shevak testified that he thereafter threw his cigarettes into some nearby bushes.

Shevak also testified he had obtained marihuana from Lamb prior to September 18, 1954.

Matthew O'Connor, Narcotics Investigator for the Department of Justice, State of California, Los Angeles Office, testified that he and Officer O'Grady observed Lamb at the parking lot at the aforesaid cafe from across the street on the night of September 18, 1954. He further testified that on the night in question, he observed several different persons drive into the lot, and walk into the lot and have a conversation with Lamb; whereupon Lamb would depart and at times walk to a lamp post and at other times to a car wheel, stoop down, then stand up, walk back to the persons, and then these persons would leave the parking lot without entering the cafe. Officer O'Connor further testified that he later examined the aforesaid lamp post but found nothing of a contraband nature. That on the following morning, in company with police officer O'Grady, they searched the home of defendant and again found no marihuana or other narcotics.

John E. O'Grady testified that he was a police officer of the City of Los Angeles assigned to the Narcotics Division; that he observed defendant in the parking lot on September 18, 1954, that he arrested

Hormel and conducted a search of the latter's automobile in which he found thirteen or fourteen paper-wrapped cigarettes with a rubber band around them.

William G. Penprase, a chemist for the Los Angeles Police Department, testified that he received the aforesaid cigarettes, selected six of the thirteen at random, examined them and found that they contained marihuana.

As a witness in his own behalf, defendant Lamb testified that he did not sell any marihuana to any person on the night in question; that he did not ask Kessel to deliver any message to anyone. He further denied talking to Shevak and Hormel together that night except that as they passed through the parking lot on their way to work when they "spoke and I spoke".

Appellant's sole ground for reversal is that the court erred to his prejudice in refusing to give his proffered instructions regarding the testimony of the witness Shevak, who, it is urged, was an accomplice.

Section 1111 of the Penal Code defines an accomplice as one who is liable to prosecution for the *identical* offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

In the instant proceeding appellant Lamb was on trial upon the specific charge of *selling*, furnishing and giving away marihuana. In other words, he was charged with the *sale* of marihuana, while the witness Shevak was interested in the *purchase* of marihuana from appellant.

[1] In *People v. Baskins*, 72 Cal.App. 2d 728, 731, 165 P.2d 510, 511, it was held, "* * * An accomplice must stand in the same relation to the crime as the person charged therewith and must approach it from the *same direction*. *Similarity* of offenses is *not* the same as *identity*. *People v. Galli*, 68 Cal.App. 682, 684, 230 P. 20. * * *" (Emphasis added.) See also, *People v. Cowan*, 38 Cal.App.2d 231, 242, 101 P.2d 125; *People v. Brown*, 61 Cal.App. 748, 752, 216 P. 58.

[2] It is manifest that while the witness Shevak may well be guilty of some

crime nevertheless, under the requirements of identity of offense as distinguished from a mere similarity, he cannot be classed as an accomplice. To be an accomplice one must knowingly, voluntarily, and with common intent unite with the principal offender in the commission of the crime. *People v. Shaw*, 17 Cal.2d 778, 799, 112 P.2d 241; *People v. Frahm*, 107 Cal.App. 253, 263, 290 P. 678; *People v. Walker*, 88 Cal.App.2d 265, 268, 198 P.2d 534.

[3] In the case at bar there was no "common intent" between appellant and Shevak, nor a "uniting" in the commission of the crime charged against the former. As heretofore pointed out, Shevak was interested in the purchase of marihuana and not in its sale. Shevak received nothing from appellant by way of compensation for the sale. It was after the sale to Hormel was consummated by appellant that Shevak took one-half of the cigarettes as a gift from Hormel. Applying the facts and circumstances here shown in evidence with the definition set forth in section 1111 of the Penal Code, the conclusion is inescapable that Shevak was not liable to prosecution for the identical offense charged against appellant, who was guilty of selling, *People v. Abair*, 102 Cal.App.2d 765, 772, 773, 228 P.2d 336. There was therefore, no error in refusing the requested instructions.

[4, 5] Where, as in the instant case, the facts with respect to the participation of a witness in the crime for which the accused is on trial are clear and not disputed, it is for the court to determine whether he is an accomplice. It is only when although there is evidence tending to connect the witness with the crime, the facts are disputed or susceptible of different inferences, that the question of complicity should be submitted to the jury, *People v. Swoape*, 75 Cal.App. 404, 413, 414, 242 P. 1067; *People v. Allison*, 200 Cal. 404, 408, 253 P. 318; *People v. Frahm*, supra, 107 Cal.App. at page 264, 290 P. at page 682.

The judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

DORAN and DRAPEAU, JJ., concur.

134 Cal.App.2d 298

In re MAYELLEN APARTMENTS, Inc.,
a corporation,

In the Process of Voluntary Winding Up.

MAYELLEN APARTMENTS, Inc., a California corporation, Petitioner and Respondent,

v.

Marlo J. M. PACMAN, Vera Busch, Margaret Hughlett, and E. C. Clements,
Defendants and Appellants.

Civ. 20893.

District Court of Appeal, Second District,
Division 3, California.

July 8, 1955.

Rehearing Denied July 29, 1955.

Hearing Denied Sept. 1, 1955.

Proceeding by corporation for judicial supervision of winding up of its affairs and its dissolution. From adverse orders of the Superior Court, Los Angeles County, Frank G. Swain and Arnold Praeger, JJ., the defendants appealed. The District Court of Appeal, Vallée, J., held that Superior Court had jurisdiction to entertain proceeding by corporation for judicial supervision of the winding up its affairs and its dissolution notwithstanding provision in articles of incorporation that no exchange or other disposition of all or substantially all of property or corporation could be made unless approved by vote of all shareholders or by their written consent, which four shareholders refused to give.

Affirmed.

1. Corporations ~~C~~610(1)

Superior Court had jurisdiction to entertain proceeding by corporation for judicial supervision of winding up its affairs and its dissolution notwithstanding provision in articles of incorporation that no exchange or other disposition of all or substantially all of property of corporation could be made unless approved by vote of all shareholders or by their written consent, which four shareholders refused to give. West's Ann. Corp.Code, §§ 4600, 4607-4619, 4800, 4801(g, h); West's Ann.Const. art. 6, § 5.

2. Corporations Ⓒ610(1)

Under provisions of Constitution authorizing Legislature to provide for formation, organization, and regulation of private corporations, the Legislature has power to provide for voluntary dissolution of corporations and for judicial supervision of winding up, notwithstanding contractual right of shareholders created by articles of incorporation. West's Ann.Const. art. 12, § 1.

3. Corporations Ⓒ174

Relation of a shareholder to corporation is one of contract, which is defined by the articles, the by-laws, and applicable statutes.

4. Corporations Ⓒ174

Provisions of Constitution and sections of Corporation Code form part of contract between corporation and its shareholders. West's Ann.Corp.Code, §§ 4607-4619.

5. Constitutional Law Ⓒ93(1)

In proceeding by corporation for judicial supervision of the winding up of its affairs and its dissolution, exercise of court's jurisdiction in winding up and dissolution of corporation did not violate any vested contract or property right of shareholders notwithstanding provision in articles of incorporation that all or substantially all of corporate property could not be disposed of unless approved by vote of all shareholders or by their written consent, which was not given by four shareholders.

6. Corporations Ⓒ622(2)

Statute providing that corporation shall not sell or dispose of all or substantially all its property except by vote or written consent of shareholders entitled to vote, applies to an existing, going organization and not to a corporation in process of winding up its affairs and dissolution. West's Ann.Corp.Code, §§ 3901, 4801.

7. Appeal and Error Ⓒ863

Where question of fraud was made an issue by corporation's petition for judicial supervision of the winding up of its affairs

and for its dissolution and defendants' answers thereto and by corporation's petition for an order approving sale of its assets and answer thereto and no appeal was taken from order entered on either petition, question of fraud could not be raised on appeal from denial of motion to vacate order approving sale of assets. West's Ann.Corp.Code, § 4607.

8. Injunction Ⓒ26(3)

Where superior court had entered an order that it take jurisdiction of proceeding by corporation for judicial supervision of winding up of its affairs and its dissolution, court had jurisdiction to enjoin prosecution of an action instituted by a shareholder against corporation and its officers to cause a revocation of election to wind up, to cancel its attempted sale of all corporate assets, and to obtain other relief. West's Ann.Corp.Code, § 4607.

Arthur E. Briggs, Los Angeles, for appellants.

Nathan Newby, Jr., Los Angeles, for respondent.

VALLÉE, Justice.

This proceeding was commenced on February 17, 1954 by Mayellen Apartments, Inc., a corporation, for judicial supervision of winding up its affairs and its dissolution pursuant to the provisions of sections 4607-4619 of the Corporations Code.

Mayellen Apartments, Inc., is a California corporation organized January 31, 1948 for the purpose of owning and operating an apartment house with 16 apartments in Los Angeles. It is authorized to issue 16 classes of stock, each class having one share. The holder of a share of stock has the exclusive right to use and occupy one of the 16 apartments, which apartment is named in the certificate evidencing the share of stock so held.¹ Each of the 4 appellants owns a

1. The articles provide: "The holders of each class of stock shall be entitled to the use and exclusive right to occupy the apartments set opposite the class of stock as follows: * * * Said apartments being located in the structure at

1243 West 24th Street, and on the real estate above described in Article Two hereof, as long as said occupancy does not violate any laws regulating the occupancy of apartment houses and/or the apartments located therein."

share of stock. The articles of incorporation provide that any shareholder desiring to sell his share of stock shall first make it available to a co-owner, then to the corporation, then to other shareholders, each with the right to purchase at par plus \$100 and improvements, or less if acceptable to the seller. They further provide that no sale or other disposition of all or substantially all of the property of the corporation shall be made unless approved by the vote of or written consent of all the shareholders entitled to exercise the entire voting power of the corporation.

About August 24, 1953 the corporation elected to wind up its affairs and voluntarily dissolve. Twelve of the 16 shareholders consented in writing to the election. (See Corporations Code, § 4600.) The reasons for the dissolution are stated in the margin.² Thereafter the required steps precedent to judicial supervision of winding up and dissolution were taken.

The minority shareholders, who are the appellants here, answered the petition for judicial supervision, objecting thereto. Among other things, they prayed that if the court took jurisdiction it ascertain the value of the share of each shareholder and they be given their right to purchase the shares of the majority in accordance with the articles. On April 7, 1954, after a hearing at which appellants were represented, an order was made continuing the hearing on the petition to April 21 on condition that if appellants on or before 5:00 p. m. on April 14 deposited \$39,075 with the county clerk for the purpose of purchasing the shares of the majority, and if on or before 5:00 p. m. on April 20 the majority consent in writing to the purchase for that sum, then the \$39,075 would be held for distribution to the majority. The minority shareholders did not deposit the \$39,075 with the

county clerk. On July 20, 1954 an order was made adjudging that the court take "jurisdiction of and supervision of winding up proceedings and may make orders and adjudge as to any and all matters concerning the winding up of the affairs of the corporation." This order became final. On August 13, 1954, after a hearing at which appellants were represented, an order was made approving the sale of the assets of the corporation to one Garrett for \$50,500.

On July 26, 1954 Pacman, one of the minority shareholders, filed an action, Number 631227, in the superior court in which he sought a decree ordering the officers of the corporation "to cause a Revocation of Election To Wind Up" and "to cancel attempted sale of all corporate assets" or, in the alternative, for general and special damages. On September 15, 1954 the court in this proceeding issued a preliminary injunction restraining Pacman from prosecuting action 631227 until the final determination of this matter.

On September 16, 1954 Pacman regularly moved the court for an order vacating the order approving the sale of the assets and subjecting the corporation "to Supervision of Court of Winding Up Proceedings" on the ground the court was without jurisdiction to make it. All appellants were represented at the hearing. The motion was denied.

The minority shareholders appeal from the order denying the motion to vacate the order approving the sale of the assets of the corporation and from the order granting the preliminary injunction.

[1] Appellants assert that because of the provisions of the articles the court was without jurisdiction of the proceeding and that the proceeding is an attempt by the majority shareholders and the officers of the corporation to take their property from

2. "That a schism has arisen between the majority stockholders and the minority stockholders which has prevented the harmonious administration of the affairs of the corporation and disrupted the normal and peaceful living of the occupants of the apartment house building owned by the Petitioner, said occupants being the shareholders; that because of

said disunity among the stockholders, individual stockholders who desired to sell their respective shares of stock have been unable to secure buyers because of the fact that prospective buyers do not desire to occupy the premises where a spirit of bickering and disunity prevails."

them without due process of law. They say their property consists of the right, as shareholders, to the use and exclusive occupancy of their apartments as provided in the articles of incorporation. They say further the proceeding constitutes a breach of the contract between the corporation and its shareholders and a fraud on their rights as shareholders in that it was agreed in the articles that no sale of the assets shall be made unless all the shareholders consent thereto in writing.³

A corporation may elect to wind up its affairs and voluntarily dissolve by the vote or written consent of shareholders representing 50 per cent or more of the voting power. Corp.Code, § 4600.⁴ When voluntary proceedings for winding up or dissolution have been commenced the board of directors continues to act as a board and has full power to wind up and settle its affairs. Corp.Code, § 4800. After the commencement of such proceedings the directors have power "[t]o sell at public or private sale, exchange, convey, or otherwise dispose of, all or any part of the assets of the corporation, upon such terms and conditions and for such considerations as such board deems reasonable or expedient, and to execute bills of sale and deeds of conveyance in the name of the corporation" and "[i]n general, to make contracts and to do any and all things in the name of the corporation which may be proper or convenient for the purposes of winding up, settling, and liquidating the affairs of the corporation." Corp.Code, § 4801(g), (h). When judicial supervision is invoked the board of directors acts under the supervision of the court. Corp.Code, §§ 4607-4619. Section 4607 reads:

"If a corporation is in the process of voluntary winding up, the superior court of the county in which the principal office of the corporation is located, upon the petition of (a) the corpora-

tion, or (b) the holders of 5 percent or more of the number of its outstanding shares, or of (c) three or more creditors, and upon such notice to the corporation and to other persons interested in the corporation as shareholders or creditors as the court may order, may make orders and adjudge as to any and all matters concerning the winding up of the affairs of the corporation."

The Code provides that the court has jurisdiction to determine the rights of all shareholders in and to the assets of the corporation, the settlement or determination of all claims of every nature against the corporation or any of its property, and the amount of money or assets available for distribution among shareholders. Corp.Code, §§ 4609, 4610.

The Constitution provides that the superior courts shall have original jurisdiction in all civil cases and proceedings and of all such special cases and proceedings as are not otherwise provided for. Const. art. VI, § 5. There can be no doubt that section 4607 is valid and that the superior court had jurisdiction to entertain this proceeding. *Wright v. Central California C. W. Co.*, 67 Cal. 532, 533, 8 P. 70; *Wickersham v. Brittan*, 93 Cal. 34, 39, 28 P. 792, 29 P. 51, 15 L.R.A. 106, in which it was held the superior court has jurisdiction to entertain a proceeding under former Civil Code sections 312 and 315 to determine the validity of an election to the board of directors of a corporation; *Whitehead v. Sweet*, 126 Cal. 67, 58 P. 376, holding the superior court has jurisdiction of a proceeding to oust corporate directors; *City of Los Angeles v. Owens River Canal Co.*, 120 Cal.App. 380, 7 P.2d 1064, in which it was held the superior court has jurisdiction to entertain a proceeding to compel the holding of an annual shareholders' meeting for the purpose of electing directors of a corporation; *De-*

3. The articles provide: "No sale, lease, conveyance, transfer, exchange or other disposition (except by way of hypothecation) of all or substantially all of the property and assets of this Corporation shall be made unless approved by the vote of or written consent of all of the shareholders of this Corporation entitled to exercise the entire voting pow-

er of this Corporation, except that the Corporation may lease individual apartments, the control of which the Corporation has acquired under subparagraphs (e) and (f) of Article Five aforesaid or under the powers herein granted."

4. All section references are to the Corporations Code, unless otherwise noted.

Garmo v. Goldman, 19 Cal.2d 755, 123 P.2d 1; California Fruit Growers' Ass'n v. Superior Court, 8 Cal.App. 711, 97 P. 769, holding the superior court has jurisdiction to entertain a proceeding to remove directors of a corporation for fraudulent practices. Cf. Smith v. San Francisco & N. P. Ry. Co., 115 Cal. 584, 47 P. 582, 35 L.R.A. 309, an action brought for the purpose of having it declared that one person, rather than another, was elected director of a corporation.

Corporations Code sections 4607-4619 are a re-enactment of former Civil Code section 403.⁵ Speaking of former Civil Code section 403, the court in *In re San Joaquin Light & Power Corp.*, 52 Cal.App.2d 814, at page 824, 127 P.2d 29, at page 36, stated:

"A petition was filed as authorized by section 403 of the Civil Code and the superior court then had 'power to order and adjudge as to any or all matters in and for the winding up of the affairs of the corporation,' including '(3) the determination of the rights of shareholders * * * in and to the assets of the corporation.' An absolute right to petition for such supervision and direction is impliedly given and we think it follows that the court not only has the power to order and adjudge as to all matters thus presented, but that the duty of so doing is imposed upon the court."

Daugherty v. Superior Court, 56 Cal.App.2d 851, at page 856, 133 P.2d 827, at page 830, says:

"The latter section [former Civil Code, § 403] gives to a superior court power to order and adjudge as to any and all matters in connection with the winding up of a corporation, including many specified matters which involve the adjudication of disputes which may arise between any of the interested parties."

See also *Hare & Chase v. Bankers' Discount Corp.*, Ohio App., 56 N.E.2d 943, 949.

[2-4] The Constitution authorizes the Legislature to provide for the formation,

organization, and regulation of private corporations and to prescribe their powers, rights, duties, and liabilities and the powers, rights, duties, and liabilities of their officers and shareholders. Const. art. XII, § 1. The power of the Legislature under the constitutional reservation of power to provide for voluntary dissolution of corporations and for judicial supervision of winding up, notwithstanding contractual rights of shareholders created by the articles, is not open to question. The relation of a shareholder to the corporation is one of contract. (12 Cal.Jur.2d 748, § 186.) The contract is defined by the articles, the bylaws, and applicable statutes. *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 280, 110 P. 942; *Fawkes v. Farm Lands Invest. Co.*, 112 Cal. App. 374, 378-379, 297 P. 47. The provisions of the Constitution and sections 4607-4619 of the Corporations Code form part of the contract between the corporation and its shareholders. *Schroeter v. Bartlett Syndicate Bldg. Corp.*, 8 Cal.2d 12, 14, 63 P.2d 824; *DeMello v. Dairyman's Co-op. Creamery*, 73 Cal.App.2d 746, 750, 167 P.2d 226; *Silva v. Coastal Plywood & Timber Co.*, 124 Cal.App.2d 276, 278, 268 P.2d 510. Appellants' contracts with the corporation were subject to the constitutional reservation of power and to all laws relative to dissolution of a corporation. An analogous state of facts was before the court in *Silva v. Coastal Plywood & Timber Co.*, supra, 124 Cal.App.2d 276, 268 P.2d 510. There the articles provided that only one share of stock could be issued to or owned by any shareholder, who had to be an active employee of the corporation or a person acceptable to the board of directors as a future active employee. There were extensive provisions in the bylaws having to do with the minimum and maximum wages to be paid shareholder employees and job tenure. The corporation ran into difficulties and the board of directors called a shareholders' meeting for the purpose of approving an amendment to the articles so that shares of stock could be sold without restriction and that any person could own any number of shares. The suit was to enjoin the proposed

5. Stats.1931, ch. 862, p. 1825; Stats.1933, ch. 533, § 81, p. 1408; Stats.1947, ch. 1038, p. 2385.

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act of the board. The court, speaking through Mr. Justice Peek, said, 124 Cal. App.2d at page 279, 268 P.2d at page 512:

"Plaintiffs do not contend, nor could they, that their rights are property rights existing separate and apart from their contract rights as shareholders. Without that element it cannot be said that there has been such impairment of their contract as would come within constitutional prohibitions. Mere interference with their contract rights as shareholders cannot overcome the reserved right of the state to exercise what it determines to be in the public welfare under the power reserved to it in the constitution. Thus the problem is not as to whether 'vested' rights or the 'fundamental nature' of the corporation will be affected, but whether or not the amendment falls within the scope of the applicable statute. Inherent in the statute is the possibility of change. There can be no other reason for the reservation. The wisdom of enactment is the concern of the legislature, not the courts."

Schroeter v. Bartlett Syndicate Bldg. Corp., supra, 8 Cal.2d 12, 63 P.2d 824, 825, was an action by a shareholder to recover assessments paid by him on his stock. At the time the plaintiff's stock was issued, the law permitted the levy and collection of assessments. At the time the assessment was made, the law had been changed to provide that shares were assessable only when the articles expressly conferred such authority. The articles did not, at that time, confer the authority. It was contended by the corporation that its right to assess had to be measured by the law existing at the time the stock was issued, that to hold otherwise "would be a violation of article 1, § 10, and the Fourteenth Amendment of the United States Constitution as well as section 16 of article 1 of the California Constitution" and would impair the obligation of the contract of the corporation with its stockholders within the constitutional inhibition. Answering, the court stated, 8 Cal.2d at page 14, 63 P.2d at page 825:

"The fallacy in this reasoning is that it does not take into consideration section 1 of article 12 of the California Constitution, which reads: * * * This provision was also a part of the contract between the corporation and its stockholders. * * * The state reserved the right to amend or repeal the then existing statute authorizing the levy of assessments and there was no impairment of the obligation of contract by the legislative exercise of this right. The amended statute did not take from the corporation the right to assess its stockholders. It only requires, as a basis for the assessment of corporate stock, that the articles of incorporation must expressly confer authority therefor. No limitation was placed upon the corporation to amend its articles of incorporation. No obligation of contract was impaired; no vested right was interfered with."

In *DeMello v. Dairyman's Co-op. Creamery*, supra, 73 Cal.App.2d 746, 167 P.2d 226, it was held that the reorganization of a cooperative business association into a non-profit cooperative marketing association did not violate the vested rights of dissenting members where it was necessitated by a membership structure resulting in dissension, hampered operations, and unnecessary payment of taxes, and where such members could remain with a full proportionate interest in the assets or withdraw and receive a cash payment equal to the full amount recoverable under the former association's by-laws and an additional credit for the balance of the value of their interest.

One of the questions in *Stubbs v. Jones*, 121 Cal.App.2d 218, 263 P.2d 100, was whether a corporation had been validly dissolved. It was contended it had not been because of the existence of a trust indenture executed by the sole shareholder by which the assets of the corporation were to be controlled and distributed by a trustee. Holding the corporation had been validly dissolved, the court quoted from 16 *Fletcher, Cyclopaedia of Corporations*, perm. ed., § 8022, 121 Cal.App.2d at page 222, 263 P.2d at page 102:

"The general rule is that where a statute confers power on a majority, or a certain per cent, of the stockholders to dissolve, the right is absolute, so far as the motives of the majority are concerned, in the absence of actual fraud, and not subject to judicial review on behalf of minority stockholders."

The court continued, 121 Cal.App.2d at page 223, 263 P.2d at page 103:

"The statutes lay down no conditions for the dissolution of corporations other than that the specific statutory requirements be met, and they declare that when that has been done and when winding up has been completed, and the certificate to that effect has been filed where required, the 'corporate existence shall cease'. Sec. 5201, Corp. Code."

[5] The exercise of the court's jurisdiction in supervising the winding up and dissolution of the corporation does not violate any vested contract or property right of appellants. Their contract and property rights are subject to all statutory provisions relative to winding up and dissolution of the corporation.

[6] It is argued that section 3901 prohibits the sale of all the property and assets of the corporation without the approval of all the shareholders. Section 3901 provides that a corporation shall not sell or otherwise dispose of all or substantially all of its property and assets except by vote or written consent of the shareholders entitled to vote, with the proviso that "the articles may require for such approval the vote or consent of a larger proportion of the shareholders or the separate vote of a majority or a larger proportion of any class or classes of shareholders." As we have noted, the articles of respondent provide that no sale or other disposition of all or substantially all of its property and assets shall be made unless approved by the vote or written consent of all the shareholders. It is manifest that section 3901 applies to an existing, going corporation and not to a corporation in process of winding up its affairs and dissolution. Section

4801, which is found in part 9, division 1 of title 1 of the Corporations Code, treating of "Winding Up and Dissolution", imposes no restriction on the power of the directors to sell all the property and assets of a corporation in the process of winding up its affairs and dissolution, except in case a sale for profit is made for any consideration other than money. Section 4801, and not section 3901, controls in the present instance. The court had the power under section 4801 to order sale of the assets without the consent of all the shareholders.

[7] Appellants claim the evidence shows the entire proceeding for dissolution was conceived in fraud, and for that reason the order denying their motion to vacate the order approving the sale of the assets should be reversed. The claim of fraud is based on the assertion that the corporation commenced the process of dissolution and the proceeding for judicial supervision "solely for the purpose of avoiding its contractual obligations to" appellants for the "use and exclusive occupancy" of their apartments. We find no support in the record for this contention. This question was made an issue by the petition for judicial supervision and the answers of appellants thereto. The court, in ordering that it take jurisdiction, necessarily found the proceedings prior to the filing of the petition were fair and regular and no fraud had been practiced. No appeal was taken from that order and it became final. Thereafter the corporation petitioned for an order approving the sale of its assets to Garrett. Appellants answered the petition, objecting thereto, and again pleaded fraud. Following a hearing at which appellants were represented, the court found the sale of the assets to Garrett was for the best interest of the corporation, two-thirds of the shareholders had consented to the sale and approved the same, and an order ratifying and approving the sale followed. No appeal was taken from that order and it became final. The present appeal is from an order denying Pacman's motion to vacate the order approving the sale. Having had their day in court on the hearing of the petition for judicial supervision and on the hearing of the petition for approval of the

sale of the assets, and having failed to appeal from either of those orders, appellants cannot now raise the question of fraud.

It is argued that the corporation will receive less from the sale approved than it would have realized had the sale been made to appellants. The obvious answer is that shortly after the petition for judicial supervision was filed and before an order was made on the petition, appellants were given the opportunity to purchase the shares of the majority. They failed to take advantage of the opportunity and did not deposit the necessary funds with the county clerk. They cannot complain that the sale was not made to them. There is no showing that the sale price approved by the court is not the fair market value of the assets.

[8] The contention that the court was without jurisdiction to enjoin the prosecution of action 631227 is without merit. That is an action by appellant Pacman against the corporation and its officers "to cause a Revocation of Election To Wind Up," "to cause a Revocation of inequitable amendments," "to cancel attempted sale of all corporate assets," "to henceforth abide by the Articles of Incorporation and the By-Laws," or, in the alternative, for general and special damages. The complaint alleges substantially the same matters as are alleged in appellants' answers to the petition for judicial supervision and in their objections to the petition for sale of the assets. Section 4616 specifically provides:

"The jurisdiction of the court includes staying the prosecution of any suit, proceeding, or action against the corporation and requiring the parties to present and prove their claims in the manner required of creditors."

It is manifest the court had jurisdiction to stay the prosecution of the action. It was entirely competent for the Legislature to provide for the suspension of rights which claimants would otherwise have to pursue and require them to assert their rights, if at all, in the dissolution proceeding. *Hare & Chase v. Bankers' Discount Corp.*, supra, Ohio App., 56 N.E.2d 943, 949-950. The purpose of this limitation of remedies is to preserve the assets for

the payment of all the creditors ratably rather than to permit one creditor to seize the assets and obtain an unfair preference, and to protect the orderly liquidation of the corporation from suits by dissatisfied shareholders. (Ballentine, Corporations, 731, § 317. See American Bar Association Committee on Business Corporations, Model Business Corporation Act (Rev.1950) § 80 (b) comment; 9 Uniform Laws Anno., Model Business Corporation Act, § 50.) All the matters complained of in action 631227 are subject to determination in this proceeding.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



134 Cal.App.2d 559

Henry F. KANGIESER, Plaintiff and Appellant,

v.

Howard A. ZINK, First Doe, Second Doe, Third Doe, Fourth Doe and Fifth Doe, Hartford Accident & Indemnity Company, Defendants and Respondents.

Civ. 16352.

District Court of Appeal, First District, Division 2, California.

July 26, 1955.

Action against police chief for false arrest and false imprisonment. The Superior Court, Santa Clara County, Edwin J. Owens, J., entered judgment of nonsuit, and plaintiff appealed. The District Court of Appeal, Dooling, J., held that in the absence of evidence that police chief had had any knowledge, while plaintiff was in jail, that plaintiff had not been brought before a magistrate, evidence was insufficient for jury on issue whether police chief had co-operated in or countenanced the delay in bringing plaintiff before a magistrate.

Judgment affirmed.

1. Municipal Corporations ⇨182

Chief of police is not personally liable for tortious acts of his subordinates unless he has directed or countenanced such acts or has personally cooperated therein.

2. False Imprisonment ⇨8

Unreasonable delay in bringing one arrested before a magistrate renders the confinement "false imprisonment." Pen.Code, § 849.

See publication Words and Phrases, for other judicial constructions and definitions of "False Imprisonment".

3. False Imprisonment ⇨39

In action against police chief for false arrest and false imprisonment, in absence of evidence that police chief cooperated in or countenanced the delay in bringing plaintiff before a magistrate, evidence was insufficient for jury on issue as to whether plaintiff was brought before a magistrate without unnecessary delay as required by statute. Pen.Code, § 849.

4. False Imprisonment ⇨39

In action against police chief for false arrest and false imprisonment, in absence of evidence that police chief had any knowledge, while plaintiff was in jail, that plaintiff had not been brought before a magistrate, evidence was insufficient for jury on issue as to whether police chief had cooperated in or countenanced the delay in bringing plaintiff before a magistrate. Pen.Code, § 849.

Morgan & Beauzay, San Jose, for appellant.

Robert E. Michalski, City Attorney, Palo Alto, for respondents.

DOOLING, Justice.

Plaintiff appeals from a judgment of nonsuit in an action for false arrest and false imprisonment. The action was tried only against the chief of police of the City of Palo Alto and the company which furnished his official bond.

Appellant suffered a paralytic stroke at about 8 a. m. while driving to work in his truck. He lost the use of his legs, hip and

voice. He was unable to take his foot off the gas pedal so he turned off the ignition and drove his truck into a gasoline station. He remained there helpless in his truck until about 10 a. m. when the proprietor of the station called the police. A police officer answered the call and from appellant's appearance concluded that he was intoxicated. He was arrested and taken to the Palo Alto Police Station where he was booked on a charge of violating section 502, Vehicle Code (driving while intoxicated). The police officer got permission from the respondent Zink, as chief of police, to take appellant to the Palo Alto Hospital for a blood-alcohol test, and this was done. The blood specimen was taken by a technician who came to the police car for that purpose. Appellant was then locked up in a cell where he remained until 6 p. m. when he was released to his brother and taken to a hospital. During his confinement appellant was not taken before a magistrate although there was one in the same building.

[1] The parties are agreed that under *Michel v. Smith*, 188 Cal. 199, 205 P. 113, 114, and the cases which have since followed it, a chief of police is not personally liable for the tortious acts of his subordinates "unless he has directed such acts to be done, or has personally co-operated therein." Later cases have added to the statement the word "countenanced" so as to place liability on the superior officer if he "has directed or countenanced the tortious acts * * * or has co-operated therein." *Noack v. Zellerbach*, 11 Cal. App.2d 186, 188, 53 P.2d 986, 987; *Reed v. Molony*, 38 Cal.App.2d 405, 410, 101 P.2d 175.

We need not concern ourselves with the question whether the original arrest was legal because there is no showing in the record that respondent Zink at any time knew of the circumstances surrounding that arrest. Without such knowledge he could not be said to have "countenanced" it or "cooperated" in it.

[2-4] Appellant's main argument is that in any event the failure to bring him before a magistrate from about 10 a. m. to

6 p. m. was sufficient to raise a jury question as to whether he was brought before a magistrate without unnecessary delay as required by Penal Code, section 849. Such unreasonable delay would make his confinement false imprisonment. *Kaufman v. Brown*, 93 Cal.App.2d 508, 209 P.2d 156. The trial court found that there was no substantial evidence in the record which would support a finding that respondent Zink cooperated in or countenanced the delay in bringing appellant before a magistrate. With this conclusion we agree.

Appellant relies upon the following facts developed in the testimony to establish a case for the jury on the question whether respondent Zink countenanced or cooperated in the failure to bring appellant before a magistrate: 1. the authorization to take appellant from the jail for a blood test; 2. the fact that at some time during his incarceration appellant testified that Zink saw him in the jail cell and smiled at him; 3. testimony of statements made afterward by Zink that they had made a mistake; 4. the refusal of Zink to permit an investigator to see the police records or to disclose the name of the arresting officer; 5. respondent Zink did not reprimand the officers involved; 6. an equivocal answer by Zink to the question "it was part of the job of the Chief of Police to see that the men were taken to the magistrate to be told what they were charged with, was it not?" to which Zink replied: "Always they are supposed to be taken before the magistrate, yes."

None of the evidence enumerated under numerals 1 to 5 shows that Zink had any knowledge while appellant was in jail that he had not been brought before a magistrate. Without evidence of such knowledge the jury could not find that he either countenanced or cooperated in the failure to bring him before a magistrate. The answer to the question under numeral 6 was not responsive. Zink simply stated the generality that prisoners are supposed to be brought before a magistrate without stating that it was his duty in all cases to see that this was done. Counsel did not pursue the question further and there is other evidence that this duty actually rested

on the superintendent of police, one Atwood. We are satisfied that appellant did not make a case to go to the jury against respondents.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J.,
concur.



134 Cal.App.2d 430

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Howard S. ROBINSON, Defendant and
Appellant.

Cr. 5305.

District Court of Appeal, Second District,
Division 3, California.

July 19, 1955.

Hearing Denied Aug. 17, 1955.

Defendant was convicted of robbery while armed with a deadly weapon. The Superior Court, Los Angeles County, Leroy Dawson, J., rendered judgment and denied motion for new trial, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Criminal Law ☞1159(6)

Where circumstances reasonably justify an inference of guilt, as found by jury, fact that inference of innocence might likewise be reasonably drawn therefrom does not present a question of law for review by reviewing court any more than does a verdict based upon conflicting direct evidence, and in neither case will verdict be disturbed.

2. Robbery ☞24(1)

Evidence was sufficient to sustain conviction for robbery while armed with a deadly weapon.

3. Criminal Law $\S$ 878(2)

Where defendant was charged with two counts of robbery, each perpetrated upon different person, but first count was dismissed and, at trial, all evidence related to second count, verdict that defendant was guilty of robbery as charged in information, without specifying which count, was not defective.

4. Indictment and Information $\S$ 144

Dismissal of count in information had effect of striking out that count, leaving only an information consisting of remaining count.

5. Criminal Law $\S$ 1144(10)

On appeal from conviction, it was presumed that clerk had performed his duty of omitting, when reading charge, a count which had been dismissed. West's Ann. Code Civ.Proc. $\S$ 1963, subd. 15.

Caryl Warner, Warner & Jackson and Arthur Meifert, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Defendant Howard S. Robinson was charged by information with two counts of robbery, and it was alleged that he had suffered three prior convictions of felony. Count I charged the robbery of one Zou-hire. Count II charged robbery of one John R. Campbell and that at the time of the robbery defendant was armed with a deadly weapon. After a jury trial the defendant was convicted of Count II of the information and Count I was dismissed by the court. The judgment of conviction on Count II was subsequently reversed by the Supreme Court. *People v. Robinson*, 42 Cal.2d 741, 269 P.2d 6. The case was reset for trial and the jury returned a verdict finding defendant guilty of "robbery, a felony, as charged in the information," that it was of the first degree, and that defendant was armed at the time of the offense. The court entered a judgment on the verdict stating that defendant had been found

guilty of Count II of the information, Count I having been dismissed. Defendant was duly sentenced. Defendant's motion for a new trial was denied and he appeals from the judgment of conviction and order denying the motion for a new trial.

The principal evidence was that of John R. Campbell, a newspaper vendor, who identified defendant as one of the two men who beat him and robbed him of approximately \$23.80. An eyewitness observed the robbery and noted the license number of the car in which the defendant and another man fled. A short time later defendant was arrested nearby, sitting in this car. Defendant's fingerprints were taken from the steering wheel of the car and from a wine bottle in the car and were introduced in evidence. Campbell's wallet was found in the car. Appellant's defense was that he was leaving a restaurant on his way to work when arrested, that he had not previously seen nor driven the car in question, that he had been forced to get into it by an officer, and that he had not seen Mr. Campbell before.

[1,2] Appellant contends that the evidence was insufficient to support the verdict. He argues that it was just as reasonable for the jury to conclude that he was innocent as that he was guilty, and that where two inferences may be drawn from the evidence, one of guilt and one of innocence, the court should have given him the benefit of the inference of innocence. This contention is untenable. It is based to a large degree on the statement of the Supreme Court in the original appeal that "the evidence was sufficient to support either a conviction or an acquittal * * * on either or both counts." *People v. Robinson*, supra, 42 Cal.2d 741, 742, 269 P.2d 6, 7. In such a situation the finding of the jury is conclusive. The rule is correctly stated in *People v. Newland*, 15 Cal.2d 678, 683, 104 P.2d 778, 780, where the court quoting *People v. Martinez*, 20 Cal.App. 343, 128 P. 952, stated that "Where the circumstances are such as to reasonably justify an inference of guilt, as found by the jury, the fact that an inference of innocence

might likewise be reasonably drawn therefrom does not present a question of law for review by an appellate court any more than does a verdict based upon direct conflicting evidence. In neither case will the verdict be disturbed.'” The fact that the evidence was capable of two inferences as contended here does not warrant a reversal. *People v. Crawford*, 41 Cal.App.2d 198, 205, 106 P.2d 219; *People v. Stanhope*, 37 Cal.App. 2d 631, 634, 635, 99 P.2d 1075. Here it cannot be said that the evidence was insufficient to support a verdict of guilty.

[3] Appellant next urges that the verdict was not responsive to the charge, requiring a reversal. The jury returned a verdict of “guilty of robbery, a felony, as charged in the information,” without specifying upon which count. The verdict was not defective. All the evidence offered at the second trial related to the offense charged in Count II of the information, i. e., robbery of John R. Campbell. The exhibits offered in evidence related to this charge. No evidence was offered tending to prove that defendant perpetrated the robbery of Abe Zouhire, originally charged in Count I.

[4, 5] The clerk’s minutes show that the information was read, exclusive of the allegations of the former convictions. It was the duty of the clerk to omit reading the charge set forth in Count I which had been dismissed. The dismissal had the effect of striking out that count and the information would then consist of Count II alone. It must be presumed that the clerk performed his duty and read only Count II. Code Civ.Proc. § 1963, subd. 15; *People v. Hudson*, 120 Cal.App.2d 870, 262 P.2d 23. The verdict finding defendant guilty as charged in the information was not irregular. It was responsive to the only issue that was tried and, presumably, the only one of which the jury had knowledge.

The judgment and the order denying a new trial are affirmed.

WOOD and VALLÉE, JJ., concur.

134 Cal.App.2d 314

Jacob J. OCKENFELS, Plaintiff and Appellant,

v.

Simon PETERS, Defendant and Respondent.
Civ. 16410.

District Court of Appeal, First District,
Division 2, California.

July 11, 1955.

Suit for damages for disparagement of title to real property in the amount of \$2,750. The Superior Court, San Mateo County, A. R. Cotton, J., entered order sustaining demurrer to the complaint and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that the suit was not within jurisdiction of the Superior Court, which had jurisdiction in actions of this character only in matters in which the amount in controversy was \$3,000 or more, but that suit could be brought in the Municipal Court.

Appeal dismissed.

1. Appeal and Error ⇐78(3)

Where an order of trial court was entered sustaining a demurrer, no final judgment had been entered by the court and the order could not be appealed from. West’s Ann.Code Civ.Proc. § 963.

2. Courts ⇐120

Where total amount involved in suit for damages for disparagement of title was \$2,750, the suit was not within jurisdiction of the Superior Court, which is limited to amounts of \$3,000 in actions of that character, but the suit could be properly brought in the municipal court.

Dennis L. Woodman, Redwood City, for appellant.

Phoenix & Kennedy, Redwood City, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for damages for the disparagement of title to real property alleging actual damages in the sum of \$250 for attorney’s fees and seeking exemplary damages

in the sum of \$2,500. The total amount involved, therefore, was the sum of \$2,750. A demurrer to the complaint was sustained without leave to amend and this appeal was taken from that order.

Only two questions arise on this appeal:

[1] (1) The appeal is taken from a non-appealable order. Section 963 of the Code of Civil Procedure which determines the matters from which an appeal can be taken from the Superior Court does not include an appeal from an order sustaining a demurrer. Since no final judgment has been entered herein, the appeal from the order sustaining the demurrer must be dismissed.

[2] (2) The complaint to which the demurrer was sustained does not state a cause of action within the jurisdiction of the Superior Court. The jurisdiction of such courts is limited to actions of this character in which the matter in controversy amounts to \$3,000 or more. When the amount prayed for is less than that sum, the jurisdiction is limited to the Municipal Court.

Appeal dismissed.

DOOLING and KAUFMAN, JJ., concur.



134 Cal.App.2d 547

In the Matter of the Application of Herbert L. SINGER and Mrs. Herbert L. Singer on behalf of Sharon Singer, for a Writ of Habeas Corpus.

Cr. 5457.

District Court of Appeal, Second District,
Division 3, California.

July 25, 1955.

Habeas corpus proceeding by parents on behalf of minor child. The District Court of Appeal held that actions of officials in removing minor child from her proper home and detaining her, without claim or pretense that custody or detention

of minor was matter of immediate or urgent necessity for protection of her welfare, but solely to preserve her as a witness in a criminal proceeding against her grandfather, was illegal and in violation of rights of minor and her parents.

Minor ordered discharged.

1. Habeas Corpus ⇨83

Allegations of habeas corpus petition and supplemental petition, in so far as they were not placed in issue by return, were taken as true.

2. Witnesses ⇨20

No court, official, officer or authority has authority to seize person of a minor and to incarcerate and detain such minor for sole purpose of keeping minor available for use as a witness in a criminal proceeding or any other proceeding.

3. Infants ⇨16.1

The taking of a minor into custody and her detention is illegal unless it is a matter of immediate and urgent necessity for protection of child's welfare.

4. Witnesses ⇨20

Actions of officials in removing minor child from her proper home and detaining her, without claim or pretense that custody or detention of minor was matter of immediate or urgent necessity for protection of the welfare, but solely to preserve her as a witness in a criminal proceeding against her grandfather, was illegal and in violation of rights of minor and her parents. Welfare and Institutions Code, §§ 700, 701, 720(a), 726, 729, 729.5, 730; Pen.Code, § 288.

Randolph Weltner, Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel, R. Eldon Dick, Deputy County Counsel, Los Angeles, for respondent.

PER CURIAM.

[1] Upon petition of Herbert L. Singer and wife, parents of Sharon Singer, for a writ of habeas corpus on behalf of their daughter, a writ was issued directed to Da-

vid Bogan, Superintendent of Juvenile Hall of the County of Los Angeles. A return has been filed by said respondent and a hearing has been held, upon which it was stipulated that the petition and supplemental petition be treated as a traverse to the return. The allegations of the petition and supplemental petition insofar as they have not been placed in issue by the return will be taken as true. *In re Smith*, 143 Cal. 368, 77 P. 180; *In re Hoffman*, 155 Cal. 114, 99 P. 517; *In re Application of O'Connor*, 80 Cal.App. 647, 252 P. 730; *Carlson v. Landon*, 9 Cir., 186 F.2d 183; *Daly v. Elton*, 195 U.S. 242, 25 S.Ct. 22, 49 L.Ed. 177.

The facts bearing upon the detention of Sharon Singer by the authorities are the following. The minor, 8 years of age, was residing with her parents in a fit and proper home and was receiving proper and sufficient parental care, support, supervision and control; her parents were fit and proper persons to have custody of the minor and her home environment was unobjectionable. On June 23, 1955, at about 8:00 p. m., the minor was taken into custody and placed in Juvenile Hall and she remained in the custody of the superintendent of Juvenile Hall until she was released to the custody of her parents under order of this court on July 7. No petition that the minor be made a ward of the Juvenile Court was filed until on or about June 29, 1955, when the judge of the Juvenile Court granted a writ of habeas corpus for said minor and set the same for hearing at 9:30 a. m., June 30, and at that time proceeded to conduct a hearing "for the purpose of determining the reasons for the necessity of the detention of the minor", § 729.5, Welfare and Institutions Code, and a hearing on the writ of habeas corpus; that no notice of the hearing was given to the parents of said minor; the court then discharged the writ of habeas corpus, ordered the minor to be detained in said Juvenile Hall and set for hearing on July 13 the petition to have said minor made a ward of the Juvenile Court. During said detention of the minor neither her parents nor their attorney have been allowed to speak privately with her. At the hearing on June 30 an officer having

charge of the minor prevented the parents from speaking with her and when she signaled a greeting to them, removed her from the room. On July 7 at the time this court issued its writ of habeas corpus, the court also made an order for the release of said minor to the custody of her parents upon their written agreement to produce said minor before this court upon the hearing of the writ.

It has been made to appear to the satisfaction of this court that the sole purpose of the detention of said minor and of the filing of the petition to have her made a ward of the Juvenile Court and all proceedings had thereunder was and is to keep her in custody for use as a witness in a criminal action against David Ely Singer, the paternal grandfather of the minor, who was accused by complaint filed June 24 of an offense committed against said minor in violation of section 288 of the Penal Code while the child was visiting her grandparents. On July 1 said minor did testify as a witness at the preliminary hearing of said accused on said charge and upon the conclusion of said hearing said minor was retained in custody by Juvenile Court authorities, was placed in a private home under their jurisdiction, and the parents of said minor were denied all information as to the place where said minor was retained and as to the identity of the person or persons in whose custody she was held. It is alleged in the petition and not denied that a deputy district attorney has threatened to cause said minor to be detained in custody by placing a "District Attorney's Hold" against her with the Superintendent of Juvenile Hall and that such "hold" orders have been and will be accepted by said Superintendent as authority for holding juveniles in custody solely as witnesses and subject to the orders of the district attorney.

In reaching our conclusions as to the lawfulness of the detention of said minor and the purposes and motives of the authorities involved, we have taken into consideration certain additional facts which are known to the court, namely, when this court in conference decided to issue a writ of habeas corpus, the court was advised of

the fact that said minor had been placed in the custody of a person or persons and in a home unknown to the petitioners and the court made inquiries of the Superintendent of Juvenile Hall and requested that the court be advised as to the person or persons having custody of said minor at that time; said inquiries met with delay, evasion, opposition and lack of cooperation.

From all the facts made known to the court, this court has concluded that the pending proceeding purporting to be one to have said minor declared a ward of the Juvenile Court was instituted as a mere device and means to retain said minor in custody solely for the purpose of separating her from her parents, the petitioners, and keeping her available as a witness at the trial of said David Ely Singer.

Section 700 of the Welfare and Institutions Code sets forth the conditions and circumstances in which any person under the age of 21 years is within the jurisdiction of the Juvenile Court. The described conditions are 14 in number and need not be enumerated. Suffice it to say that it appears from the facts divulged to the court that the detention of said minor as related above has not been and is not based upon the existence of any of the conditions specified in section 700 of the code. The same is true with respect to the conditions under which a person under the age of 21 years may be declared free from the custody and control of either or both parents as specified in section 701 of the code.

1. "§ 729.5. Whenever a minor under the age of eighteen years is taken into custody by any peace officer or probation officer, such minor shall be released within forty-eight hours after having been taken into custody, excluding Sundays and nonjudicial days, unless within said period of time a petition in accordance with subdivision (a) of Section 720 concerning him is filed with the clerk of the superior court or a criminal complaint against him is filed in a court of competent jurisdiction. If the minor remains in the custody of any peace officer or probation officer, within twenty-four hours, excluding Sundays and nonjudicial days, after the filing of the petition, the judge of the juvenile court shall conduct a hearing for the purpose of determining the reasons for

[2-4] Section 726 of the code requires that upon the filing of such a petition, a citation shall issue directing the parents etc. to appear at a time and place for which a hearing has been set and that such citation be served at least 24 hours before the time set for the hearing. Section 729 specifies the conditions in which a probation officer or peace officer may take temporary custody of a minor to be detained at Juvenile Hall or other suitable place designated by the Juvenile Court "when such custody or detention is a matter of immediate and urgent necessity for the protection of the welfare of the child". Throughout the proceedings above related no claim has been advanced or pretention made that the custody or detention of the minor was a matter of immediate or urgent necessity or for the protection of her welfare. Sections 729.5 and 730 read as set out in the margin.¹ Authority of law is not vested in any court, official, officer or authority to seize the person of a minor and to incarcerate and detain said minor for the sole purpose of keeping said minor available for use as a witness in a criminal proceeding or any other proceeding. No court, official, officer or authority responsible for the detention of the minor, Sharon Singer, has had any right or authority over the person of said minor other than is conferred by the provisions of the Welfare and Institutions Code which we have cited. The taking of said minor into custody and her detention was illegal unless the same was a matter

the necessity of the detention of the minor. If within said period such a hearing has not been held then the minor shall be released from custody."

"§ 730. Whenever a petition has been filed in the juvenile court alleging that a person comes within the provisions of Section 700 or 701 of this code and praying for a hearing thereon or whenever any subsequent petition has been filed praying for a further hearing in the matter of said person, said person, pending the hearing of any of said petitions, or during the continuance thereof, may be retained by the person having charge of said person or the court may order that said person be detained in the detention home or in some other suitable place."

of immediate and urgent necessity for the protection of the welfare of the child. The facts as known to us refute the existence of any such condition. The detention of said minor for more than 48 hours without the filing of a petition in accordance with subdivision (a) of section 720, or the filing of a criminal complaint, was illegal. The district attorney has no shadow of authority to cause a minor to be wrested from his or her home or the custody of parents or legal custodian and incarcerated or detained for the sole purpose of using such minor as a witness. It manifestly appears from the facts which are known to the court that the actions and proceedings that have been had for the incarceration of said minor were illegal and void *ab initio* and that the further incarceration of said minor has been and is for an illegal purpose and in violation of the rights of said minor and her parents, the petitioners herein.

It is ordered that said minor be discharged from the custody of the Juvenile Court and the probation officer of the County of Los Angeles and that her custody remain with her parents, the petitioners herein.



134 Cal.App.2d 423

**THE PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Paul R. THOMPSON, Defendant and
Appellant.**

Cr. 5361.

**District Court of Appeal, Second District,
Division 2, California.**

July 19, 1955.

Rehearing Denied Aug. 2, 1955.

Hearing Denied Aug. 17, 1955.

Defendant was convicted of attempted extortion. The Superior Court, Los Angeles County, Burdette J. Daniels, J., entered judgment of conviction and order denying defendant's motion for new trial,

and defendant appealed. The District Court of Appeal, Fox, J., held that, even if certain evidence should have been admitted, exclusion would not constitute prejudicial error, in view of fact that such evidence was merely cumulative to evidence already introduced by defendant on the subject.

Judgment and order affirmed.

1. Criminal Law §720(7)

Where, in prosecution for attempted extortion, defendant produced exhibit which admittedly contained a signature which was not genuine, and person whose name had been on exhibit in form of purported signature testified as to false statements in exhibit, district attorney's statements to jury pertaining to "that false statement" and "that false signature" were not either unfair or improper and did not constitute misconduct.

2. Criminal Law §1037(1, 2)

Defendant, who did not object to remarks made by district attorney to jury or request that trial judge advise jury to disregard such remarks, was not in position to object to such remarks upon appeal.

3. Criminal Law §1030(1)

Only when misconduct is of a flagrant character may it be reviewed on appeal without previous objection or request for admonition.

4. Criminal Law §726

Where, in prosecution for attempted extortion of money from state's witness, defense counsel referred to certain witness' conduct and pleaded that it constituted two criminal offenses, deputy district attorney's response to jury that defendant had forced witness to engage in part of such conduct and, therefore, that defendant would be guilty of a felony, if there were such a felony, did not transcend legitimate bounds of argument invited by opposing counsel.

5. Criminal Law §1163(1)

It is incumbent upon an appellant to show prejudice as result of court's ruling, and prejudice will not be presumed.

6. Criminal Law ⇨1120(3)

In prosecution for extortion, exclusion, as hearsay, of particular telephone conversation between state's witness and defendant was not prejudicial to defendant, in absence of showing of nature of the conversation. Pen.Code, § 524.

7. Criminal Law ⇨1186(4)

Even if rejection of evidence in criminal proceeding was error, reversal would be unwarranted in absence of showing of prejudice from such rejection. Cal.Const. art. 6, § 4½.

8. Criminal Law ⇨1170(2)

Even if certain evidence should have been admitted in criminal prosecution, exclusion would not constitute prejudicial error in view of fact that such evidence was merely cumulative to evidence already introduced by defendant on the subject. Pen. Code § 524.

A. Brian Weinberg, Santa Monica, Harold J. Ackerman, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James C. Maupin, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant was convicted of attempted extortion in violation of Penal Code, section 524. He appeals from the judgment of conviction and the order denying his motion for a new trial.

Defendant was manager of the Termite Company, which employed William Gerber. The latter's employment, however, was terminated around the middle of October, 1953. On May 29th of that year the Termite Company made a contract with Mr. and Mrs. Locke to do some termite work on their property. This work was commenced on the following June 3d or 4th. About the middle of October the Lockes wanted some additional work done. The Termite Company was aware of this. The work was performed by Gerber, who collected for it. He claimed he did it on his own after his employment with the Termite Company was terminated. Defendant, however, in-

sisted that the Termite Company was entitled to the money for this job. In his effort to collect it from Gerber, he telephoned Mrs. Gerber on Saturday evening, October 24th. He asked her to relay a message to her husband, that he didn't want to talk to him. He said "he wanted the money that my husband collected for this Locke job, and if my husband didn't bring it in by Monday he would go down to the District Attorney's office and press charges for fraud and embezzlement." Mrs. Gerber asked defendant what he meant by that and further stated that she didn't feel that Mr. Gerber owed defendant any money. Defendant responded that she knew "perfectly well" what he meant—for her husband to bring him the money.

Mrs. Gerber next talked to defendant on the following Tuesday. On that occasion she called a Madison number that she got by telephone from the secretary at the office of the Termite Company. When she dialed the number a voice answered, "District Attorney's Office." This telephone was located at the May Company, in Los Angeles. It was Mrs. Thompson who answered the 'phone in this fashion. Mrs. Gerber asked to speak to Mr. Thompson. He then came on the line and said to her, " * * * I am down here at the District Attorney's office on other matters, and if you or your husband bring in the money to the office by fifteen of five, I will call into my office to make sure you have brought it and the secretary will give you a receipt for it and if you have brought it in I won't press charges; otherwise I will go ahead."

Mrs. Gerber told defendant she didn't think she had that much money around. He replied, "Well, I imagine you know where you can get it." She said she would try.

After this telephone conversation Mrs. Gerber called Captain McClure at the District Attorney's office. As a result, Lieutenant Sharp and Mr. McNair came to her house. They gave her \$150 in marked money to turn over to defendant. Later the two men from the District Attorney's office went into a bedroom, and checked to see if they could hear with the door open.

In the meantime, Mrs. Gerber received a call from defendant, who was at his office.

Mrs. Gerber told him she was still willing to give him the money but she had no one to care for her baby so she couldn't leave her house. Defendant advised that he would come right out.

When defendant arrived at the Gerber residence Lieutenant Sharp and Mr. McNair were in the front bedroom. Defendant came into the living room. Mrs. Gerber asked him who he had seen at the District Attorney's office. He said he had talked to a deputy district attorney. She then asked whether he was going to sign a complaint. He replied: "Not if I get the \$150.00." Mrs. Gerber thereupon inquired, "Will the District Attorney's office prosecute even if I pay you the money?" Defendant responded, "They do not even know your name." Defendant further stated he was not going to have Mr. Gerber arrested and that "This means nothing to me. I am only trying to get money for the company." He then said, "It would be a shame to call Bill [her husband] in front of a judge. He might * * * have to go to jail, or he might get probation. It would be hard on the family."

Mrs. Gerber gave defendant the \$150 she had received from the men from the District Attorney's office. Defendant gave her a receipt.

Defendant put the money in his pocket and left the house. The men from the District Attorney's office followed him to his car, identified themselves and instructed him to return to the house.

Under questioning by Lieutenant Sharp, defendant admitted making the foregoing statements to Mrs. Gerber in her living room. He also admitted that Mrs. Thompson answered the telephone at the May Company on October 27, 1953, and said "District Attorney's office" and that he had stated he would do anything to collect this bill. Defendant then produced the money Mrs. Gerber had given him.

Defendant urges two grounds for reversal: (1) Misconduct of the district attorney in his argument to the jury, and (2) erroneous exclusion of evidence. We find no merit in either.

The first incident of asserted misconduct on the part of the district attorney relates to his reference in his closing argument to a typewritten document (Defendant's Exhibit B) that bore the name "Tom Jensen" in ink at the end thereof. This document was produced by defendant. Admittedly, the signature was not Tom Jensen's. On the witness stand Jensen told the jury many of the statements were incorrect and pointed out those that were false. In discussing this phase of the evidence the deputy district attorney told the jury: "Now, we don't know where that document came from. We don't know who put the signature of Tom Jensen on that paper, but it was produced by the defendant, Paul Thompson, and I think we can infer from that who prepared that false statement and who put that false signature on that paper. Mr. Thompson is the kind of a man who will accuse a stenographer of not telling the truth, inferentially, and yet offer as evidence a document which was false and which bears a false signature * * *."

[1-3] In view of the source of the document, the lack of genuineness of what, on its face, would have appeared to be an authentic signature, and the testimony of Jensen as to the falsity of statements therein, it cannot be said that the comments of the district attorney were either unfair or improper. Clearly, they did not constitute misconduct. And, apparently, defendant's trial attorney¹ did not so regard them for he made no objection or request that the trial judge advise the jury to disregard them. Defendant is therefore in no position to raise this point on appeal. *People v. Temple*, 102 Cal.App.2d 270, 284, 227 P.2d 500; *People v. Codina*, 30 Cal.2d 356, 362, 181 P.2d 881. As pointed out by this court in *People v. Lamendola*, 119 Cal.App.2d 570, 573, 259 P.2d 982, 984, "It is only when such misconduct is of a flagrant character that it may be reviewed on appeal without previous objection or request for admonition." Obviously, the comment here does not fall into this category.

Defendant's second specification of misconduct on the part of the district attorney

1. Defendant has new counsel on appeal.

has to do with his comment to the jury in his closing argument relative to Thompson's part in causing Gerber to sign a completion notice before the work was done on a home improvement job on his home which was financed by an F.H.A. loan. The Termite Company had the contract to do this work. In a Borrower's Report of Irregularities to the F.H.A. Gerber had stated: "After the work was just barely begun, Thompson told me that I must sign the completion certificate so that they could get their money from the bank because they didn't want to tie up company money. Thompson said that he was not making any money on this job; he was just doing me a favor. He also implied that if I did not sign I would not be working there long. I could not afford to be out of work so I had no choice but to sign." In referring to this matter, counsel for defendant told the jury: "Here is a man, Gerber, that has committed two offenses in this deal. He signed a completion report, just a short time after the work started upon their own home. *That is a criminal offense.* He did termite work when he had no license. That is another criminal offense." (*Italics added.*)

In response to this argument the deputy district attorney said to the jury: "He [Mr. Babcock, the defendant's counsel] says, 'Look, Mr. Gerber committed a felony by signing a completion report on this work that was being done at his house.' But who forced him to sign that completion report? At whose insistence and urging did Mr. Gerber sign that completion report? Paul Thompson (indicating). So Paul Thompson is guilty of a felony—if there is such a felony; and Mr. Babcock, I assume, knows."

[4] It is thus apparent that the deputy district attorney was merely trying to bring into proper focus the relation of each of the parties to this transaction which had been introduced into the case by defendant, and whose counsel had denominated Gerber's conduct in signing the completion notice before the job was completed as criminal. He was simply saying that Thompson's requirement that Gerber sign the completion notice when "the work was just barely begun" placed him in the same position as

Gerber. The deputy district attorney did not actually charge Thompson with having committed a felony; rather, he disclaimed personal knowledge of the criminal character attributed to the conduct in question by defense counsel. When considered in the light of the evidence and the nature of defense counsel's charges it cannot be said that the remarks of the deputy district attorney transcended the legitimate bounds of argument invited by opposing counsel. It is therefore clear that the charge of prejudicial misconduct on the part of the deputy district attorney is without substance. *People v. Jackson*, 106 Cal.App.2d 114, 123, 234 P.2d 766; *People v. Rinesmith*, 40 Cal.App. 2d 786, 792, 105 P.2d 1021.

People v. Wilkes, 44 Cal.2d 679, 284 P.2d 481, 486, cited by defendant, is without relevance. In the Wilkes case, the prosecuting attorney, in his oral argument, commented on the failure of defendant Wilkes' wife to testify with respect to a certain telephone call allegedly made to her by defendant at a certain time. The making of the telephone call was a part of an alibi defense. Upon counsel's objection to the comment and his request for an instruction to the jury on the right of a wife not to testify, the court stated: "The question is not her right not to testify, but whether or not the best evidence has been brought out by the party to whom it is available. * * * I suppose you can discuss the phone call." The Supreme Court, in finding prejudicial error, observed that it was error for the prosecution to comment on the failure of a wife to testify; that under section 1322 of the Penal Code Wilkes had no power to produce his wife as a witness without her consent; that the prosecutor's comment "erroneously and deliberately struck at the heart of defendants' only defense, their sharply controverted alibi"; and that the court aggravated the situation by "indicating that there was anything 'better' as a matter of law about the testimony of Mrs. Wilkes than the testimony of defendants themselves." It is at once apparent that the factors found to constitute prejudicial error in the Wilkes case are not only wholly absent

from the case at bar, but there is not even the remotest analogy between the two cases.

[5-7] Defendant briefly argues that the court erred in excluding as hearsay a particular conversation he had with Gerber on the telephone. It is of course elementary that it is incumbent upon an appellant to show prejudice as a result of the court's ruling. Prejudice will not be presumed. Here defendant has failed to show prejudice because there is no suggestion as to the nature of the telephonic conversation. The trial court, as well as this court, are left entirely unenlightened as to what benefit defendant expected to derive from such testimony and how he was prejudiced by its exclusion. For even assuming error in the rejection of evidence, in the absence of a showing of prejudice therefrom, a reversal is unwarranted. Calif.Const. Art. VI, sec. 4½.

Defendant also complains that during the testimony of witness Martinez, an employee of the Termite Company, the court rejected testimony of a conversation between defendant and the witness, allegedly in Gerber's presence, purporting to show that the latter was fired on October 16th. Defendant insists that because of the conflict between his testimony and that of Mrs. Gerber as to when Mr. Gerber's employment with the company was terminated, he was entitled to have the testimony of Martinez to establish such date. However, it appears that Martinez was unable to establish this date with any certainty. At the court's suggestion, counsel for defendant had asked Martinez: "Do you know when he was discharged? A. *Well, I don't know definitely. I only know what Mr. Thompson said after the meeting broke up.*" (Italics added.)

[8] Assuming such evidence relative to Gerber's discharge was admissible its exclusion was not prejudicial since it was merely cumulative to evidence already introduced by defendant on this subject. Addressing itself to the same point, this court, speaking through Mr. Justice McComb, stated in *People v. Valencia*, 30 Cal. App.2d 126, 129, 86 P.2d 122, 123, that:

"The law is established that the erroneous exclusion of evidence is not *prejudicial* error where the excluded evidence is cumulative to other evidence which is introduced at the trial. [Citations.] In the instant case the trial court permitted other testimony that deceased had made threats against the defendant's life. Therefore, the excluded evidence was merely cumulative to evidence which was received during the course of the trial, and hence the error was not prejudicial to defendant." To the same effect, see *People v. Goldberg*, 110 Cal.App.2d 17, 27, 242 P.2d 116, and 4 Cal.Jur. Ten Year Supp. (1943), sec. 600, pp. 1002-3.

The purported appeal from the sentence is dismissed. The judgment and order denying motion for new trial are affirmed.

MOORE, P. J., and McCOMB, J., concur.



134 Cal.App.2d 270

Nagnetta McGulre ZELLERS, Plaintiff
and Appellant,
v.

STATE of California, California Highway Commission, Oscar Oberg, Seth A. Oberg, Oscar Oberg, Seth A. Oberg, doing business as Oberg Bros. Construction Company, S. L. Chowning, Defendants.

S. L. Chowning, Oscar Oberg and Seth A. Oberg, doing business as Oberg Bros. Construction Company, Respondents.
Civ. 20784.

District Court of Appeal, Second District,
Division 1, California.

July 6, 1955.

Rehearing Denied July 26, 1955.

Hearing Denied Sept. 1, 1955.

Action against property owner and against construction company which owner had directed to place fill on property adjoining his own and owned by plaintiff,

who had agreed to permit such filling of her property to certain level, brought to obtain injunctive relief and damages when defendants had allegedly filled in plaintiff's land in excess of agreement. The Superior Court of Los Angeles County, Allen W. Ashburn, J., sitting without jury, rendered judgment from which plaintiff appealed. The District Court of Appeal, White, P. J., held, *inter alia*, that evidence supported finding that plaintiff's conduct had conferred implied license on defendants.

Judgment affirmed.

See also 281 P.2d 296.

1. Appeal and Error ⇨989, 1010(1)

Court on appeal will not attempt to determine weight of evidence but will decide only whether upon face of evidence it can be held that sufficient facts could not have been found to warrant finding of lower court, and before judgment arrived at by duly constituted arbiter of facts can be set aside on appeal on ground of insufficiency of evidence, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in court below.

2. Appeal and Error ⇨989, 996

Appellate court is not authorized to retry cause, reweigh evidence, and draw inferences contrary to those drawn by trial court.

3. Appeal and Error ⇨989, 996

When verdict is attacked as being unsupported, power of appellate court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury, and when two or more inferences can be reasonably deduced from facts, reviewing court is without power to substitute its deductions for those of trial court.

4. Trial ⇨375

When view of premises involved in litigation is had by trier of facts, conditions observed and properly bearing on case are independent evidence which may be con-

sidered by trier of facts in arriving at decisions.

5. Appeal and Error ⇨931(1)

In determining whether there was sufficient evidence to support judgment of court in case tried before court without jury, every intendment tending to support judgment had to be indulged in and every reasonable inference that could be drawn from facts which tended to support findings had to be accepted.

6. Licenses ⇨64

In action against property owner and against construction company which owner had directed to place fill on property adjoining his own and owned by plaintiff, who had agreed to permit such filling of her property to certain level, brought to obtain injunctive relief and damages when defendants had allegedly filled in plaintiff's land in excess of agreement, evidence supported finding that plaintiff's conduct had conferred implied license on defendants. West's Ann.Civ.Code, § 19.

7. Negligence ⇨6

Ordinance which set up certain standards with respect to fills on hillside property, and which was passed two years after property owner and construction company acting at his direction had placed fill upon adjoining land belonging to another party but had exceeded amount of fill called for by written agreement, could not make negligent that which was not negligent at time it was done.

8. Appeal and Error ⇨1058(1)

Rejection of cumulative evidence is not prejudicial.

9. Appeal and Error ⇨1056(4)

Where liability for damages is determined adversely to party seeking damages, rejection of evidence on question of damages is not prejudicial.

10. Trial ⇨47(2)

When there is rejection of evidence temporarily, or decision as to its admissibility is withheld, party offering evidence should call court's attention to fact that, in light of subsequent evidence or for other reasons, judgment and final decision is desired.

11. Appeal and Error C-1058(1)

In action against property owner and against construction company which owner had directed to place fill on property adjoining his own and owned by plaintiff, who had agreed to permit such filling of her property to certain level, brought to obtain injunctive relief and damages when defendants had allegedly filled in plaintiff's land in excess of agreement, even if ruling excluding ordinance which was adopted some two years after acts complained of, and which set up certain standards with respect to fills on hillside property, was error, subsequent admission of ordinance rendered error harmless.

J. P. Bradley, Glen A. Duke, Los Angeles, for appellant.

Moss, Lyon & Dunn, Arvin H. Brown, Jr., Henry F. Walker, Los Angeles, for respondents.

WHITE, Presiding Justice.

Plaintiff instituted this action against the above named defendants for injunctive relief and/or damages. On motion of defendants State of California and California Highway Commission the action was dismissed as to them and they are not involved in this appeal.

The complaint is based on the alleged tort of defendants Chowning and Oscar Oberg, Seth A. Oberg; Oscar Oberg and Seth A. Oberg, doing business as Oberg Bros. Construction Company (hereinafter referred to as defendants Oberg) in the placing of earth on plaintiff's property outside of the area authorized in a written agreement between her and defendant Chowning. The complaint contained two counts and prayed for a mandatory injunction to compel defendants to remove all materials placed upon plaintiff's land and restore the same to its original condition; for damages in the sum of \$10,000 for loss of use of the land; for \$10,000 punitive damages, or in the alternative, for general damages in the sum of \$35,000, and for punitive damages in the sum of \$10,000. No briefs have been filed on behalf of defendant Chowning.

So far as necessary for a determination of the issues raised on this appeal, the following will serve as an epitome of the factual background surrounding this litigation. Plaintiff and defendant Chowning were the owners of adjacent tracts of land in the Hollywood Hills section of the City of Los Angeles. Mrs. Zellers' property lies to the north of that of Mr. Chowning, and except for a portion along the common boundary line, was and is generally higher than that of Mr. Chowning. During the first part of the year 1950, defendant Chowning commenced to develop his lot, and attempted to purchase a portion of appellant's land in connection with this development. No satisfactory agreement with respect to a sale was ever arrived at and defendant Chowning suggested to plaintiff that he fill portions of her land in connection with the contemplated development of his tract, which development called for considerable filling to bring his lot up to a level established by a hand ball court on the southeast part of Mrs. Zellers' lot. An agreement was prepared by Mrs. Zellers' attorney, authorizing Mr. Chowning to extend his fill over onto Mrs. Zellers' lot and "to grade said fill to the level of the fill on the adjoining land of Second Party (Chowning)." This agreement was signed by both parties on June 12, 1950. Mr. Chowning proceeded with the development and the first portion of the fill was made by a contractor by the name of Hickey. Hickey was unsuccessful on a bid on an earth removing job, and after placing some earth on the property, was unable to proceed further. Thereafter, defendant Chowning called in defendants Oberg, who took over the job and continued the filling. They, at defendant Chowning's direction, filled above the level set forth in the written agreement until stopped by Mrs. Zellers.

Some 20,000 cubic yards of earth was placed on plaintiff's property outside the portion thereof provided for in the contract and was not placed on plaintiff's property pursuant to her "explicit directions or at her specific request."

Following trial before the court sitting without a jury judgment was rendered

against defendant Chowning directing that he construct a retaining wall and a drainage collection and discharge system in connection with the fill and in accordance with specifications set forth in said judgment. The judgment further provided that plaintiff recover nothing from defendants Oberg.

Plaintiff appeals from the judgment in favor of defendants Oberg and from that portion of the judgment in favor of plaintiff and against defendant Chowning which denied plaintiff a mandatory injunction, damages, "or any relief for earth placed upon her real property above the level established on the defendant S. L. Chowning's property".

The court made findings that, while the fill (above the level established on the property of defendant Chowning, and being the only fill involved in this appeal) was not within that provided for in the contract and was not placed on plaintiff's property pursuant to her "explicit direction or instruction or under plaintiff's supervision or at her specific request," nevertheless it is true "that plaintiff knew that this fill was being made and that she did not object to the same until September 13, 1951, at which time this fill was approximately three-fourths complete, and at which time she stopped the work", and it was concluded that, although Chowning's acts in this regard were wilful and the Obergs were negligent trespassers, "plaintiff impliedly consented to their acts upon said portion of her land and therefore said acts were done under an implied license."

On appeal, appellant contends that the foregoing findings by the court that there was an implied license from appellant to respondents to make the fill on her land above the level established on the land of respondent Chowning is not supported by the evidence and is against law.

There seems to be little if any difference between the parties as to the definition of an implied license and the words, acts, conduct or passive acquiescence necessary to create the same. In the early case of *Weldon v. Philadelphia W. & B. R. Co.*, 1899, 2 *Pennewill, Del.*, 1, 43 A. 156, 159, it is said:

"An implied license is one which is presumed to have been given from the words, acts, or passive acquiescence of the party authorized to give it." 2 *Bouv. Law Dict.* 222. Such a license must be established by proof, and it is not to be inferred from equivocal declaration or acts of the owner of the land. [*Pennsylvania, P. & B.*] *Railroad Co. v. Trimmer*, N.J.Ch., 31 A. 310."

And in *Restatement of Law of Property*, comment "c", p. 3129, section 516, we find the following:

"c. Manifestation of consent. The consent from which a license arises may be manifested by conduct of any kind. The manifestation may consist in the use of language, or in conduct other than the use of language. Such conduct may consist of acts indicative of a consent by the actor to the use of his land by another, or it may consist in failure to take reasonable action when inaction may reasonably lead to an inference of consent."

[1-3] Appellant's argument seemingly overlooks the firmly established and recognized rule that the court on appeal will not attempt to determine the weight of the evidence but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found to warrant in this case, the inference of an implied license from appellant. Before the judgment arrived at by the duly constituted arbiter of the facts can be set aside on appeal upon the ground of "insufficiency of the evidence" it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. We are not authorized to retry the cause, reweigh the evidence, and draw inferences contrary to those drawn by the trial court, *Dawson v. Williams*, 127 *Cal.App.2d* 38, 43, 273 P.2d 75; *Sukiasian v. Shakarian*, 115 *Cal.App.2d* 798, 801, 252 P.2d 956. As was so cogently stated by our Supreme Court in *Crawford v. Southern Pacific Co.*, 3 *Cal.2d* 427, 429, 45 P.2d 183, 184: "It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether

there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. (Citing cases.)"

Keeping these well-settled rules in mind we turn to a review of the evidence, which on examination of the record shows was fairly epitomized by the learned trial judge in his "Memorandum Re Ruling", which was brought up on this appeal, and which reads in part as follows:

"She (appellant) testified that she did not know of the excessive fill until the morning of the day on which it was finished. But it is impossible to accept this assertion. She lived on Lot 1 and testified that the highest part of her property could be seen from the area back of her handball court; if so, the fill in the ravine would be equally visible. She went to work every day, going and returning in the daylight, and she traveled along Canyon Drive past Mr. French's house. The lots north and south of the French home were vacant, and the fill was plainly visible from the street as she passed by. 'The law presumes that a person possessing normal faculties of sight and hearing must have seen and heard that which was within the range of his sight and hearing', *Young v. Southern Pacific Company*, 189 Cal. [746] at [page] 754 [210 P. 259, at page 262]. Normal curiosity would have led her to actual knowledge of what was happening upon her property during the period of six weeks when it was being filled (see Civil Code, sec. 19). It is true that she was greatly perturbed at the time. Her father was dying of cancer, her husband suffering from severe heart trouble and expected, from time to time, to die at once. She was running his business, with which she had little familiarity, and was undoubtedly in a chaotic state of mind. So worried was she that her mind naturally would have extended to the further worry as to what was happening to her property under the direction of a man of Mr. Chowning's known pertinacity. The only fair inference seems to be that she was so upset that she has

now forgotten numerous things that she knew in 1950. Moreover, self-interest subconsciously led her, as it did Mr. Chowning, to testify to some things which the court cannot wholly accept. Upon cross-examination during the presentation of her main case, Mrs. Zellers told the court of a conversation with defendant Chowning, had within thirty days after the contract was made, in which she asked him how much higher the fill would go; she said she was then standing behind her handball court. Upon rebuttal she denied having any conversation with Chowning at any time between the signing of the contract and the day the fill was completed, thus denying her own previous testimony. But that is not all.

"Mr. Persh and Mr. Belden, both of whom seem to be disinterested and credible witnesses, testified that they saw her upon the property while the filling was going on. Mr. Persh, who lived at upper Graciosa, said that while the trucks were dumping material from the top of the ravine near that point, he saw Mrs. Zellers upon the property watching the process, and that this occurred two or three times, that she was on the lower part looking around, and also on the upper part while the dumping was going on at the Graciosa level. Mr. Belden, who was field superintendent for Hickey Bros., testified that on one occasion in June, 1950, he and Mr. Chowning had been at the top of the hill, walked down and met Mrs. Zellers about two-thirds of the way down; that Mr. Chowning told her Belden was the man that would make the fill; that Zellers and Chowning walked away together; and at that time dumping from the top of the canyon had been in progress and there were some seven or eight thousand yards of fill in the ravine, the greatest depth thereof being approximately 15 feet.

"The preponderance of the evidence is to the effect that Mrs. Zellers knew what was going on, and made no objection although she could have forbidden and stopped it at any time. A license to use real property may be made by parol or proved by circumstances such as tacit permission or acquiescence in acts already done. 63 C.J. sec. 113, p. 956; 37 C.J. sec. 177, p.

283; 53 C.J.S. [Licenses], § 80, page 807, § 81, page 809; Restatement Law of Property, sec. 516, comment c, p. 3129; 33 Am. Jur. sec. 92, p. 400; * * *.

[4] In addition to the foregoing, the trial judge at the inception of the trial, pursuant to stipulation of the parties, personally viewed the properties. The conditions observed and properly bearing on the case, are independent evidence which may be considered by the trier of facts in arriving at his decision, *Gates v. McKinnon*, 18 Cal.2d 179, 182, 183, 114 P.2d 576.

[5, 6] Indulging in every intendment which tends to support the judgment, and accepting as we are required to do, every reasonable inference that may be drawn from the facts which tend to support the findings, we cannot say that as a matter of law the evidence was insufficient to support the finding that appellant's conduct conferred an implied license with regard to the fill here in question.

Finally, appellant contends that the court erred in sustaining an objection to the admission into evidence of Los Angeles City Ordinance No. 100347. The record reflects that the proffered ordinance was not adopted until some two years after the acts of respondents complained of in this action were committed. The ordinance sets up certain standards with respect to fills on hillside property, including compactions and slope of the fill. It is appellant's contention that the ordinance should not have been excluded from the evidence in that, (1) it sets up a standard for assisting in determining whether or not the filling was negligently done, and if so, assists in determining the measure of damages; and (2) if the acts were a trespass, it is pertinent in determining, likewise, the measure of damages. That, in either case, it represents an expense the appellant must bear in order to utilize her property an expense that she would not have incurred but for the acts of respondents. As to appellant's first contention, we are satisfied that the ruling of the trial judge was correct insofar as the ordinance might have a bearing on negligence or damages when he said:

"Now it is true with respect to torts that the liability is for the damages proximately caused, whether foreseeable or not, but it must be damages which are proximately caused by the wrongdoer. Now, when a third party, like the city, two years later, intervenes and by virtue of its sharing in the sovereign power creates a new condition, I don't believe there is any proximate cause here * * *".

[7] In other words, the ordinance, passed two years after completion of the acts complained of, could not make negligent that which was not negligent at the time it was done, *James v. Oakland Tractor Co.*, 10 Cal.App. 785, 793, 103 P. 1082; *Morris v. Pacific Electric Ry. Co.*, 2 Cal.2d 764, 768, 769, 43 P.2d 276.

[8, 9] When the ordinance was offered in evidence, appellant's counsel stated it was "for the purpose of adding additional evidence to that presented by Mrs. Zellers (appellant)", and that, "it would be cumulative evidence on the damage factor". Rejection of cumulative evidence is not prejudicial, *Ash v. Soo Sing Lung*, 177 Cal. 356, 360, 170 P. 843; *Nulty v. Price*, 202 Cal. 279, 283, 260 P. 291. And where, as here, liability for damages was determined adversely to appellant who sought damages, the rejection of evidence on the question of damages is not prejudicial, *Bashford v. A. Levy & J. Zentner Co.*, 123 Cal. App. 204, 214, 11 P.2d 51.

[10] The record further reveals that when appellant offered the ordinance in evidence the court sustained the objection with the statement, "Well, I think I will have to sustain the objection. You may renew it later if you can give me any further light on it". Thereupon, the ordinance was marked for identification. When there is a rejection of evidence temporarily, or a decision as to its admissibility is withheld, the party offering the evidence should call the court's attention to the fact, that in the light of subsequent evidence or for other reasons, a definite and final decision is desired, *Spanfeller v. Meyer*, 51 Cal.App.2d 390, 392, 124 P.2d 862. In the instant case no offer of the whole ordinance in evidence was thereafter made.

[11] Later in the trial, however, on cross-examination of the witness Shields, appellant's counsel read into the record portions of the ordinance, to wit, Sections 91.2815 et seq., including Section 91.2817. When counsel for respondents Oberg interposed an objection and moved to strike the answers on the ground no showing had been made that the sections read were in existence at the time the acts charged against respondents were committed, the court refused to strike the answers for the reason that the objection was too late, commenting, "you waived your objection". As a result of this ruling there is to be found in the record portions of the aforesaid ordinance. Even though we assume the ruling of which appellant complains was erroneous, the subsequent admission of the evidence contained in the ordinance, would render the previous adverse and challenged ruling harmless. *Battle v. Niece*, 43 Cal.App.2d 655, 659, 111 P.2d 455; *Ward v. Sherman*, 155 Cal. 287, 294, 100 P. 864.

The judgment and the portions thereof from which this appeal was taken are and each is affirmed.

DORAN and DRAPEAU, JJ., concur.



134 Cal.App.2d 370

Sarah GIPSON, Plaintiff and Respondent,
v.

Robert L. SPEARS, Defendant and Appellant.
Civ. 4889.

District Court of Appeal, Fourth District,
California.

July 13, 1955.

Rehearing Denied Aug. 5, 1955.

Hearing Denied Sept. 8, 1955.

Quiet title action by grantee of execution deed against purchaser at a subsequent tax sale. The Superior Court, San Diego County, C. M. Monroe, J., entered judgment for grantee and subsequent purchaser ap-

pealed. The District Court of Appeal, Griffin, J., held that evidence supported findings that subsequent purchaser had conspired with former record owner of property to prevent grantee from acquiring notice of tax delinquencies and purchased property at tax sale for former record owner, and judgment quieting title in grantee was not contrary to law.

Affirmed.

1. Trusts ☞89(1)

In action by grantee of execution deed against subsequent tax sale purchaser where testimony showed that life long friend of former record owner of property paid money to former record owner's attorney to purchase property at a tax sale, court could infer that friend had no real interest in property and was merely holding it for the former record owner.

2. Taxation ☞811

In action by grantee of execution deed against subsequent tax sale purchaser where testimony showed that grantee sold one of two tracts of land formerly owned by same predecessor in title and found parcel sold was subject to delinquent irrigation district assessments whether such fact was also notice that other parcel was subject to such delinquencies was a question of fact.

3. Evidence ☞317(7)

In quiet title action by grantee of execution deed against purchaser at a subsequent tax sale, testimony of conversation between grantee and former record owner as to fact that former owner was to pay taxes during extended period of redemption granted by grantee, was admissible over objection of hearsay notwithstanding fact that purchaser was not present at conversation, where grantee charged that purchaser had conspired with former record owner to prevent notice of tax delinquencies from reaching grantee and to purchase property at tax sale for former record owner.

4. Conspiracy ☞19

Taxation ☞810(3)

In quiet title action by grantee of execution deed against subsequent purchaser at tax sale findings by court that purchaser had conspired with former record owner to

prevent grantee from acquiring notice of tax delinquencies and to purchase land at subsequent tax sale for former record owner, was supported by evidence and judgment quieting title in grantee was not contrary to law. Water Code, § 26307.

5. Taxation ☞674

A disqualified person is not allowed to acquire a valid title to land sold at a tax sale by procuring another to purchase the tax title for him. West's Ann.Civ.Code, § 3517.

Vincent Whelan, San Diego, for appellant.

Higgs, Fletcher & Mack, San Diego, for respondent.

GRIFFIN, Justice.

Plaintiff originally brought this action in the usual conventional form against defendant to quiet her title to a certain parcel of property in the La Mesa, Lemon Grove and Spring Valley Irrigation District. In an amended complaint plaintiff realleges this claim and specifically alleges that by deed of August 11, 1952, the collector of the irrigation district deeded the property to the district, and that by deed of August 26, 1952, the district deeded it to defendant and that such deeds were invalid for certain assigned reasons. Plaintiff then claimed in paragraph VI that defendant conspired with one John A. C. Austin, and they fraudulently prevented plaintiff, the owner of the property since April 19, 1951, from receiving notice of tax assessments and tax delinquencies, and accordingly defendant acquired no title to the property by reason thereof.

Defendant denied generally these allegations and set up several claimed defenses. The trial court found that these deeds were not invalid for the reasons claimed, but found that the allegations of paragraph VI were true, and that John A. C. Austin and Alta M. Austin induced the defendant to permit a tax deed to the property to be taken in his name in order to terminate the interest of the plaintiff in the property without redeeming it, and accordingly concluded that the purchase of the tax deed by defendant, acting in behalf of the Austins, was

nothing more than the payment of the delinquent irrigation district taxes, and quieted plaintiff's title thereto. Judgment was entered accordingly and defendant appealed.

The evidence shows that prior to June 26, 1948, Mrs. Austin owned a piece of land which was divided into two parcels, which we will refer to as A and B. A is the property here involved. On June 26, 1948, parcel A was sold under writ of execution on a judgment against Mrs. Austin. The day before the period of redemption was to expire Mrs. Austin, who had been having "money difficulties", prevailed on plaintiff to pay about \$557.21 to the creditor and plaintiff took an assignment of the creditor's right in and to the property and plaintiff extended Mrs. Austin's right of redemption for another six months under some oral agreement between them that she would be repaid that amount during that period. The sheriff's deed to plaintiff was dated April 9, 1951, and recorded April 19, 1951. Plaintiff testified that she paid the state and county taxes in the fall of 1952, and assumed that Mrs. Austin had paid all other taxes since the property was assessed in her name up to 1953; that she never received any notice of, nor did she have any knowledge that any irrigation district taxes were due on the property until September 1, 1952, when she endeavored to sell that property; that she learned defendant Spears had purchased it through a delinquent irrigation district tax sale for \$22.29; and that she later contacted him and that he agreed with her, being the record owner, that she should have received some notice in reference to the taxes due; that she asked him about making some sort of a settlement and that she agreed to repay the taxes paid by him; that he stated he would think it over and call her; that he failed to call and she later reached him; and that he then stated he had decided to keep the property.

The irrigation district records show that in 1953, it was assessed to plaintiff; that prior to that time it was assessed to Mrs. Austin, and that statements of delinquent taxes were mailed to Mrs. Austin at her address.

Some person who identified himself as Mr. Spears inquired about the delinquency

in August, 1952, and he was informed that it had been deeded to the district and was subject to sale for such tax. Apparently this person was not Mr. Spears.

It appears from the record that Mr. and Mrs. Austin separated in November, 1950, and on September 17, 1951, he alleged in a divorce action against her that parcels A and B were community property of the Austins and that plaintiff here and one Mason, joined as defendants in the divorce action, conspired with Mrs. Austin to deprive Mr. Austin of his community interest in that property, and claimed that Mrs. Gipson held the property as trustee for the Austins. In January, 1952, a written property settlement agreement was entered into between the Austins and Mrs. Austin quitclaimed to Mr. Austin all her interest in the above-mentioned property in consideration of a specific sum of money. The divorce feature was heard as a default. However, after trial on the other issues the trial court held that the property was not Mr. Austin's community property, and Mrs. Gipson was declared to be the owner of parcel A. (Parcel B had previously been sold by her.)

[1] In the instant action defendant testified he had known Mr. Austin all his life, had roomed with him for several years, and they were very close friends; that he knew Austin had previously tried to obtain this property in the divorce action; that sometime after the issuance of the tax deed to the district Austin informed him that the district had a deed to the property here in question. He denied he bought the tax deed for Austin. He said he did not inquire about it at the tax office but dealt through his attorney, who was also attorney for Austin in the divorce action. His attorney, called as a witness for the plaintiff, testified that the money for the purchase of the property was paid into his office but he would not say whether Austin or Spears paid it to his secretary. When asked whether he had any dealings with Austin to purchase this property from the district for Austin he claimed attorney and client privilege, and refused to answer unless Austin released him from the privilege. An attempt was made to serve Mr. Austin with a subpoena on several occasions, but he could not, for

some rather suspicious reasons, he found. Defendant's attorney admitted, however, that he paid the tax for the deed by his own office check and refused to produce his receipt book indicating who paid the money to him for the purchase of the property. Spears testified he paid the money to the attorney. From the evidence produced and from these circumstances the court might well infer that Spears was acting for his life-long friend Austin in the transaction, and that defendant had no real interest in the property but was holding it for the Austins. *Garvey v. Byram*, 18 Cal.2d 279, 115 P.2d 501, 136 A.L.R. 1137.

The court also found that the allegations of plaintiff's complaint were true and found generally in favor of the plaintiff; that it was not established that the tax deeds were void, and found as true that the Austins "induced the defendant Robert L. Spears to permit a tax deed to" the property involved to be taken in his name in order to terminate the interest of the plaintiff in the property without redeeming it, and concluded that the purchase of the tax deed by defendant Spears, acting in behalf of the Austins, was, in equity, nothing more than the payment of the delinquent irrigation district taxes.

On December 9, 1953, the trial judge signed a memorandum opinion in which he recites that the evidence convinced him that in March, 1952, the Austins agreed that Mrs. Austin would quitclaim to Mr. Austin her alleged interest in the property; that contrary to their claim that it was community property, the trial court found in the divorce action that Mrs. Gipson was the owner of it; that thereafter, a person representing himself as Spears, made arrangements through Austin's attorney to obtain a deed to the property; that notices of the delinquent tax assessments were sent out by the district and received by the Austins, but they were not forwarded to plaintiff nor was she told of them; that when the Austins arrived at their settlement in the divorce action they must have been completely aware of the manner in which the property was held; that they made no attempt to redeem the property and accordingly the Austins induced Spears to permit a tax deed to be taken in his name in order to terminate the

interest of plaintiff in the property without redeeming it; and that the Austins joined forces in seeking to destroy plaintiff's interest. The court concluded that these facts bring the case within the holding of *Garvey v. Byram*, supra, and accordingly the procuring of the tax deed by the Austins through defendant Spears was, in equity, but the payment of the taxes, and title should be quieted in favor of plaintiff upon depositing in court for defendant the sum of \$22.29, the amount paid for the tax deed.

Further consideration was given to this point on a motion for new trial and the judge again reviewed the evidence. Defendant there contended that there was no contractual relationship between plaintiff and the Austins and accordingly the Austins were at liberty to obtain a tax title to the property themselves. In disposing of this contention the court said the evidence shows that plaintiff purchased the certificate of sale at the request of Mrs. Austin and had orally extended to her the privilege of redeeming the property, and that Mrs. Austin, as part of the consideration, had agreed to keep up the taxes; that these taxes were not paid by her and the Austins knew of the delinquencies but failed to notify plaintiff of this fact; that accordingly, there was a duty imposed upon the Austins to pay the tax or notify plaintiff of the delinquency; that they failed to do this and accordingly the Austins, in equity, could not take advantage of their own default occasioned by their neglect or failure.

It is defendant's claim that the findings go outside the issues raised by the pleadings; that certain rulings were erroneously made as to the admissibility of certain evidence; that the evidence does not support the findings; and that the judgment is contrary to law, citing such authorities as *Willard v. Glenn-Colusa Irrigation District*, 201 Cal. 726, 735, 258 P. 959; *Freeman v. Superior Court*, 44 Cal.2d 533, 282 P.2d 857; *Rotea v. Rotea*, 93 Cal.App.2d 827, 832, 209 P.2d 963; and Section 26307, Water Code, and related sections.

[2-4] In this connection it is argued that there is no mention in the complaint that plaintiff did not know the property was subject to irrigation district taxes; that no

such finding should have been made because defendant offered in evidence certain documents in the escrow agreement in reference to the sale of parcel B by plaintiff on April 19, 1951, in which it is indicated that there were delinquent assessments on that property for the years 1948, 1949, 1950 and 1951, and that plaintiff must be considered to have had notice of that fact because these assessments were paid through the escrow by the title company. A casual observation of the pleadings warrant the findings made upon the issues therein presented, 22 Cal.Jur. p. 152, sec. 32, and the question of notice was a factual question. The court allowed in evidence a conversation between plaintiff and Mrs. Austin as to who was to pay the taxes on the property during the redemption period. Defendant objected to this conversation as hearsay because it was not made in his presence. The charge was that defendant conspired with Austin to obtain title to the property. The findings rather indicate that Mrs. Austin was a co-conspirator in this respect. Accordingly, the conversation was admissible. 5 Cal.Jur. p. 525, sec. 27. Our conclusion is that the evidence supports the findings and the judgment and that the judgment is not contrary to law. It is a general provision of law in equity that no one can take advantage of his own wrong. Civ. Code, § 3517. Under this rule it has been held that where a mortgagor is under obligation to pay the taxes, the act of such party acquiring title through his own default is held to be fraudulent, and the mere failure of the mortgagee to pay the taxes is not laches which the mortgagor can take advantage of. *Jones on Mortgages*, 8th Ed. sec. 841; and *McKinnon v. Bradley*, 178 Or. 45, 165 P.2d 286.

[5] In *Garvey v. Byram*, supra, 18 Cal. 2d at page 281, 115 P.2d at page 502, it is said, quoting from *Christy v. Fisher*, 58 Cal. 256, 258:

"It is well settled that one who is under a moral or legal obligation to pay the taxes is not in a position to become a purchaser at a sale made for such taxes. If such person permits the property to be sold for taxes, and buys it in, either in person or indirectly through the agency of another, he does not

thereby acquire any right or title to the property, but his purchase is deemed one mode of paying the taxes."

See also 85 C.J.S., Taxation, § 809, par. h., p. 140. A disqualified person is not allowed to acquire a valid title to land sold at a tax sale by procuring another to purchase the tax title for him. 85 C.J.S., Taxation, § 809, par. j, pp. 142-143. Under these authorities and the general finding of conspiracy to defraud plaintiff of her title to the property, it must be held that there is support for the judgment. No prejudicial error appears as a result of the order denying a new trial.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



151 Cal.App.2d 391

In the Matter of Earl Leroy STEINER, a
person under the age of twenty-one
years.

Civ. 20925.

District Court of Appeal, Second District,
Division 3, California.

July 15, 1955.

Proceeding for adjudication declaring a minor to be a ward of the juvenile court. From order of the Superior Court, Los Angeles County, William B. Neely, J., declaring minor to be a ward of juvenile court and placing him in custody of probation officer, the minor appealed. The District Court of Appeal, Ashburn, J. pro tem., held that it was not necessary that juvenile court make written findings of fact.

Order affirmed.

1. Infants ⇨16.10

In proceeding for adjudication declaring minor to be ward of juvenile court, instituted by petition charging that minor

used force or violence upon person of another in violation of Penal Code, report of probation officer was properly considered by the court. Welfare and Institutions Code, §§ 700(m), 735.

2. Infants ⇨16.8

In proceeding for adjudication declaring a minor to be a ward of the juvenile court, evidence was sufficient to support implied finding that minor was frequently in trouble at school because of fighting and truancy and that minor attacked a motorist, who had stopped to talk to minor after minor had called motorist a name. Welfare and Institutions Code, §§ 700(m), 735; Pen.Code, § 242; Welfare and Institutions Code, § 700.

3. Infants ⇨16.9

In proceeding for adjudication declaring a minor to be a ward of the juvenile court, wherein there was a conflict in testimony concerning a fight which gave rise to institution of the proceeding, court had prerogative and duty of accepting that testimony which appeared to him to be credible. Welfare and Institutions Code, §§ 700(m), 735.

4. Continuance ⇨22

In proceeding for adjudication declaring minor to be a ward of the juvenile court, denial of motion for a continuance in order to present witnesses to impeach testimony of person, whom minor had attacked, was not an abuse of discretion when no surprise was asserted, no witnesses were named, and no assurance was given, either by affidavit or oral assurance of counsel, as to what testimony of any of witnesses would be. Welfare and Institutions Code, §§ 700(m), 735.

5. Appeal and Error ⇨966(1)

Continuance ⇨44

Mere statement by counsel, in support of motion for continuance, that additional time is needed and that some unnamed witness might give material testimony, without supporting affidavit, presents no issue either before trial court or before reviewing court.

6. Continuance ⇨24

A continuance to enable a party to present an absent witness is properly re-

fused if testimony of absent witness would only tend to impeach a witness of the adverse party.

7. Infants ⇨16.5

Proceeding for adjudication declaring a minor to be a ward of juvenile court is not a trial in ordinary sense of word but rather is more in character of a guardianship whereby minor is relieved of stigma of a criminal conviction by placing him upon probation with individuals or in institutions having facilities to give him corrective care, supervision and training. Welfare and Institutions Code, §§ 700(m), 735.

8. Judges ⇨49(1)

Marked disapproval by judge of unlawful misconduct disclosed by evidence does not amount to a manifest prejudice of the trial judge denying defendant a fair trial.

9. Infants ⇨16.10

In proceedings for adjudication declaring a minor to be a ward of the juvenile court, it was not necessary that the judge make written findings of fact. Welfare and Institutions Code, §§ 735, 739, 785.

10. Judgment ⇨215, 282

Law pertaining to judgments generally recognizes the propriety of an oral pronouncement which is carried into the court minutes, and the judge's signature to a written judgment is not essential.

11. Judgment ⇨215

Except where findings are specifically required, a judgment is rendered when decision is announced and carried into the minutes.

12. Judgment ⇨214

It is a matter of trial court procedure whether the court chooses to make its final decision by entry in the minutes of an order without a direction that a written order be prepared, signed and filed, or elects to enter a direction that a formal order be prepared.

13. Infants ⇨16.12

In proceeding for adjudication declaring a minor to be a ward of the juvenile court, if it was necessary that findings and judgment be in writing, minute order declaring the minor a ward of the juvenile court and taking his custody from the par-

ents and releasing minor to custody of probation officer was sufficient. Welfare and Institutions Code, § 735.

14. Appeal and Error ⇨761

A point which is merely suggested by counsel for appellant, without supporting argument or authority, is deemed to be without foundation and will not be considered.

Nathan Newby, Jr., Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan, Deputy Dist. Atty., Los Angeles, for respondent.

ASHBURN, Justice pro tem.

[1] This is an appeal from an order declaring Earl Leroy Steiner, a minor, to be a ward of the juvenile court under subdivision (m) of section 700, Welfare and Institutions Code and placing him in the custody of the probation officer for integration in the forestry camp program. Said section 700(m) provides that jurisdiction of the juvenile court extends to any person under the age of 21 years who "violates any law of this State or any ordinance of any town, city, or county, of this State defining crime." Section 735 provides for an adjudication declaring a minor person to be a ward of the juvenile court upon finding that he comes within the provisions of said section 700. This proceeding was instituted by a petition charging that the minor Steiner "wilfully and unlawfully used force or violence upon the person of Paul Emil Laurin by striking the said person * * * about the face with his fist and kicking him in the shins; thereby violating Penal Code Section 242, Battery." After a hearing the court caused a minute order to be made, as follows: "* * * The court finds the allegations of the petition filed December 14, 1954, true; and the petition is sustained. Minor is declared a ward of the Juvenile Court under Subdivision M, Section 700, Welfare and Institutions Code. The court finds it is to the best interests of the minor that his custody be taken from the parents, and his custody is taken from the parents.

Minor is ordered released to the custody of the probation officer for integration in the forestry camp program. The probation officer is authorized to transport the minor to and from Juvenile Hall for medical care when necessary. The minor's camp earnings are ordered impounded and released to him upon his discharge from camp. This matter is continued to the non-appearance calendar of January 20, 1956, for further report. Minor is ordered detained by Sheriff (Biscailuz Center recommended) pending camp replacement." From this order the appeal is taken.

[2, 3] The evidence consisted mainly of the testimony of said Paul Laurin, said Earl Steiner, one Richard Prell, and a probation officer's report. Such report was, for course, properly considered by the court. In *re* Halamuda, 85 Cal.App.2d 219, 223, 192 P.2d 781; In *re* Jones, 34 Cal.App.2d 77, 82, 93 P.2d 185. The evidence is sufficient to sustain the following implied findings, which were presumptively made. Steiner, aged 17 years, was in frequent trouble at school because of fighting and truancy, being suspended twice; had been the subject of numerous complaints about the fast and noisy driving of his car. He was living with his father who defended his conduct and rationalized it on all occasions. On December 5, 1954, at about 7:00 p. m., young Steiner, Richard Prell and another boy were in the street, Borson near Ardis, in Bellflower. Mr. Laurin drove his automobile from Ardis into Borson at a moderate speed and saw the boys some 50 or 100 feet ahead of him. As he noticed them Steiner fell down onto the street and Laurin brought his car almost to a stop. Steiner got up at once, had no fear of being run over, but as Laurin passed slowly by, began to curse him, calling him a son of a bitch. Laurin by that time was a few feet past the boy, but this nettled him and he backed his car to talk to Steiner. Thereupon Steiner yelled "You want to fight?", grabbed the door handle on the driver's side, opened the door and started to hit Laurin, who tried to push and kick him away. At this juncture Prell, from the right side of the car hit Laurin, who was

pulled down to the seat, pummeled by both of them; he was blowing his horn and neighbors began to arrive; the boys ran away from the scene. Steiner gave a version which was contrary to that of Laurin in most respects. For instance he said that Steiner called him to the car and started arguing about his driving, then kicked him in the head and knocked him out, knocked him clear across the street. Of course, the court had the prerogative and the duty of accepting that testimony which appeared to him to be credible, and the record as a whole indicates he made no mistake in accepting the story of Laurin rather than that of Steiner.

Counsel for appellant attacks the testimony of Laurin as contradictory and inherently improbable, but the argument rises no higher than a showing of a conflict calling upon the judge to accept the true and reject the false. See *Murphy v. Ablow*, 123 Cal.App.2d 853, 858, 268 P.2d 80, as to the applicable rule on review.

[4-6] Counsel also complains that prejudicial error occurred through denial of his motion for a continuance in order to present witnesses to impeach the testimony of Laurin. Steiner had testified that Laurin and others had previously threatened him several times about driving his car too fast, saying "they were going to pull me out of my car and slap something out of me." This was flatly denied by Laurin. After the court had announced its ruling, the following occurred: "Mr. Newby: Your Honor, one question I would like to ask. We have time to produce the witnesses who were present at the time that this man threatened Earl, because if we prove that, then he has committed perjury, and I know that we are going to press it. The Court: All right. You press your perjury charges, because as far as I am concerned, I am only concerned with this thing here that I have before me, the boys who were in this court. We are working in the interests of the minor." No surprise was asserted, no witnesses were named, and no assurance given as to what testimony any of them would give,—either by affidavit or oral assurance of counsel. Indeed, counsel's own confidence in his

move was not very apparent,—“* * * *if we prove that*, then he has committed perjury, and I know that we are going to press it.” (Emphasis supplied.) “The mere statement by counsel that additional time was needed, and that some witness (unnamed and unidentified) might give material testimony, without a supporting affidavit in either case, presents no issue either before the trial court or before this court on an appeal from the judgment.” *People v. Schenk*, 19 Cal.App.2d 503, 505, 65 P.2d 895, 896. See also 12 Cal.Jur.2d § 38, p. 149; 12 Cal.Jur.2d § 39, p. 150. Moreover, “[i]t is the rule that a continuance is properly refused if the testimony of the absent witness would only tend to impeach a witness of the adverse party.”—*Rose v. Tandowsky*, 80 Cal.App.2d 927, 933, 183 P.2d 347, 351. See also 12 Cal.Jur.2d § 37, p. 149. There was no abuse of discretion in this matter and hence no valid ground for complaint.

[7] Appellant asserts denial of a fair trial because of manifest prejudice of the trial judge. To get true perspective one must recognize that the instant proceeding was not a trial in the ordinary sense of the word. It is designed to be informal to a marked degree. It “is more in the character of a guardianship whereby the minor is relieved off the stigma of a criminal conviction by placing him upon probation with individuals or in institutions having the facilities to give him corrective care, supervision and training.” *People v. Renteria*, 60 Cal.App.2d 463, 470, 141 P.2d 37.” *In re Dargo*, 81 Cal.App.2d 205, 207, 183 P.2d 282, 283. See also *In re Jones*, supra, 34 Cal.App.2d 77, 82, 93 P.2d 185; *In re Halamuda*, supra, 85 Cal.App.2d 219, 222–223, 192 P.2d 781.

[8] And there is nothing in the law to the effect that a judge cannot be prejudiced against unlawful conduct, or that marked disapproval of conduct disclosed by the evidence is prejudice within the recognized connotation of that term. “From these authorities the rule appears to be that when the state of mind of the trial judge appears to be adverse to one of the parties but is based upon actual observance of the witnesses and the evidence given during

the trial of an action, it does not amount to that prejudice against a litigant which disqualifies him in the trial of the action. It is his duty to consider and pass upon the evidence produced before him, and when the evidence is in conflict, to resolve that conflict in favor of the party whose evidence outweighs that of the opposing party. The opinion thus formed, being the result of a judicial hearing, does not amount to that bias and prejudice contemplated by section 170, subdivision 5, of the Code of Civil Procedure as a basis for a change of venue or a change of judges.” *Kreling v. Superior Court*, 25 Cal.2d 305, 312, 153 P.2d 734, 738. To the same effect are *In re Guardianship of Jacobson*, 30 Cal.2d 312, 317–318, 182 P.2d 537; *McEwen v. Occidental Life Ins. Co.*, 172 Cal. 6, 11, 155 P. 86; *People ex rel. Department of Public Works v. McCullough*, 100 Cal.App.2d 101, 111, 223 P.2d 37; *People v. Sweet*, 19 Cal.App.2d 392, 396, 65 P.2d 899. The remarks of the judge of which complaint is made are clearly within this category. There is no substance to the charge that the judge was prejudiced against Steiner individually or that he did not give him a fair hearing.

[9] It is also argued that the judge failed to make written findings of fact, that this constituted error and “deprives this court of jurisdiction,” meaning the juvenile court. Reliance is placed on section 785, Welfare and Institutions Code and the cases of *In re Matter of Hill*, 78 Cal.App. 23, 247 P. 591, *In re Brodie*, 33 Cal.App. 751, 166 P. 605 and *In re Spiers*, 15 Cal. App.2d 487, 59 P.2d 838. Examination of each of those cases reveals that there was no finding of facts in a proceeding wherein the juvenile court statute specifically required such finding (in the *Spiers* case the so called findings were held to be mere conclusions). But none of them holds that a statute requiring findings in a proceeding such as this makes written findings necessary.

Section 785, Welfare and Institutions Code (misabeled 784 in appellant's brief), reads as follows: “Whenever the procedure prescribed in the foregoing sections of this article has been followed, the ju-

venile court may make a final written order signed by the judge presiding in such court, judicially depriving the parents of the custody and control of a person who should be declared free from the custody and control of his parents; but nothing in this section shall be construed to impair the right of the court to make orders or commitments under any other section of this chapter." It does call for a written order signed by the judge; but, as respondent points out, it applies only to a proceeding under "this article" which is Article 8 of Chapter 2, dealing with proceedings to declare a minor free from custody and control of his parents. And the section expressly disclaims any application to any proceeding "under any other section of this chapter." The instant proceeding falls within Article 7, "Proceeding to Declare a Person a Ward of the Juvenile Court * * *." That article contains two sections which are pertinent. Section 735: "When any person under the age of twenty-one years, alleged to come within the provisions of section 700, is found by the court or judge to come within the said provisions, the court shall adjudge the person to be a ward of the juvenile court and shall in its judgment make a finding of the facts upon which the court exercises its jurisdiction over such person as a ward of the juvenile court. The court shall thereupon make such order or orders, in accordance with such findings, as may be necessary for the care of such ward of the juvenile court. All commitment and recommitment orders shall be in writing, and shall be signed by the judge of the juvenile court." And section 739:

"In all cases the court may determine whether or not the parents or guardian shall exercise any control of a ward of the juvenile court or of any other minor person concerning whom a petition has been filed in accordance with the provisions of sections 721 and 722, and may define the extent of control permitted; but no ward of the juvenile court shall be taken from the custody of his parent or legal guardian without the consent of the parent or guardian, unless the court finds one of the following facts: * * *

"(d) That the welfare of the person requires that his custody be taken from his parent or guardian."

The necessity of written findings of fact under these sections has been considered in *In re Hartman*, 93 Cal.App.2d 801, 807, 210 P.2d 53 (§ 735); *In re Ortiz*, 74 Cal. App.2d 810, 813-817, 169 P.2d 664 (§ 739); *In re Etherington*, 35 Cal.2d 863, 868-869, 221 P.2d 942 (§ 739). In each instance oral findings were held to be sufficient. This was likewise the holding in *Knight v. Superior Court*, 102 Cal.App.2d 211, 215, 227 P.2d 62, a matter arising under sections 734 and 834, Welfare and Institutions Code, having to do with minors found unfit for consideration under the Juvenile Court Law.

[10-13] The exact language of section 735 deserves attention. It says "* * * the court shall adjudge the person to be a ward of the juvenile court and shall in its judgment make a finding of the facts upon which the court exercises its jurisdiction * * *." Considered independently of the ruling in *Hartman*, supra, this implies a necessity for written findings if the judgment is required to be in writing. But it is not so specified with respect to the judgment. And the law pertaining to judgments generally recognizes the propriety of an oral pronouncement which is carried into the court minutes. The judge's signature to a written judgment is not essential. *Brown v. Superior Court*, 70 Cal.App. 732, 735, 234 P. 409; *In re Cook*, 77 Cal. 220, 227, 17 P. 923, 19 P. 431, 1 L.R.A. 567; *Crim v. Kessing*, 89 Cal. 478, 488, 26 P. 1074. Except where findings are specifically required (as in section 632, Code of Civil Procedure) a judgment is rendered when decision is announced and carried into the minutes. *Brown v. Superior Court*, supra, 70 Cal.App. 732, 734, 234 P. 409; *Davis v. Rudolph*, 80 Cal.App.2d 397, 407-408, 181 P.2d 765; *Carpenter v. Pacific Mut. Life Ins. Co.*, 10 Cal.2d 307, 327, 74 P.2d 761. "It is a matter of trial court procedure whether the court chooses to make its final decision by the entry in the minutes of an order without a direction that a written order be prepared, signed and filed, or elects to

Adolph E. NORDEN, Plaintiff and
Respondent,

v.

Paul HARTMAN, Defendant and Appellant.

Civ. 4898.

District Court of Appeal, Fourth District,
California.

July 11, 1955.

Rehearing Denied Aug. 5, 1955.

Hearing Denied Sept. 8, 1955.

Malpractice action. The Superior Court, San Diego County, John A. Hewicker, J., rendered judgment on verdict for plaintiff, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that evidence was sufficient to sustain finding that defendant had been negligent in respect to applying and maintaining a cast which was too tight, resulting in necrosis.

Judgment affirmed.

1. Physicians and Surgeons §14(4)

A physician or surgeon is not liable for every untoward result which may occur, and is only required to have degree of learning and skill which is common in medical profession in that locality, and to exercise ordinary care in applying such learning and skill to treatment.

2. Physicians and Surgeons §18(8, 9)

Whether a physician or surgeon possesses or exercises the required learning or skill in particular case is generally question for experts and can be established only by their testimony, and such testimony is conclusive where matter in issue is one within knowledge of such experts only and not within common knowledge of layman, but in some cases, even when testimony of experts is uncontradicted, a question of fact may remain.

3. Evidence §571(3)

Professional witnesses may testify concerning teachings of their science and customs of their craft, but whether these things disclose due care presents question for court or jury.

enter a direction that a formal order be prepared. *Gwinn v. Ryan*, 33 Cal.2d 436, 202 P.2d 51." *Herrscher v. Herrscher*, 41 Cal.2d 300, 304, 259 P.2d 901, 904. See also *Steen v. Board of Civil Service Com'rs*, 26 Cal.2d 716, 727, 160 P.2d 816; *E. Clemens Horst Co. v. Federal, etc., Co.*, 22 Cal.App.2d 548, 549, 71 P.2d 599; *Pessararra v. Pessararra*, 80 Cal.App.2d 965, 183 P.2d 279; 3 Cal.Jur.2d § 53, p. 484. Section 735 concludes with a requirement that all commitment orders "shall be in writing, and shall be signed by the judge of the juvenile court." No such provision being made as to findings and judgment the contrasting treatment in the same section requires a holding that the findings and judgment do not have to be in writing. But if a writing were thereby required the minute order would be sufficient compliance. This follows from the ruling in *Cox v. Tyrone Power Enterprises*, 49 Cal.App.2d 383, 391 et seq., 121 P.2d 829, wherein a minute order was held to be a compliance with the requirement of section 657, Code of Civil Procedure, that, in granting a motion for new trial on the ground of insufficiency of the evidence, "the order shall so specify this in writing". To same effect is *Broderick v. Sutherland*, 94 Cal.App.2d 694, 695, 211 P.2d 364. There was no failure to comply with the statute in the case at bar with reference to the manner or form of findings.

[14] Counsel for appellant assigns as one of the alleged errors that: "The Court erred when it failed to sign written findings of fact and the judgment of commitment." But nothing further is said in the brief about the commitment. The argument is that there was a failure to make written findings, which matter we have decided. A point which is merely suggested by appellant's counsel, with no supporting argument or authority, is deemed to be without foundation and requires no discussion. 4 Cal.Jur.2d § 484, p. 318. No other matters merit comment.

The order is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

4. Physicians and Surgeons Ⓒ18(8)

In malpractice action, evidence was sufficient to sustain finding that defendant had been negligent in respect to applying and maintaining a cast which was too tight, resulting in necrosis.

5. Trial Ⓒ260(8)

Instruction given in malpractice case relative to necessity of medical testimony precluded necessity of giving defendant's requested instructions on that issue.

6. Trial Ⓒ235(7)

Instructions given in malpractice case were not subject to claimed objections of instructing jury that medical testimony was not necessary and could be disregarded.

7. Trial Ⓒ235(7)

Instruction given in malpractice case was not subject to claimed objection of instructing that jury could base holding of malpractice on circumstantial evidence, rather than medical testimony, and inviting jurors to disregard testimony of experts and to decide case upon their own ideas of proper methods of treatment and other medical matters, and to infer malpractice from ultimate outcome of treatment.

8. Appeal and Error Ⓒ1060(1, 2)

Plaintiff's claimed misconduct in argument to jury in malpractice case, and in cross-examination of defendant could not reasonably be thought to have affected verdict.

Gray, Cary, Ames & Frye, San Diego, for appellant.

Melvin M. Belli, San Francisco, Nottbusch & Nottbusch, San Diego, for respondent.

BARNARD, Presiding Justice.

This is a malpractice action. On May 15, 1942, the plaintiff suffered a severe comminuted fracture of his right heel bone. He was hospitalized and treated by three doctors, including Dr. West who took charge of the case on August 28, 1942. On April 9, 1943, Dr. West performed a second operation known as a triple arthrodesis.

On June 10, 1943, Dr. West entered the military service and the defendant took over the case. Because the patient was unable to use his foot, and because the bones had not healed in proper alignment, the defendant performed another operation on May 12, 1944. It is this operation and the following postoperative treatment of which the plaintiff complains. After this operation on May 12, 1944, a cast was put on the foot, and the plaintiff complained of terrific pain and that the cast felt tight. Within a day or two, a small window was cut in the cast over the wound caused by the operation, and some medication was applied. There was some relief at first, but the plaintiff continued to feel pain and to complain that the cast was tight. On June 2, he was discharged from the hospital but was using crutches. On June 21, 1944, the defendant removed the cast, and then observed a necrosis and a slough which later developed into a sinus at or near the site of the operation. The defendant treated this condition by various means, conservative in nature, until the middle of October, 1944. The condition failed to clear up and increased in size, and in late October the defendant notified the insurance company that the foot had not improved, and informed it of the slough area. The plaintiff was taken to Los Angeles and on November 14, 1944, another doctor performed an operation and removed certain dead or necrotic bones. On November 29, 1944, still another doctor performed another operation and removed more bone. Finally, in January or February, 1945, the foot was amputated above the ankle.

This action was filed in October, 1945, but was not tried until several years later. A jury returned a verdict for \$25,000 in favor of the plaintiff, and the court granted the defendant's motion for a new trial. On appeal, that order was affirmed, *Norden v. Hartman*, 111 Cal.App.2d 751, 245 P.2d 3. Some of the facts are there more fully stated. The case was retried in March, 1954, with special emphasis on the tightness of the cast as a basis for the charge of negligence. The jury again returned a verdict for \$25,000 in favor of the plaintiff. A motion for a new trial was denied, and

the defendant has appealed from the judgment.

It is first contended that the verdict is erroneous because it is unsupported by any competent medical evidence that defendant was negligent or caused plaintiff any injury. It is argued that whether a doctor has used ordinary care in a particular case, in applying the learning and skill required of him to the treatment of his patient, is a question for experts and can be established only by such testimony; that the rule is that laymen on a jury cannot be permitted to speculate on matters that are exclusively within the knowledge of experts; that there was no testimony here by any doctor indicating any impropriety in the defendant's treatment of the plaintiff; that no expert testified that any act or omission of the defendant caused any of the injuries complained of; and that the expert testimony here was flatly to the effect that no negligence appeared, and that the plaintiff's troubles were the result of things beyond the control of the defendant.

The plaintiff testified that the cast put on by the defendant felt much worse than the cast previously put on by another doctor; that the cast was tight and there was a constant pain in there which was terrific at times; that he told the nurse to tell the doctor that he had to do something because of the pain; that the second day he told the defendant "that the cast hurt me, that it was tight and I was in awful agony, that he would have to do something"; that the defendant told the nurse to have a window cut in the cast; that the cast always felt tight in spite of the cutting of the window; that the cast "still seemed kind of tight" when he left the hospital; and that the cast was left on until June 21. Mrs. Norden testified that the day after the operation the plaintiff complained of extreme pain and throbbing in his foot and that the cast was so tight he said he could hardly bear it, and that she visited him in the hospital about twice a week and he continued to complain of the tightness of the cast.

The defendant testified that before he operated on May 12, 1944, there was no evidence of anything on the foot except a

healed incision with a normal scar. In response to a hypothetical question as to whether a cast that was too tight at a particular pressure point at or near the surgical site, as the surgical site was in this case, could not have caused the same type of infection that was caused in this case, he replied that it could. When asked what else could have caused this infection he stated that it could also have been caused if the vascular system at or about the operation site was severed, or could have been caused by a blood clot landing somewhere. He further testified that in this case the cast was not too tight; that there is a universal precaution to be taken in casting; that the cast should not be too tight because of the danger of necrosis or sloughing off of skin; that when the patient tells you it is too tight it is something you would necessarily heed, in good medical practice; that when he took off the cast on June 21, it did not have a window in it; that when he took off the cast on that day he found that there was a "slough on the lateral side of the ankle down to the bone"; that this was the result of an infection; and that the amputation which later occurred was made necessary by an infection.

Dr. McPherson testified that this infection was caused by "some circulatory disturbance that produced a slough of an area of the skin which became infected, and there was some extension into the bone." Dr. West testified that it is well recognized medical practice to loosen a cast where it is too tight; that he would like to have some facts to go on as to whether it is too tight, as in every case patients complain that it is too tight; that where a cast has pressure at one particular point there will be a resultant necrosis or death of that tissue if it remains for too long a time; that the cause of the amputation in this case was traceable back to an original infection whatever the cause of that infection was; that the original infection here was caused by circulatory impairment at a specific location in that foot and not by a general circulatory impairment through the entire system; that in his opinion the original infection here was not caused by any major interruption of the blood supply and not by

any blood clot; and that from a statement of what occurred between the date of the operation and June 21, when the cast was removed, "it would lead me to believe the cast was not necessarily—was not on too tightly."

[1-3] The general rules applicable to malpractice cases are well settled. A physician or surgeon is not liable for every untoward result which may occur. It is only required that he have the degree of learning and skill which is common in the medical profession in that locality, and that he exercise ordinary care in applying such learning and skill to the treatment of his patient. Whether or not he possesses or exercises the required learning or skill in a particular case is generally a question for experts and can be established only by their testimony, and such expert evidence is conclusive where the matter in issue is one within the knowledge of such experts only and not within the common knowledge of laymen. *Huffman v. Lindquist*, 37 Cal. 2d 465, 234 P.2d 34, 29 A.L.R.2d 485; *Engelking v. Carlson*, 13 Cal.2d 216, 88 P.2d 695. In some cases, however, even when the testimony of experts is uncontradicted, a question of fact may remain for the jury. The negligence of such a defendant may be established by the evidence produced by him. *McCurdy v. Hatfield*, 30 Cal.2d 492, 183 P.2d 269. The ultimate question which a jury must answer, and the question which an expert may answer for the purpose of furnishing evidence upon which the jury is to make up its mind, are not identical. Professional witnesses may testify concerning the teachings of their science and the customs of their craft, but whether these things disclose due care presents a question for the court or jury. *Thomason v. Hethcock*, 7 Cal.App.2d 634, 46 P.2d 832. In *Sim v. Weeks*, 7 Cal.App.2d 28, 45 P.2d 350, 354, it is said:

"A charge of negligence in a choice of treatment is refuted, as a matter of law, by showing that a respectable minority of expert physicians approved the method selected. But where a physician is charged with negligence in the actual performance of a treatment, after its method was chosen over oth-

ers, evidence tending to show such negligence presents a case for the jury.

* * * When a result may or may not be occasioned by malpractice, an expert medical witness invades the province of the jury when permitted to go beyond stating that it *could* and in saying that it *did* occasion the result. * * * But, when a result could have been occasioned by one of two or more causes, the ultimate fact of which cause occasioned the result is for determination by the jury, * * *."

In *Dickow v. Cookinham*, 123 Cal.App. 2d 81, 266 P.2d 63, a judgment based on a directed verdict for the defendant was reversed. It was held that the jury could have found that the defendants were negligent in disregarding the plaintiff's complaint and making no examination to ascertain the cause thereof, or in failing to treat an ulcer which was developing under a cast and which could have been discovered.

[4] On principle and authority, it must be held that there was a question here for the jury and that the evidence was sufficient to support the verdict. While the defendant testified that this cast was not too tight, there was other evidence justifying a contrary inference. While such questions as whether a cast should have been used, and as to the effect of a too-tight cast, were exclusively within the knowledge of experts, the question as to whether this particular cast was too tight was not and could not be exclusively within their knowledge, as experts. While the testimony of the experts here supports the method of treatment used by the defendant it does not necessarily disclose the absence of negligence in carrying out that treatment. Some of that testimony supports a contrary conclusion. All of the doctors testified that it is common medical practice to loosen a cast where it is too tight, and the defendant testified that, in good medical practice, the patient's complaint of tightness should be heeded. Dr. West testified that pressure from a cast at a particular point will cause a death of the tissue at that point if it remains too long; that the original infection here was caused by a cir-

culatory impairment at a specific location; and that in his opinion this impairment was not caused by any major interruption of the blood supply or by a blood clot. While he later expressed an opinion that certain things would lead him to believe that this cast was not too tight, this was somewhat qualified by his use of the words "not necessarily."

There was expert evidence that this necrosis could have been caused by this cast being too tight, and some expert evidence tending to exclude other possible causes. There were also other circumstances which have an important bearing on the ultimate question of fact. It appears that the plaintiff's foot was well healed from the prior operation at the time the defendant operated on May 12, 1944; that the plaintiff suffered great pain shortly after the cast was put on and for a considerable period, and made vigorous complaint; that nothing was done except to open a small window over the operation wound itself and apply some medication there; that that window was subsequently closed; and that when the cast was removed on June 21, an area of necrosis was found which was so serious that it would not respond to treatment over a period of several months. While there was evidence that the original injury was of a type which presents great difficulties in the matter of treatment, that the results of the prior operations and treatment were not entirely satisfactory, and that the form of treatment adopted by the defendant was proper, there was also evidence tending to show negligence in the actual performance of that treatment. The evidence, as a whole, was sufficient to support the verdict.

[5] It is next contended that the court refused to instruct the jury on the necessity of medical testimony to establish malpractice and, to the contrary, instructed the jury, in effect, that such testimony was not necessary and could be disregarded. Complaint is made of the refusal of two instructions which read as follows:

"Negligence upon the part of a physician is never to be presumed, and in the absence of expert testimony to the contrary, it is to be presumed that a

physician possesses and has exercised the requisite degree of skill and care in examining a patient. In determining the question of whether the defendant was guilty of negligence as alleged in the complaint you cannot and must not set up a standard of your own but must be governed in that regard solely by the testimony of expert witnesses who have appeared and testified in this case.

"In this case it is necessary to have expert testimony to establish the nature of the alleged injury and that it was proximately caused by the treatment that is claimed to have been improper. You cannot consider whether, as a matter of common knowledge, the treatment rendered in this case was or was not proper but you may determine only from the testimony of the experts who have testified in the case whether or not the plaintiff in fact suffered the injury he claims as the result of the treatment alleged to be improper."

It is argued that the first of these instructions was inferentially approved in *Moore v. Belt*, 34 Cal.2d 525, 212 P.2d 509, and that the subject-matter of these instructions was not otherwise covered. While the wording of these instructions is subject to some criticism the subject-matter thereof, insofar as proper, was sufficiently covered in other instructions which were given.

The court gave the following instructions:

"In this case there has been testimony of expert witnesses on the medical procedure in use in this community, on methods of medical and surgical treatment, on the causes and courses of disease, and on other medical matters. In respect of any such testimony which has not been contradicted by any similar testimony, you are instructed as follows: Inasmuch as the subject matter of such evidence is not within the common knowledge of laymen, but is within the exclusive province of specialized study and experience, it may not be contradicted by the opinion of a

non-expert, and you are not permitted to reject it, but shall find in accordance with it unless, *under the rules of law stated to you in these instructions you find the testimony unreliable and unworthy of belief.* (Italics ours.)

"The mere fact that the plaintiff has suffered a disability to his foot, considered alone, does not support an inference that some party, or any party, to this action was negligent.

"The law does not permit you to guess or speculate as to the cause of the accident in question. If the evidence is equally balanced on the issue of negligence or proximate cause, so that it does not preponderate in favor of the party making the charge, then he has failed to fulfill his burden of proof.

"To aid you in finding on the issue whether the defendant was guilty of malpractice, there are a few discriminations that you should have in mind. The law does not require of a physician and surgeon perfection, nor prophetic insight, nor infallible judgment; nor does it condemn him simply because his efforts prove unsuccessful. The difficulties and uncertainties in the practice of medicine and surgery, the unpredictable variations in response to treatment are such that no practitioner can guarantee results.

"Where there is more than one recognized method of diagnosis or treatment, and no one of them is used exclusively and uniformly by all practitioners in good standing, it is not negligence for a physician and surgeon if, in exercising his best judgment, he selects one of the approved methods, which later turns out to be a wrong selection, or one not favored by certain other practitioners.

"In short, it is quite possible for a physician and surgeon to err in judgment, or to be unsuccessful in his treatment, or to disagree with others of his profession, without being negligent.

"In malpractice suits against physicians and surgeons, as in all civil actions, negligence on the part of the physicians and surgeons may be proved by circumstantial evidence, and such circumstantial evidence, if any, need not rise to that degree of certainty which would exclude every reasonable conclusion other than that drawn by you, the jury. The facts relied upon to establish the plaintiff's case need not be of such a nature and so related to each other that negligence is the only conclusion that can be fairly or reasonably drawn therefrom. But they must prove the allegations of the complaint by a preponderance of the evidence."

[6] It is further argued that two of the instructions thus given had the effect of instructing the jury that medical testimony to establish malpractice was not necessary and could be disregarded. The italicised portion of the first of these instructions was added by the court, the rest of the instruction having been requested by the defendant. It is argued that the portion thus added by the court permitted the jury to disregard or reject the uncontradicted testimony of medical experts within the field of their exclusive knowledge. The portion added by the court related only to the matter of credibility, covered by the general instructions, and did not change the effect of the instruction as a whole. The jury was thus told that such expert testimony was conclusive as to matters within the medical field which are not within the common knowledge of laymen, that it must be accepted as such, that it could not be contradicted by the opinion of a non-expert, and that it must not be rejected unless it could be found unworthy of belief under some other rule of law. The court also instructed the jury that it was not to single out any certain sentence or portion of an instruction and ignore the others, but that it was to consider all of the instructions as a whole. Assuming that the portion added by the court was unnecessary, no reversible error appears.

[7] It is also argued that the last of these instructions erroneously told the jury that it could base a holding of malpractice on circumstantial evidence, rather than on the medical testimony, and invited the jurors to disregard the testimony of the experts and decide the case upon their own ideas of proper methods of treatment and other medical matters, and to infer malpractice from the ultimate outcome of the treatment. While it would have been better to have omitted a part, at least, of this instruction in a case of this nature, we are unable to agree that it had the effect of inviting the jury to disregard the testimony of the experts and to substitute their own ideas of proper methods of medical treatment. While there was much expert testimony there was also evidence of a number of circumstances, outside the field of that testimony, which could properly be taken into consideration. The instructions as a whole covered all of the material issues, and it does not appear that any portions thereof were sufficiently prejudicial to justify a reversal. None of the instructions can be interpreted as permitting the jury to disregard the expert testimony with respect to the medical questions which were exclusively within the knowledge of the experts.

[8] It is unnecessary to consider in detail the further contentions that the court erred in two other minor matters in the instructions and that the plaintiff's counsel was guilty of misconduct in one respect in arguing to the jury, and in several respects in his cross-examination of Dr. West. It is conceded that the latter matters were not repeated after they were objected to, and none of the matters referred to could reasonably be thought to have affected the verdict.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; EDMONDS, SCHAUER and SPENCE, JJ., dissenting.

Allan Lee WOODS, Plaintiff and Appellant,
v.

SECURITY FIRST NATIONAL BANK, etc.,
et al., Defendants and Respondents.*

Civ. 20885.

District Court of Appeal, Second District,
Division 1, California.

July 18, 1955.

Rehearing Denied Aug. 10, 1955.

Hearing Granted Sept. 15, 1955.

Action by surviving husband to assert claim that certain property in wife's estate was community property. The Superior Court, Los Angeles County, Jesse J. Framp-ton, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Doran, J., held that evidence as to whether parties had in any manner dealt with property as community property supported finding that, despite alleged oral agreement that wife's property should become community property, the proposed transmutation had never been consummated or executed.

Judgment affirmed.

1. Husband and Wife $\S$ 266

In action by surviving husband to assert claim to property in wife's estate, evidence as to whether parties had in any manner dealt with property as community property supported finding that, despite oral alleged agreements that wife's property should become community property, the proposed transmutation had never been consummated or executed.

2. Husband and Wife $\S$ 266

Separate property may be transmuted into community property, and an oral agreement may evidence parties' intention to do so.

3. Appeal and Error $\S$ 931(1)

Where there was no transcript of evidence before reviewing court, finding and judgment would be viewed with every reasonable and deducible inference and presumption favorable to judgment.

* Opinion vacated 299 P.2d 657.

4. Appeal and Error $\S$ 671(3)

Where record on appeal did not disclose what, if any, evidence had been introduced at trial in respect to alleged prior adjudication or whether such matter had been made proper issue for trial court, and trial court made no specific finding as to *res judicata*, reviewing court would not consider this issue.

Guerin & Guerin; John J. Guerin, Los Angeles, for appellant.

Benjamin S. Crow, Los Angeles, and Rex W. Kramer, Monrovia, for respondent.

DORAN, Justice.

Plaintiff, the surviving husband of Eugenie A. Norton Woods, deceased, appeals from that portion of a judgment which declared that said husband has no interest in certain real and personal property standing in the decedent's name, claimed by the husband to have been transmuted into community property by oral agreement.

The complaint "to quiet title, for declaratory relief, for recovery of possession of personal property and for money had and received", alleges that the Security Bank, as executor of the wife's estate, had possession of certain cash and other items of property claimed as community property; and that the other defendants, named as beneficiaries under the wife's will claim an interest in the real property adverse to plaintiff's alleged superior right.

It appears that the wife died on May 28, 1949; that a short time previous thereto, namely, on January 14, 1949, the plaintiff married said wife, then about the age of 91 years. It is alleged "That on a number of occasions subsequent to the marriage * * * plaintiff and decedent orally agreed that all property of the decedent was the community property of decedent and the plaintiff herein". In a second count the complaint alleges "That on or about the 14th day of January, 1949, the said decedent orally conveyed to the plaintiff herein all her right, title and interest in and to all her property, both real and personal,

to take effect upon her death", and, "That plaintiff contends that upon the death of the said decedent the plaintiff became the owner of all the property of said decedent".

The trial court found that "Prior to her marriage with plaintiff said decedent orally agreed with him that if they were married all of her property would become community property and would become his property at her death"; also that after the marriage, "she orally declared to plaintiff and to others that by reason of said marriage the property had become the community property of herself and plaintiff and would become his after her death, to which statement plaintiff assented; and said decedent intended by such declarations to transmute her separate property to community property."

It was further found that at the time of the marriage, "and thereafter, plaintiff was possessed of no property, except items of personal use and adornment. He had no real estate, he had no bank account, no stocks, bonds or securities; he had no cash except approximately \$10. After the said marriage plaintiff earned no money and contributed nothing in the way of property, money, or otherwise, to the community. After the marriage, said deceased did nothing in the way of transmutation of her separate property, except to make the oral declarations hereinbefore stated; she did not part with the control of any of said property or put the possession of any of it in plaintiff". The decedent's oral declarations that the property was community property were "never followed by any action on the part of her or the plaintiff to transfer title, control, or possession". The trial court therefore concluded that the surviving husband had no interest in any of the real or personal property with the exception of the household furnishings and a Buick automobile.

It is appellant's contention that the trial court's "basic error" was "his conclusion that the oral agreement of the transmutation was not executed or consummated". In addition, appellant presents a "Moral Argument" that, since plaintiff "has proved

both a pre-nuptial and post-nuptial agreement wherein he was to receive the property of the decedent", it "seems ridiculous * * * that purported legal technicalities should operate to frustrate the intent of a property owner, especially as between husband and wife".

To this latter argument respondents answer that "there is nothing moral about the situation that this case presents. The idea that an old lady of 91 years should purchase a marriage with her young chauffeur by a promise to give him all her property goes counter to our idea as to the sanctity of marriage and its purpose. That upon her death four and a half months after the marriage he should claim the property standing in her name without contributing one cent to the value or assuming any of the duties of its management and control, is repugnant to our sense of justice and fair dealing". Appellant, however, views the matter in a different light, and calls attention to testimony that before the marriage decedent stated: "This is no romance, this is a business proposition. I am marrying Allan so that he can have my property. He is the only one I can rely on".

[1] The trial court's decision that the proposed transmutation of decedent's property from separate to community property was never consummated or executed, and that therefore the surviving husband had no interest therein, must be sustained. The cases cited by appellant, holding that in certain peculiar circumstances, a transmutation into community property had taken place pursuant to an oral agreement between husband and wife, are, as respondents point out, predicated upon factual situations not present in the instant litigation.

In *Estate of Raphael*, 91 Cal.App.2d 931, 938, 206 P.2d 391, 395, the trial court found that the transmutation had been effected. "by an oral agreement which was fully executed and corroborated by documentary evidence", namely income tax returns filed in the names of both spouses. This opinion states that "All that is required to show

an executed oral agreement of transmutation is proof of the parties' acts and conduct in dealing with their property. * * * The income tax returns * * * constitute evidence of the fact that the parties regarded their property as community property".

In the present case there is no evidence showing that the parties in any manner dealt with the property as community property. The trial court found that decedent "did not part with the control of any of said property or put the possession of any of it in the plaintiff; she retained her bank account in her own name subject only to her right of withdrawal; she retained her safe deposit box in her own name", etc.

[2] As appellant avers, it is well settled that separate property may be transmuted into community property and that an oral agreement may evidence the parties' intention so to do, but the cases cited do not support the contention that this was the situation in the present case. *Tomaier v. Tomaier*, 23 Cal.2d 754, 146 P.2d 905, merely holds that property deeded to husband and wife in joint tenancy may be deemed community property where it was purchased with community funds. And in *Kenney v. Kenney*, 220 Cal. 134, 136, 30 P.2d 398, 399, the very point of the decision was that the oral agreement had been consummated by the subsequent actions of the parties, "concerning the selling, purchasing, mortgaging, and improving of said property". The present case lacks the particular elements upon which these cases turned.

Appellant also argues that the decision of the probate court on plaintiff's petition to determine interest in the wife's estate and for a probate homestead, to the effect that the property was community and not separate in nature, "is *res judicata* on the matter of community property". The respondents' brief, however, points out that in the present action to quiet title, the trial court made no specific finding as to *res judicata*, "doubtless, because such adjudication was not pleaded".

[3] The trial court, after hearing the proof and observing the demeanor of parties and other witnesses, did find that the property in question was the wife's separate property in which the surviving husband had no interest for the reason that the proposed transmutation had never taken place, and that the husband had "contributed nothing in the way of property, money or otherwise, to the community". On this present appeal, which contains no transcript of the evidence, such finding and judgment must be viewed with "every reasonable and deducible inference and presumption favorable to the judgment". *Tyra v. Board of Police & Fire Commissioners*, 101 Cal.App.2d 248, 250, 225 P.2d 617, 619.

[4] In the state of the present record, it cannot be determined what, if any, evidence may have been introduced at the trial in respect to the alleged prior adjudication, or even whether such matter was made a proper issue for the trial court to determine. Such being the situation, on the instant appeal it would obviously be improper to indulge in any speculation on this subject, for which reason further discussion is uncalled for.

Appellant's claim that the property was community in nature is predicated upon the assertion that there were both pre-nuptial and post-nuptial agreements of transmutation. Such matters as consideration, the Statute of Frauds, etc. are apparently bypassed, and the contentions made seem to seek to modify or destroy long established and salutary principles concerning real property tenure.

The findings of fact support the judgment rendered in favor of the respondents, no reversible error has been pointed out, and it cannot be said that the decision of the trial court violates any fundamental rights, legal or moral, possessed by the appellant.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

Charles A. UTLEY, Plaintiff and Respondent,

v.

Jewell H. SMITH, Gene Lewis and John M. Desch, Defendants,

Gene Lewis and John M. Desch, Appellants.

Civ. 8538.

**District Court of Appeal, Third District,
California.**

July 20, 1955.

Action by optionee to compel specific performance of contract resulting from exercise of option to buy realty, against optionor and subsequent purchasers from optionor. The Superior Court, Sacramento County, J. O. Moncur, J., entered judgment for optionee, and purchasers appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence was insufficient to support finding that purchasers were not bona fide purchasers without notice of interest of optionee.

Reversed.

1. Conversion

Vendor and Purchaser

Where vendor executed written document entitled "agreement of sale" which acknowledged that he had received \$200 as deposit on realty from purchasers, which stated that purchase price of \$3,500 was payable in cash on delivery of title, and which was signed by purchasers, document constituted agreement of purchase and sale, which, except as against interests prior in right, worked an equitable conversion of the title.

2. Vendor and Purchaser

The exercise by an optionee of an option to purchase property gives rise to a contract of purchase and sale binding upon the parties to an option and good as against intermediate purchasers who were not bona fide purchasers without notice.

3. Appeal and Error ⇐931(1)

Findings must be construed in support of judgment where such a construction is reasonable.

4. Vendor and Purchaser ⇐244

In action by optionee to compel specific performance of contract resulting from exercise of option to buy realty against optionor and subsequent purchasers from optionor, evidence was insufficient to support findings that purchasers were not bona fide purchasers without notice of interest of optionee.

Lewis, Lewis & Lewis, Sacramento, for appellants.

Noel C. Stevenson, Sacramento, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment decreeing specific performance of a contract resulting from the exercise of an option to buy real estate.

[1] On September 30, 1952 Jewell H. Smith was the owner of a certain parcel of real property in Sacramento County. On that day he executed a written document entitled "Agreement of Sale", which acknowledged that he had received from Lewis and Desch, defendants and appellants here, the sum of \$200 as the deposit upon the purchase price of his property. It was stated that the purchase price was \$3,500 and that it was payable in cash upon the delivery of title. This document he signed and over the signatures of Lewis and Desch there was written the word "Accepted". No question is raised, and we think none could be raised, but that this document constituted an agreement of purchase and sale which, except as against interests prior in right, at once worked an equitable conversion of the title so that thereafter Lewis and Desch were the equitable owners and Smith retained the legal title pending the consummation of the agreement. In re Estate of Reid, 26 Cal.App.2d 362, 367, 79 P.2d 451; In re Estate of Dwyer, 159 Cal. 664, 675, 115 P. 235. Upon the same day Smith executed a document entitled "Op-

tion for Sale of Real Estate", which recited that in consideration of \$10 Smith had received he was giving to Utley, plaintiff and respondent herein, the right and option to purchase from Smith on or before the 20th day of October, 1952 the same property aboved referred to. The purchase price was fixed at \$3,500. The document provided that if respondent elected to purchase he would pay Smith \$3,490 or might deposit that sum for Smith at the office of a named title company. On October 7, 1952 respondent recorded the option contract. Within the time given, that is, on October 10, 1952, respondent notified Smith in writing of his election to buy the property and deposited the full balance of the purchase price with the title company. He demanded that the property be conveyed to him. Appellants Lewis and Desch proceeded under their contract of sale of September 30th and received a deed from Smith on October 14th. Smith refused to convey to respondent Utley and respondent began an action to compel specific performance, asking this relief against Smith and also against appellants Lewis and Desch. The trial court granted respondent's prayer for relief and ordered Lewis and Desch to convey the property to him. From that decision this appeal was taken.

[2] As between optionor and optionee the exercise by the latter of an option to purchase property gives rise to a contract of purchase and sale binding upon the parties to the option and good as against intermediate purchasers of the property who were not bona fide purchasers without notice. Said the court in Smith v. Bangham, 156 Cal. 359, 363, 104 P. 689, 691, 28 L.R.A., N.S., 522:

"The option had at least the force of an offer to sell, and the acceptance of this offer before it had expired or had been revoked constituted a valid and binding contract from which neither party could recede."

In the cited case the optionor gave an option to the optionee to purchase separate property of the optionor. Before the option was exercised the optionor's wife declared a homestead and on exercise of the option

the optionor refused to convey. The court said, 156 Cal. at page 365, 104 P. at page 692:

"* * * the option vests in the grantee the right or privilege of acquiring an interest in the land, and, when accepted, entitles him to call for specific performance. * * * Such right, when exercised, must necessarily relate back to the time of giving the option [citing case], so as to cut off intervening rights acquired with knowledge of the existence of the option."

[3, 4] It was material to determine whether or not the option preceded the agreement of sale between Utley and appellants for if appellants were first in time they were first in right. Respondent in his complaint pleaded the execution of the option contract, his election to purchase and the refusal of Smith to convey. Concerning appellants, he alleged that they "knew that the defendant Jewell H. Smith had given the aforesaid option * * * to the plaintiff, and after the making of said Option and after said defendants acquired knowledge of said Option * * * induced the defendant Jewell H. Smith to sell and convey" the property to them. These allegations were found by the trial court to be true and no more specific findings were made or asked for by the parties. Under the rule that findings must be construed in support of the judgment where such a construction is reasonable we must consider that the trial court found that the option preceded the purchase and sale agreement in point of time, although both were executed on the same day and that, therefore, appellants' rights arose during the existence of the option and that they purchased with knowledge thereof. We so construe the findings, as the existence of the option

would not prevent the vesting in appellants of rights under their purchase and sale agreement with Smith unless they had actual or constructive notice of the option. It is undisputed, and the court found, that the option agreement was recorded on October 7th, about a week after appellants contracted to buy from Smith. They could not, therefore, have had constructive notice of record. If we turn to actual notice we find a complete lack of any affirmative evidence, either testimonial or documentary, showing that appellants possessed such actual notice. On the contrary, we find much evidence by the testimony of witnesses to the effect that they did not have such notice and were, therefore, purchasing in good faith notwithstanding the option. Smith testified that he told appellants nothing about the option. Respondent did not testify that he gave any such notice until after appellants had executed with Smith their purchase and sale agreement. Appellants testified they had no notice or knowledge that the option was outstanding. It results, therefore, that the findings to the effect that appellants were not bona fide purchasers without notice are without support in the evidence and are in the face of positive evidence to the contrary. There is no reason appearing in the record why the trial court should refuse credence to the witnesses whose testimony we have summarized and the result is that the record shows appellants to have had, from the date of their purchase and sale agreement, the equitable title to the property notwithstanding the option; and that they were entitled, upon performance of their agreement, to receive the legal title from Smith. 55 Am.Jur. p. 505.

The judgment is reversed.

FINLEY, J. pro tem., concurs.

134 Cal.App.2d 278

BRUNZELL CONSTRUCTION CO., Inc., a
California corporation, Plaintiff
and Appellant,

v.

G. J. WEISBROD, Inc., a California corpo-
ration, also known as C. J. Welsbrod, Inc.,
and Gilbert J. Welsbrod, Defendants.

G. J. Welsbrod, Inc., Respondent.

Civ. 20748.

District Court of Appeal, Second District,
Division 2, California.

July 7, 1955.

Action for breach of a subcontract for steel work on junior high school auditoriums and connecting shelter, for construction of which plaintiff corporation was general contractor. From a judgment of the Superior Court of Los Angeles County, Robert H. Scott, J., for defendant corporation, plaintiff appealed. The District Court of Appeal, Fox, J., held that evidence justified trial court's finding that defendant made a mistake, of which plaintiff knew, in a letter confirming the subcontract by failing to exclude therefrom steel decking excluded in defendant's oral bids for subcontract, that plaintiff took unfair advantage of such mistake by incorporating such decking in subcontract, and that defendant assented to subcontract under honest misapprehension, so that defendant was entitled to rescind subcontract and plaintiff could not enforce it as made.

Judgment affirmed.

1. Contracts — 93(5)

Knowledge of party to contract that other party is acting under mistake as to provision thereof is treated as equivalent to mutual mistake for purposes of rescission of contract.

2. Contracts — 93(1)

Relief from mistaken bid for contract by party thereto is allowed, where other party knows or has reason to know of bidder's error and requirements for rescission of contract are fulfilled.

3. Contracts — 259

Rescission of contract may be had for a party's mistake of fact, if mistake is

material to contract and not result of neglect of legal duty, enforcement of contract as made would be unconscionable, and other party thereto can be placed in statu quo.

4. Contracts — 266(1), 271

A party seeking rescission of contract for his mistake of fact must give prompt notice of election to rescind and restore or offer to restore everything of value received by him under contract to other party.

5. Contracts — 99(3)

In action for breach of subcontract for steel work on junior high school auditoriums and connecting shelter, for construction of which plaintiff had general contract with school district, evidence justified trial court's findings that defendant corporation made a mistake in its sales manager's letter confirming subcontract by failing to exclude therefrom steel decking specifically excluded in its bid therefor, that plaintiff knew of such mistake and took unfair advantage of it by incorporating such decking in subcontract, and that defendant assented to such contract under honest misapprehension, so as to entitle defendant to rescind it and preclude plaintiff from enforcing it as made. West's Ann.Gov.Code, §§ 4100-4106.

6. Contracts — 266(1)

Where corporation entering into subcontract for steel work on junior high school auditoriums and connecting shelter gave general contractor for construction thereof prompt notice of rescission of subcontract on discovering, a few days after contract was signed and while it was still executory, mistake in failure of subcontract to exclude steel decking specifically excluded in subcontractor's oral bids, no offer of restoration by subcontractor to general contractor was necessary as subcontractor had received nothing of value to be restored. West's Ann.Gov.Code, §§ 4100-4106.

7. Contracts — 93(1)

The fact that some element of carelessness not amounting to neglect of legal duty, permeated mistake of party to contract as to provision therein, will not of itself bar his right to relief by rescission of contract, where mistake does not stem from original error in judgment.

8. Contracts ⚡93(1)

When a contract is still executory and parties thereto can be put in statu quo, party knowing of other party's mistake as to provision of contract will not be permitted to obtain unconscionable advantage through enforcement of contract, where such mistake is material and not result of neglect of legal duty or error in judgment, and requirements for rescission of contract are fulfilled.

9. Contracts ⚡93(1)

A mistake, through which corporation subcontracting to do steel work on junior high school auditoriums and connecting shelter, for construction of which another corporation, aware of such mistake, had general contract with school district, seemingly agreed to perform for \$37,700 for work reasonably worth at least \$47,000 because of failure to exclude from subcontract steel decking specifically excluded in subcontractor's oral bids, was so essential and fundamental that parties' minds never met on subcontract as executed and subcontractor was entitled to rescission thereof. West's Ann.Gov.Code, §§ 4100-4106.

10. Contracts ⚡93(1)

Where one of parties to contract, through excusable mistake or neglect, and not because of error in judgment, names a consideration out of all proportion to value of subject of negotiations, and other party, cognizant of such mistake, takes inequitable advantage thereof, he cannot claim an enforceable contract.

11. Contracts ⚡99(3)

In action for breach of subcontract to do steel work on junior high school auditoriums and connecting shelter, for construction of which plaintiff corporation had general contract with school district, trial court's findings that plaintiff was fully aware of defendant's mistake in failing to exclude from written subcontract steel decking, excluded in defendant's oral bids, when plaintiff received defendant's letter confirming contract as written and secured defendant's signature to subcontract with knowledge that defendant never bid on such decking, was not without evidentiary sup-

port as grounded on mere speculation and inference based on inference. West's Ann. Gov.Code, §§ 4100-4106.

12. Evidence ⚡54

In civil case, a reasonably probable inference may be used as basis for a succeeding inference.

13. Evidence ⚡54

An inference may be based on a fact based on circumstantial evidence, true rule being that inference cannot be based on inference that is too remote or conjectural.

14. Contracts ⚡99(2)

In action for breach of subcontract to do steel work on junior high school auditoriums and connecting shelter, for construction of which plaintiff corporation had general contract with school district, defendant corporation's sales manager's testimony as to why his letter confirming subcontract mistakenly failed to exclude steel decking, specifically excluded in defendant's oral bids, was properly admitted to clarify character of such mistake by showing that it did not arise out of neglect of legal duty or error of judgment which might defeat defendant's claimed right to rescind subcontract. West's Ann.Gov.Code, §§ 4100-4106.

Preston D. Orem, Los Angeles, for appellant.

Mitchell & Hibbert, Los Angeles, for respondent.

FOX, Justice.

Plaintiff appeals from the judgment in an action to recover damages for an alleged breach of contract.

Plaintiff and defendant are domestic corporations, the former licensed to engage in building construction and the latter licensed as specialty contractors in the business of steel construction. The individuals primarily concerned as protagonists in the matter before us are Everett S. M. Brunzell, secretary of plaintiff corporation, John C. Ringer, an employee of plaintiff, Gilbert J. Weisbrod, president and general manager of defendant corporation, and Leonard W. Klamm, its sales manager.

Plaintiff sued defendant and its president¹ for damages resulting from an asserted breach of a subcontract to do the steel construction on a contract with a school district. Defendant answered with a general denial and with allegations that a mistake was made in executing the agreement as prepared by plaintiff, in that steel decking had not been excluded therefrom; that such mistake was known by plaintiff; that notwithstanding such knowledge on the part of plaintiff, it attempted to take advantage thereof by compelling defendant to carry out the terms of the subcontract, knowing that by mistake, the steel decking had not been excluded from such writing; and that upon discovery of the mistake, plaintiff was notified of defendant's election to rescind.

The Burbank Unified School District had announced it would accept bids, beginning at 2:00 p.m., July 2, 1953, for the construction of "Auditoriums and Connecting Shelter" at the John Muir Junior High School. In anticipation of bidding for the job, plaintiff solicited bids from subcontractors for various phases of the work several days before bidding commenced. Included among the bidding items was the steel work, which consisted primarily of a basis bid and a bid known as Alternate No. 1. This latter item, in general, comprised the connecting covered arcade, for the construction of which the specifications required, among other items, steel decking made by the Detroit Steel Products Company. Mr. Brunzell knew that the Walter

Steyer Company was the sole local distributor for Detroit Steel Products. The bid specifications relative to steel were divided into three sections—Section E, Structural Steel, Section EE, Reinforcing Steel, and Section EEE, Miscellaneous Iron and Steel.

Mr. Brunzell testified that plaintiff received four bids for the above steel work—all of them over the telephone—from the Apex Steel Co., the Kyle Company, Walter Steyer Co., and from defendant prior to submitting its own bid. Mr. Klammer, representing defendant, testified he made his bid over the 'phone in the following language: "We have a figure for the structural steel and miscellaneous iron, *omitting decking*, on the auditorium building, John Muir Junior High School, Burbank. The sections covered are Section E, Structural Steel, and Section EEE, Miscellaneous Iron and Steel *omitting decking*. Our base price is \$30,000.00, Alternate No. 1 \$7,700.00." (Emphasis added.) Defendant's total bid, therefore, excluding decking, was \$37,700. The record shows that Apex Steel bid \$39,800.00, excluding decking, for the same work, while the Kyle bid for both the base proposal and Alternate No. 1, including decking, was \$51,778. Meanwhile, plaintiff had obtained a bid from the Steyer Company for steel decking alone in the amount of \$9,300.

Plaintiff was the successful bidder for the general contract. In compliance with the provisions of sections 4100 to 4106 of the Government Code,² plaintiff, in sub-

1. The case against Weisbrod as an individual defendant was dismissed.

2. The following sections are of interest here:

Section 4102: "Any officer, department, board or commission taking bids for the construction of any public work or improvement shall provide in the specifications prepared for the work or improvement or in the general conditions under which bids will be received for the doing of the work incident to the public work or improvement that any person making a bid or offer to perform the work, shall, in his bid or offer, set forth:

"(a) The name and the location of the place of business of *each subcontractor who will perform work or labor or render service to the general con-*

tractor in or about the construction of the work or improvement in an amount in excess of one-half (½) of one per cent (1%) of the general contractor's total bid.

"(b) *The portion of the work which will be done by each such subcontractor under this act.*"

Section 4103: "If a general contractor fails to specify a subcontractor for any portion of the work to be performed under the contract in excess of one-half (½) of one per cent (1%) of the general contractor's total bid, *he agrees to perform that portion himself.*"

Section 4104: "No general contractor whose bid is accepted shall, without the consent of the awarding authority, either:

mitting its bid, set forth the names of the subcontractors who were to render service for it in performance of the proposed contract. In addition to defendant's name, there was listed the following: "Steel Deck: Walter Steyer." Mr. Brunzell stated this was written in the school bid under his direction. Mr. Gerd H. Schulte, a registered structural engineer employed by the Burbank United School District, testified that when the Steyer Company was listed as the subcontractor for the steel decking on the plaintiff's bid, it was understood that the Steyer Company, and not the defendant, would do the decking. If the installation of the decking by defendant were contemplated, he asserted there would be no need to set out the Steyer Company by name, since the subcontractor of a subcontractor need not be listed to comply with the law.

On July 7, 1953, Mr. Klamm signed and sent to plaintiff a letter entitled "Confirmation," expressive of defendant's willingness to furnish for the total sum of \$37,700 the following: "1. Structural steel as defined in Section E, of specifications. 2. Miscellaneous iron as defined in Section EEE of specifications. 3. Labor for the erection of structural steel, decking, railing, ladders and wire work. Balance of miscellaneous iron items are to be furnished only F.O.B. job." Section EEE of the specifications included, as item 21, "Metal Decking and Siding." On July 9, 1953, the Steyer Company wrote plaintiff confirming its bid for the steel decking.

"(a) Substitute any person as subcontractor in place of the subcontractor designated in the original bid.

"(b) Permit any such subcontract to be assigned or transferred or allow it to be performed by anyone other than the original subcontractor listed in the bid.

"(c) Sublet or subcontract any portion of the work in excess of one-half ($\frac{1}{2}$) of one per cent (1%) of the general contractor's total bid as to which his original bid did not designate a subcontractor.

"(d) The awarding authority may consent to the substitution of another person as a subcontractor, when the subcontractor named in the bid after having had a reasonable opportunity to do so, fails or refuses to execute a written

After receiving defendant's letter of "Confirmation" Mr. Brunzell prepared a printed form of "Subcontract Agreement." In an available space, in paragraph one, there was typewritten the provision that defendant would perform the work previously quoted in its "Confirmation." Klamm thereupon called at Brunzell's office on July 9 to pick up the agreement. While there Klamm, Brunzell and Ringer discussed all phases of the work to be done by defendant. Brunzell stated to Klamm that the school board wanted the portion of the job involving the connecting arcades, which included the decking, done immediately. Klamm replied: "Furnishing the structural steel for this portion of the work is relatively simple. Completion will be dependent upon the delivery of the metal deck by Mr. Steyer. As soon as I return to my office I'll try to contact Mr. Steyer to learn what deliveries may be expected on the metal deck, since there's no reason to rush my work if we have to wait for the deck."

After taking the contract back to defendant's office, Klamm checked it and asked that paragraph 13, relating to a surety bond, be deleted. This was done and the contract was signed by the parties. Klamm testified that on July 13, 1953, following a conversation with Mr. Steyer, he realized for the first time that plaintiff purportedly understood that defendant was to furnish the steel decking. He thereupon telephoned plaintiff and spoke to Ringer, telling him: "I just discovered that neither my confirming proposal nor your subcontract agree-

contract, when said written contract, based upon the general terms, conditions, plans and specifications for the project involved, or the terms of such subcontractor's written bid, is presented to him by the contractor."

Section 4106: "A general contractor violating any of the provisions of this chapter violates his contract and the awarding authority may cancel the contract. After any such violation, the general contractor shall be penalized to the extent of twenty per cent (20%) of the amount of the subcontract involved. Funds recovered through the application of this penalty shall be paid to the State Treasurer who will deposit them in the General Fund."

ment excluded metal decking. I felt certain that you intended metal decking to be excluded. Had you not intended metal decking to be excluded my bid would have been ridiculously low. And, furthermore, I would not have bid on the item of metal decking since it was a proprietary item or material to be furnished by Steyer Company." Ringer replied that Brunzell was out of town for a few days and the matter would be taken up upon his return. On the same day, Klamm sent plaintiff the following letter: "We spoke with the Walter E. Steyer Co., today, to learn of the date delivery might be expected of the metal decking for the covered walks only to learn that a contract had not been awarded to them, as yet. It was then recalled that our confirming proposal on this project did not exclude the metal decking, as it should to conform with verbal bid given prior to bid opening. Obviously this was an error by our office and apparently escaped the attention of your office. We would greatly appreciate your cooperation in correcting your contract to us to provide for the deletion of all metal decking."

On July 15, defendant received its copy of the signed Subcontract Agreement. Klamm amended it by striking out therefrom the word "decking," and by typing in the words "omitting steel decking." He returned it to plaintiff with a request that plaintiff's copy be amended to conform therewith and that both be initialled by the parties. Brunzell declined to accede. Defendant then made known its refusal to perform under the contract as executed. Brunzell subsequently obtained other bids for the work in question, including the decking. The work was awarded to Apex as lowest bidder at \$49,000.00, and Apex's substitution in place of defendant was approved by the school district.

In this action, plaintiff sought damages in the sum of \$11,300.00, the difference between the \$37,700 bid by defendant and the contract for \$49,000 entered into with Apex for allegedly the same work. In entering judgment for defendant, the court made findings conforming to the allegations in the answer. So far as is here germane, the court found that in making its

oral bid, defendant had excluded the decking and that the parties understood that if defendant was awarded the contract it would not be required to furnish or install decking but that this would be done by the Steyer company; that in confirming its oral bid defendant mistakenly and inadvertently failed to exclude the decking; that when plaintiff received the letter of confirmation, it was fully aware of defendant's mistake in not excluding decking and knowingly sought to take advantage of that mistake by preparing a "Subcontract Agreement," later executed by the parties, which did not exclude decking, and was contrary to the oral bid; "that there was never any meeting of the minds of the parties agreeing to the provisions of the purported subcontract agreement;" that there was never any agreement requiring defendant to furnish and install the decking, plaintiff having secured defendant's signature to the subcontract knowing it had never bid on the decking; that defendant made numerous requests of plaintiff to correct the mistake in accordance with its oral bid, which were refused; and that upon discovering its mistake, with due diligence, defendant notified plaintiff of its election to rescind.

Plaintiff's fundamental contention is that "the court erred in ruling that [defendant] was entitled to rescind the subcontract agreement by reason of the discovery of certain alleged mistakes." Such contention is thoroughly refuted by the case of *M. F. Kemper Const. Co. v. City of Los Angeles*, 37 Cal.2d 696, 235 P.2d 7, 10. There, plaintiff Kemper sued to cancel a bid it had submitted on a public construction project and to obtain a discharge of its bid bond. In submitting its bid, plaintiff inadvertently omitted an item amounting to \$301,769 which had figured in its computations. The company discovered its error several hours after the bids were opened and sought to withdraw its bid. The Board of Public Works refused to permit this and passed a resolution accepting the erroneous bid. Section 386(d) of the City Charter of Los Angeles provides: "After bids have been opened and declared, except with the consent of the officer, board or City Council having jurisdiction over the bidding, no bid shall be withdrawn, but the same shall be

subject to acceptance by the city for a period of three months * * * The trial court found, in part, that the bid had been submitted as the result of an honest mistake of a material character, that plaintiff was not negligent, that it had acted promptly to rescind, and that the board had accepted with knowledge of the error. It concluded that it would be unconscionable to require plaintiff to perform for the amount of the bid and that the city suffered no prejudice though it had to award the contract to the next lowest bidder.

[1,2] In affirming the judgment, the Supreme Court expounded the law directly apposite to the case before us: "The city contends that a party is entitled to relief on that ground [rescission] only where the mistake is mutual, and it points to the fact that the mistake in the bid submitted was wholly unilateral. * * * However, the city had actual notice of the error in the estimates before it attempted to accept the bid, and knowledge by one party that the other is acting under mistake is treated as equivalent to mutual mistake for purposes of rescission. * * * Relief from mistaken bids is consistently allowed where one party knows or has reason to know of the other's error and the requirements for rescission are fulfilled. * * *

[3,4] "Rescission may be had for mistake of fact if the mistake is material to the contract and was not the result of neglect of a legal duty, if enforcement of the contract as made would be unconscionable, and if the other party can be placed in statu quo. * * * In addition, the party seeking relief must give prompt notice of his election to rescind and must restore or offer to restore to the other party everything of value which he has received under the contract. * * *

"Omission of the \$301,769 item from the company's bid was, of course, a material mistake. The city claims that the company is barred from relief because it was negligent in preparing the estimates, but even if we assume that the error was due to some carelessness, it does not follow that the company is without remedy. Civil Code section 1577, which defines mistake of fact for which relief may be allowed, describes it as one not caused by 'the neglect of a

legal duty' on the part of the person making the mistake. It has been recognized numerous times that not all carelessness constitutes a 'neglect of a legal duty' within the meaning of the section. * * * On facts very similar to those in the present case, courts of other jurisdictions have stated that there was no culpable negligence and have granted relief from erroneous bids. * * * The type of error here involved is one which will sometimes occur in the conduct of reasonable and cautious businessmen, and, under all the circumstances, we cannot say as a matter of law that it constituted a neglect of legal duty such as would bar the right to equitable relief.

"The evidence clearly supports the conclusion that it would be unconscionable to hold the company to its bid at the mistaken figure. The city had knowledge before the bid was accepted that the company had made a clerical error which resulted in the omission of an item amounting to nearly one-third of the amount intended to be bid, and, under all the circumstances, it appears that it would be unjust and unfair to permit the city to take advantage of the company's mistake."

[5-7] The instant case falls squarely within the equitable principles announced in the Kemper case. The evidence shows that when defendant made its oral bid through Klamm, it specifically excluded the decking in its bid of \$37,700. That plaintiff fully knew and comprehended this is reasonably to be inferred from a miscellany of evidentiary matters appearing in the record. First and foremost is the fact that in submitting its own bid, and in conformity with the requirement of section 4102 of the Government Code, plaintiff listed Walter Steyer, who had bid \$9,300 for the decking job as the subcontractor for the steel decking. Secondly, as an experienced bidder on public projects, Brunzell must have clearly known that defendant's bid would be "in line" with other bids only if it excluded decking. This appears from the other bids—Apex Steel Company having bid \$39,800 for the job without decking (\$2,100 more than defendant's bid), and the Kyle Construction Company having bid \$51,778 including decking (or \$4,778 more than the combined bid of plaintiff and

Steyer). Thirdly, after Brunzell received the confirming letter and before the contract was signed, Klamm and Brunzell discussed the arcade work, the only place in which the specifications called for decking. Brunzell emphasized the need for speed in constructing the arcade. Klamm replied that "furnishing the structural steel for this portion of the work is relatively simple. Completion will be dependent upon delivery of the metal deck by Mr. Steyer"—an indication that the parties recognized the decking would be Steyer's responsibility.

From all the foregoing evidence, the court was justified in finding that defendant had made a mistake in its letter of confirmation, that plaintiff knew that such a mistake had been made, that it took unfair advantage of this mistake to incorporate decking into the contract though the bid price was made exclusive of decking, and that defendant assented to the contract under an honest misapprehension which plaintiff was trying to exploit. Upon discovering the true facts a few days after the contract was signed and while it was still executory, defendant gave prompt notice of rescission "and no offer of restoration was necessary because it had received nothing of value which it could restore." *M. F. Kemper Const. Co. v. City of Los Angeles*, supra, 37 Cal.2d at page 703, 235 P.2d at page 11. That some element of carelessness not amounting to "the neglect of a legal duty" permeated defendant's mistake, will not of itself bar its right to relief where the mistake in question does not stem from an original error in judgment. *M. F. Kemper, etc. Co. v. City of Los Angeles*, supra, 37 Cal.2d at page 703-704, 235 P.2d at page 10; *Klose v. Sequoia Union High School Dist.*, 118 Cal.App.2d 636, 641-642, 258 P.2d 515.

[8-10] It follows that the court was therefore clearly correct in its implied conclusion that plaintiff could not enforce the contract as made. When a contract is still executory, and the parties can be put in statu quo, one party to the contract will not be permitted to obtain an unconscionable advantage through enforcement of the contract where he knows of the other's mistake, where such mistake is material and not the result of neglect of a legal duty

or an error in judgment, and the requirements for rescission are fulfilled. *M. F. Kemper etc. Co. v. City of Los Angeles*, supra, 37 Cal.2d at page 701, 235 P.2d 7. That a mistake of which plaintiff was aware, and through which defendant seemingly agreed to perform a contract for a price of \$37,700 calling for work reasonably worth at least \$47,000, was of so essential and fundamental a character that the minds of the parties never met on the contract as executed, would scarcely seem to require discussion. And where, as here, one of the parties, through excusable mistake or neglect and not because of an error of judgment, has named a consideration that is out of all proportion to the value of the subject of negotiations, and the other party, cognizant of such mistake, takes inequitable advantage of it, the latter cannot under such conditions claim an enforceable contract.

[11-13] Plaintiff also attacks as lacking evidentiary support the findings that when it received the letter of confirmation it was fully aware of defendant's mistake in not excluding decking and that it secured defendant's signature to the subcontract knowing defendant had never bid on the decking. Virtually its entire reply brief is devoted to arguing that this finding was grounded on mere speculation and by improperly basing inference on inference. Plaintiff's claim is refuted both by the state of the record and the controlling principles of law. We need advert to no more of the record than the fact that defendant's oral bid to plaintiff specifically excluded decking and the further fact that plaintiff's contract bid listed Steyer as the decking contractor, giving rise to the reasonable inference that it knew defendant had not included decking in its bid. So far as concerns the law on the "inference" problem plaintiff advances, it is accurately stated in *Vaccarezza v. Sanguinetti*, 71 Cal.App. 2d 687, 698, 163 P.2d 470 (hearing denied) and *Ybarra v. Spangard*, 93 Cal.App.2d 43, 47, 208 P.2d 445, 447 (hearing denied). "In a civil case, if the first inference is a reasonably probable one it may be used as a basis for a succeeding inference." In *People v. Chessman*, 38 Cal.2d 166, 187, 238 P.2d 1001, 1014, the rationale of the

Vaccarezza case is followed and the following language quoted with approval: "The statement appearing in some cases that an inference cannot be based upon an inference, usually without citation and certainly without adequate discussion does not and cannot mean that an inference cannot be based upon a fact which is itself based upon circumstantial evidence. * * * The true rule is and should be that an inference cannot be based on an inference that is too remote or conjectural." The findings here complained of were based not only on direct evidence of the original oral bid, but on circumstantial evidence of a highly persuasive character and logical inferences derived therefrom.

[14] Finally, plaintiff assigns as error the admission over its objection of testimony by Klamm purporting to explain why his confirming letter mistakenly failed to exclude the decking work. Such testimony was properly admitted to clarify the character of the mistake by showing that it did not arise out of neglect of legal duty or from an error of judgment that might disentitle defendant to the right to rescind.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.



134 Cal.App.2d 642

**THE PEOPLE of the State of California,
Plaintiff and Respondent,
v.**

**Jack Bailey KUYKENDALL, John B. Norred, alias, and Manuel Castillo Luna,
Defendants and Appellants.
Cr. 5364.**

District Court of Appeal, Second District,
Division 2, California.

July 29, 1955.

Rehearing Denied Aug. 11, 1955.

Hearing Denied Aug. 25, 1955.

Defendants were convicted in the Superior Court, San Luis Obispo County, Rav B. Lyon, J., for robbery in first degree,

assault with intent to commit robbery, and assault by means of force likely to produce great bodily harm, and defendants appealed. The District Court of Appeal, McComb, J., held, inter alia, that evidence sustained the convictions.

Judgments affirmed.

1. Criminal Law ☞1144(13)

On a defendant's appeal from conviction, evidence will be viewed most favorably to the people.

2. Assault and Battery ☞92

Robbery ☞24(1, 6)

Evidence sustained convictions for robbery in first degree, assault with intent to commit robbery, and assault by means of force likely to produce great bodily harm. Pen.Code, §§ 220, 245.

3. Criminal Law ☞568

The element of intent is rarely susceptible of direct proof and must usually be inferred from all facts and circumstances disclosed by evidence. Pen.Code, § 21.

4. Criminal Law ☞1150(5)

Where, on appeal from conviction for crime, the evidence is sufficient to justify a reasonable inference that requisite intent existed, the verdict may not be disturbed.

5. Criminal Law ☞21, 32

"Criminal intent" is intention to do act which constitutes violation of law, and does not necessarily involve an intent to violate law, and hence ignorance of illegal nature of act is not a bar to conviction.

See publication Words and Phrases, for other judicial constructions and definitions of "Criminal Intent".

6. Criminal Law ☞808½

On a trial for robbery, it is sufficient for court, in defining robbery, to give statutory definition of the crime. Pen.Code, § 211.

7. Criminal Law ☞824(1)

In criminal case, trial court, on its own motion, must fully and fairly instruct jury concerning law relating to facts of case, and it is not relieved of duty to give such instructions merely because they are not requested.

8. Criminal Law ⇨808½

Court may couch its instructions defining elements of offense in language of code, where no instructions in elaboration of principles of statutory definitions are requested by defendant.

9. Criminal Law ⇨825(1)

Where an instruction on a particular point or points as given by court is correct as far as it goes, and only valid objection, if any, to it is that it is deficient or inadequate by reason of its generality, indefiniteness or incompleteness, if defendant desires additional, amplified, explanatory, fuller, or more complete, elaborate, comprehensive, definite, specific or explicit instructions on such point or points, he must properly request same, otherwise error cannot be predicated upon failure to give such additional instructions.

10. Criminal Law ⇨1038(3)

Where in robbery prosecution defendants failed to request additional instructions, defendant could not on appeal urge error in the failure of court to amplify its instructions on question of intent.

11. Criminal Law ⇨1173(2)

In prosecution for robbery, assault with intent to commit robbery, and assault by means of force likely to produce great bodily harm, where doctor's testimony relating to extent of injuries inflicted upon prosecuting witnesses was matter of common knowledge to both court and jury, and, in absence of showing of prejudice, failure to instruct jury regarding such expert testimony was not prejudicial error. Pen. Code, §§ 220, 245.

12. Criminal Law ⇨1171(3)

In prosecution for robbery, assault with intent to commit robbery, and assault by means of force likely to produce great bodily harm, statement by prosecutor in argument that "there was a police report that three men were trying to steal a car" was supported by evidence, and, hence, was not prejudicial error.

13. Criminal Law ⇨655(4)

In prosecution for robbery, assault with intent to commit robbery, and assault by means of force likely to produce great

bodily harm, under evidence, trial court's statement during voir dire examination of prospective jurors that defendants "wouldn't be here unless there is some reasonable cause to believe that they had committed a crime" was not error.

14. Criminal Law ⇨655(1)

In a criminal case, trial judge may properly inform jury of nature of proceedings preliminary to an actual trial, where question arises, rather than leave them to speculate as to nature of such proceedings.

15. Criminal Law ⇨1166½(12)

In prosecution for robbery, assault with intent to commit robbery, and assault by means of force likely to produce great bodily harm, trial court's direction to defense counsel to coordinate their efforts in advance so as to avoid unnecessary delay was not prejudicial error.

16. Criminal Law ⇨655(1)

In prosecution for robbery, assault with intent to commit robbery, and assault by means of force likely to produce great bodily harm, under evidence, trial court did not demonstrate prejudice against defendants during course of trial.

17. Criminal Law ⇨1035(3)

On appeal from conviction for robbery, defendants could not urge alleged prejudicial remark of court as ground of reversal since they had made no objections at time of alleged error nor did they request court to admonish jury to disregard remark.

18. Criminal Law ⇨1166½(12)

In prosecution for robbery, assault with intent to commit robbery, and assault by means of force likely to produce great bodily harm, under evidence, reprimand by court of one of defense attorneys for being late for one session of court was not prejudicial error.

19. Criminal Law ⇨1144(15)

On appeal from conviction for robbery, District Court of Appeal must assume that jury performed their duty and based their verdict upon evidence and instructions and disregarded extraneous matters.

20. Criminal Law *↔*656(1)

On appeal from conviction for robbery, assault with intent to commit robbery, and assault by means of force likely to produce great bodily harm, record failed to disclose that remarks of court, including questions directed to witnesses, interfered with relevant questioning by counsel for defendants.

John L. Seitz, San Luis Obispo, Charles E. Ogle, Morro Bay, and Martin Polin, San Luis Obispo, for appellants.

Edmund G. Brown, Atty. Gen., and Jay L. Shavelson, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From judgments of guilty of (1) robbery in the first degree, (2) assault with intent to commit robbery, in violation of section 220 of the Penal Code, and (3) two counts of assaulting Messrs. Lopez and DeCorona by means of force likely to produce great bodily harm in violation of section 245 of the Penal Code, defendants appeal. There is also an appeal from the order denying their motions for a new trial.

[1,2] *Questions: First: Was there substantial evidence to sustain the verdicts of guilty?*

*Yes.** The record discloses that on the morning of July 12, 1954, four Mexican citizens working as farm laborers went from their camp in Grover City, California, to nearby Pismo Beach. After a day spent in drinking beer, playing billiards and buying clothing, they were under the influence of alcohol to varying degrees and sought a taxi to take them back to camp.

While looking for a taxi, they were approached by defendant Luna who spoke to them in Spanish and offered them a ride to their camp. He then hailed a passing light panel truck in which were sitting his friends, defendants Kuykendall and Norred. The truck stopped and the four laborers climbed onto the rear while defendant Luna entered the cab.

As the truck left Pismo Beach, it was traveling very fast and went past the camp where the laborers lived. When the truck passed the camp, the laborers shouted and told defendants to stop but they did not. The truck later slowed down to make a turn, and two of the laborers jumped off. The truck then stopped near a liquor store belonging to Peter Santos.

Otilio Lopez, one of the victims, testified that when the truck stopped, his companion DeCorona, stepped off the truck, and was struck a blow by defendant Kuykendall while defendant Norred held a knife. Defendant Kuykendall held one of the victims and defendant Luna held the other while defendant Norred stepped onto the running board of the truck and struck the victims with a metallic object. Defendant Kuykendall rolled one of the victims over and went through his pockets; another defendant took a wrist watch from the wrist of one of the victims.

Clearly the foregoing evidence is sufficient to sustain the verdicts of guilty. Further discussion of the evidence would serve no useful purpose.

[3,4] There is no merit in defendants' contention that the evidence fails to disclose the intent with which defendants acted. Section 21 of the Penal Code reads in part thus: "The intent or intention [with which a crime is committed] is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. * * *" The element of intent is rarely susceptible of direct proof and must usually be inferred from all the facts and circumstances disclosed by the evidence. Where the evidence is sufficient to justify a reasonable inference that such intent existed, as in the present case, the verdict may not be disturbed. (People v. Smith, 84 Cal.App.2d 509, 512, 190 P.2d 941.)

[5] *Second: Was the jury properly and adequately instructed on the question of intent?*

* The evidence is viewed in the light most favorable to the People (respondent). See People v. Pianezzi, 42 Cal.App.2d

270, 277 [2], 108 P.2d 685 (hearing denied by the Supreme Court).

Yes. The trial court instructed the jury that criminal intent is the intention to do the act which constitutes a violation of the law, and does not necessarily involve an intent to violate the law, and hence that ignorance of the illegal nature of the act is not a bar to conviction. (See *People v. Durrant*, 116 Cal. 179, 208, 48 P. 75.)

[6] In addition, the trial court read to the jury as part of its instructions section 211 of the Penal Code, defining the crime of robbery. It is settled that reading to the jury the statutory definition of a crime is sufficient. (*People v. White*, 5 Cal.App. 329, 335, 90 P. 471.)

[7,8] It is true the general rule in a criminal case is that it is the duty of a trial judge to instruct the jury on its own motion, charging them fully and fairly on the law relating to the facts of the case, and it is not relieved of the duty to give such instructions merely because they are not requested. (*People v. Baker*, 42 Cal.2d 550, 576 [20], 268 P.2d 705.) However, there is an exception to this general rule that instructions defining the elements of an offense may be couched in the language of the code where no instructions in elaboration of the principles of statutory definitions are requested by defendant. (*People v. Reed*, 38 Cal.2d 423, 430 [1], 240 P.2d 590.)

[9] In *People v. Reed*, *supra*, at page 430 of 38 Cal.2d, at page 594 of 240 P.2d our Supreme Court quotes with approval from *People v. Carothers*, thus: "Where an instruction on a particular point or points as given by the court is correct as far as it goes, and the only valid objection, if any, to it is that it is deficient or inadequate by reason of its generality, indefiniteness, or incompleteness, if defendant desires additional, amplified, explanatory, fuller, or more complete, elaborate, comprehensive, definite, specific or explicit instructions on such point or points, he must properly request the same, otherwise error cannot be predicated upon the failure to give such additional instruction." *People v. Carothers*, 77 Cal.App.2d 252, 255, 175 P.2d 30, 32."

[10] In the case at bar defendants failed to request any proper additional instruc-

tions. Therefore the exception to the general rule is here applicable and they may not on appeal urge error in the failure of the court to amplify its instructions.

Third: *Did the trial court commit prejudicial error in not instructing the jury regarding expert testimony?*

[11] *No.* A doctor was called by the prosecution who gave testimony relative to the injuries received by the complaining witnesses. The expert witness was a qualified physician, licensed to practice in California. Therefore there was no question as to the correctness of the trial court's ruling in permitting him to testify as an expert.

It was not prejudicial error to fail to read to the jury an instruction regarding expert testimony for two reasons:

(1) The testimony which the doctor gave regarding the extent of the injuries inflicted upon the prosecuting witnesses was a matter of common knowledge to both the court and jury;

(2) It was not prejudicial error to fail to give such instructions for the reason that defendants have wholly failed to call this court's attention to any prejudice resulting to them because the jury was not instructed on this subject. An examination of the record discloses that it is highly improbable that a different verdict would have been returned had the omission not occurred. Therefore since the alleged error was not prejudicial, we must disregard it. (See *People v. Riley*, 35 Cal.2d 279, 286 [4], 217 P.2d 625; *People v. Letourneau*, 34 Cal.2d 478, 492 [9], 211 P.2d 865.)

[12] Fourth: *Did the district attorney commit prejudicial error in making reference in his argument to the fact that defendants had attempted to break into parked automobiles?*

No. During the examination of Mr. James Frye by the attorney for defendant Kuykendall, the following occurred:

"* * * A. One of the officers got a call on his radio that there were three suspects, or some suspects—

"Q. Did you hear this? A. Yes, I heard it.

"Q. All right. O.K. A. Trying to break into some cars up somewhere

near the Pismo Theatre, up near that auto court, and the police went up there, and then a bunch of the crowd went up there to see what was going on. That's when they started chasing around through the back alleys there.

"Q. Who were they chasing then?

A. Well, they'd seen these three fellows trying to get into a car.

"Q. What three fellows? A. I don't know. They said they saw three fellows. They called the police and said there were three fellows trying to get into some cars there, and evidently they were all locked, or something; I don't know. They saw them go this way. Some of them saw them go down behind Ford's Market, and the police went that way. And somebody else saw them go down toward the beach, and some officers went down that way, and they started chasing them. And there was different people chasing them, and telling them which way they saw them go, until they run into the cafe there.

"Q. And then what happened? A. Well, I was around in front of the cafe there, and somebody said there was three men just went in that restaurant there, so the officers went in and looked, and there was five men in there at the time, and so they just went in and brought them all out.

"Q. All five? A. Yes—yes, sir.

"Q. What happened then? A. Well, they questioned the two of them and—they started to question all of them, I guess, and two of them evidently were known, or somebody knew them, or something, and knew where they had been, so they let them go, and the other three they held there for a little bit, and one of them—or they started talking to the officer and telling him that they had an excuse, that they were in a bar or something and was drinking, and the bartender would swear that they were in there for the last hour, or something to that effect. So one of the officers took one of them

back down there, and the other officer held the two there in front of the cafe."

The three men who were held were defendants. Thus it appears that the police had a report that three men were trying to break into parked cars. These three men were seen to enter a cafe. The police entered the cafe and arrested the three defendants. This would have supported an inference that defendants were the ones who had attempted to break into the cars. However, the district attorney did not state this. He merely stated, "there was a police report that three men were trying to steal a car." This was the testimony elicited from one of the witnesses by defendants' attorney. Clearly the statement was supported by the evidence.

[13] Fifth: *Did the trial court err in stating during the voir dire examination of prospective jurors that the defendants "wouldn't be here unless there is some reasonable cause to believe that they had committed a crime?"*

No. During the voir dire examination of a prospective juror the following occurred:

"[Mr. Polin] Q. Would you apply the yardstick that the Court gives you, that a man is innocent until proved guilty beyond a reasonable doubt?

"[Mr. Warner] A. Yes.

"Q. The mere fact that a defendant is brought here and accused of something, would that indicate to you that he has done something wrong? A. No.

"Q. There seems to be doubt in your voice. A. Well, the way you state the question—you say, 'the fact that a defendant is brought here,' and 'he has done something.'

"Q. And accused of something. A. Well, state it again.

"Q. The fact that a defendant has been brought here and accused of something, would that indicate to you that he has done something wrong? A. Well, he might have done something wrong, but it wouldn't be what he is

accused of. He must have done something to be brought here. What he has done remains to be seen, or if he hasn't done anything, but the fact that the defendants are here, there must have been something that happened previously.

"Q. You think he has done something wrong? A. Well, I don't know. I haven't the slightest idea.

"The Court: No, he doesn't know; the man is very right. They wouldn't be here unless there is some reasonable cause to believe that they had committed a crime.

"Mr. Polin: Yes—Well, reasonable doubt—cause to believe that they had committed a crime—

"The Court: That is what the preliminary examination finds.

"Mr. Polin: I have no further questions.

"The Court: The Juror says that they are in here, and he feels that there must have [been] something happened to bring them in here, but whether they are guilty or not, it is for them to determine from the evidence. In other words, the bringing them in here is no evidence of crime.

"Mr Warner: But they must have done something to be here.

"The Court: But it is a means of getting them in here.

"Mr. Polin: Well, of course, there could be a case of mistaken identity entirely.

"The Court: What they did may not be a crime, it might not be a crime, but they are here for some reason, that is for sure.

"Mr. Polin: That is for sure.

"Mr. Ogle: Your Honor, I am going to also pass for cause Mr. Warner. If I may be heard very briefly on the statement by the Court, that there must be reasonable cause that they had committed a crime, although, I don't have the absolute definition of the effect of being bound over after a preliminary examination at my finger tips, I believe

that we have gone a little further than the effect.

"The Court: I will read it to you. 'It appearing to me that the offense in the within Complaint mentioned, to-wit: Felony: Violation of Sections 211-220-245-182, subd. 1, 1 of the Penal Code of the State of California has been committed, and that there is sufficient cause to believe the within named Jack Bailey Kuykendall, John B. Norred, aka Larry William Alburn, and Manuel Castillo Luna guilty thereof, I order that they be held to answer the same. Webb Moore, Judge of said Court.'"

[14] The court in its statement to the jurors made a correct statement of the events preceding the trial of defendants and informed them of the proper attitude they should have toward defendants. It is perfectly proper for the trial judge to inform the jury of the nature of proceedings preliminary to an actual trial where a question arises, as in the instant case, rather than to leave them to speculate as to the nature of such proceedings. The jurors were clearly informed in the course of this discussion that the fact that defendants were brought before the trial court was no evidence of crime, and that defendants were presumed innocent until proven guilty. For example the trial judge stated:

"This being a criminal trial, we must keep in mind several basic rules: First, that a defendant is presumed innocent until his guilt is established beyond a reasonable doubt; second, that an information which is always filed in the case—not always because sometimes we have indictments by the Grand Jury, but unless there is an indictment by the Grand Jury, an information is filed by the District Attorney. Now, an information is not to be taken as any evidence of the guilt of the defendants. It is a means by which defendants, who the District Attorney has reasonable cause to believe have committed a crime in the County are brought before the Court and a Jury for a trial, so we often refer to an information. Now, that is just simply the instrument

—the paper—the document by which defendants are brought before the Court for trial by jury, and it is not to be taken as any evidence of their guilt.

“The Court: And, in fact that they are brought here, you say you feel that they must have done something or they wouldn’t be brought here. Well, maybe they didn’t; maybe what they did wasn’t a crime. They have that right to have a trial and because they are brought here is no evidence, and you are not to take it as any evidence that they have committed a crime.
* * *

“The Court: Q. You understand that the burden of proof is upon the People to establish the guilt of the Defendants beyond a reasonable doubt?
A. Yes.

“Q. And, I am going to instruct you later on what constitutes a reasonable doubt, and you further understand that the information which has been filed here is no evidence of their guilt, but they are brought in here for trial by this information, and you are to determine whether they are guilty or not guilty from the evidence presented from the witness chair and my instructions?
A. Yes, sir.”

[15] Sixth: *Were the defense attorneys prevented from consulting with each other during the course of the trial?*

No. As part of their cross-examination of prosecution witness, Santos, defense counsel wished to arrange a demonstration to test the credibility of the witness’s story. The two prosecuting witnesses were needed for this purpose. However, defense attorneys had not arranged for their presence in the courtroom, and this caused certain delay and necessitated conferences among defense attorneys which the trial judge felt could have been avoided by proper outside preparation. He therefore made the following statement:

“The Court: All right, let’s go on. If we are going to do it, let’s do it, otherwise, we’ll proceed. You see where we have three attorneys—and

you people haven’t got together and the trial has been delayed often by consultation back and forth and around. I want this trial to proceed regularly and expeditiously. If you have any counseling to do, you do it before you get in here.”

It appears that defendants’ attorneys were not forbidden to consult one another concerning unexpected developments which arose during the course of the trial, but they were told to coordinate their efforts in advance so as to avoid unnecessary delays. This did not constitute prejudicial error.

[16] Seventh: *Did the trial judge commit prejudicial error by demonstrating prejudice against defendants during the course of the trial?*

No. On cross-examination, witness Frye testified that one of the defendants “was right there at the truck, he just jumped in.” One of counsel for defendants called the witness’s attention to his earlier testimony to the effect that this defendant “did not have to run * * * and he just got in ‘the truck’.” The court then said: “Well, why are we concerned how he got in? Do you want to know which foot he put up first?”

[17] There was nothing prejudicial in the court’s remark. In any event, such alleged error may not be urged as grounds for reversal by defendants for the first time on appeal since they made no objection at the time of the alleged error nor did they request the court to admonish the jury to disregard his comment. Therefore any error has been waived. (People v. Roebbling, 14 Cal.App.2d 586, 588 [2], 58 P.2d 929.)

[18, 19] Eighth: *Did the trial court commit prejudicial error in reprimanding one of the attorneys for being late for one session of court?*

No. The record fails to disclose that defendants were prejudiced by the trial judge’s remarks and we must assume that the jury performed their duty and based their verdict upon the evidence and instructions of the trial court and disregarded extraneous matters. (People v. Eggers, 30 Cal.2d 676, 691 [22], 185 P.2d 1; People v.

Root, 112 Cal.App.2d 122, 126 [5], 245 P.2d 679.)

[20] Ninth: *Did the trial court interfere with relevant questioning by counsel for defendants?*

No. During the course of the examination of a witness the following occurred:

"Q. Oh, you turned back your head to look at Pete? A. Yes, I was seeing where he was. You know he was back phoning and I was looking back there.

"Q. How long did you look back at Pete? A. Well, I don't know.

"The Court: Well, she said that was when he was phoning. That was after it was all over.

"Mr. Polin: Q. Was that while the boys were still out there? A. Yes, he phoned just as soon as they, and know—they all got out, he phoned.

"Q. But when you looked back to look at Pete, was that while the fellows were still out there in front? A. Yes, they were still out there, yes."

In the instance of the examination of another witness the following occurred:

"Q. Had you been to any other place? A. Oh, yes.

"The Court: Well, what is the purpose of this, to test his memory, or what?

"Mr. Polin: No; I understand it is customary, in the liquor business, to drink with your customers when you come in to make sales.

"The Court: How do you understand that?

"Mr. Polin: Well, I have learned it from acquaintances of mine.

"A. That is against the law.

"Mr. Polin: Well, I have been so told.

"The Court: Well, maybe the fellow who told you wasn't a good salesman,

"Mr. Polin: Possibly not.

"The Court: Anyway, you couldn't apply that to this man.

"Mr. Polin: I was going to ask him if he had drunk with his customers. I think that is in order; it goes to the competency of the witness.

"The Court: Well, you know what he is going to tell you. He said it was against the law. Go ahead and ask him. He wants to know if you had been drinking with your customers that morning.

"A. Well, this was around 7 in the evening. I would say that probably I had 2 or 3 drinks during the day, yes.

"The Court: Q. But not with your customers, is that it? A. Well, certainly not in any package store. They don't open bottles.

"Mr. Polin: Q. But you had drinks with your customers, is that correct? A. In bars.

"Q. 2 or 3 did you say? A. Possibly.

"Q. May I ask what kind they were? A. Well, they were probably Early Times because that is what I sell. That is 86 proof, straight whiskey.

"Q. I see. And you drink it straight, do you, sir? A. No, with water—I mean, in a highball.

"Q. And how big a highball, about —would you estimate? (etc.)"

The trial court's remarks were not improper or prejudicial. Clearly they did not in any way impede relevant questioning by defendants' counsel.

An examination of the record discloses that defendants had a full, fair and impartial trial.

The judgments and orders are, and each is, affirmed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; CARTER, J., dissenting.

134 Cal.App.2d 310

Dora C. RICHMOND, Petitioner and
Appellant,

v.

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION, James G. Bryant, C. H. Herbage, Michael V. Kunz, Glenn V. Walls and Edward Coin, as members of said Commission, James G. Bryant, as Director of Employment and of the Department of Employment of the State of California, John Doe, Black Company, a corporation, Respondents.

Civ. 16307.

District Court of Appeal, First District,
Division 2, California.

July 11, 1955.

Rehearing Denied Aug. 10, 1955.

Hearing Denied Sept. 8, 1955.

Proceeding to review final administrative decision of Unemployment Insurance Appeals Board denying petitioner's claim for compensation. The Superior Court, City and County of San Francisco, Albert C. Wallenberg, upheld the board's decision and petitioner appealed. The District Court of Appeal, Dooling, J., held that under statute which requires that the party seeking unemployment compensation must earn at least \$300 during base period and not more than 75 percent of total wages during base period shall be earned in one quarter unless total wages are not less than 30 times weekly benefit amount, and woman earned approximately \$415 in first quarter and approximately \$46 in second quarter and earned no more during remainder of base period, her wages met first requirement for eligibility but failed to meet second one.

Judgment affirmed.

1. Social Security and Public Welfare ☞298

Woman who filed first claim for unemployment compensation in January, 1951, and second claim in January, 1952, and who worked only two quarters during that period and earned approximately \$415 in first quarter and \$46 in second quarter of base period did not earn sufficient wages within 12 month period following date of filing first claim to be eligible for unemployment

benefits. Unemployment Insurance Code, §§ 1275 to 1277, 1281(a).

2. Social Security and Public Welfare ☞298

Statute which requires that party seeking unemployment compensation must have earned at least \$300 during base period and that if 75 percent of wages were received in one quarter the total of such wages must not be less than 30 times weekly benefit amount contains two separate requirements, and \$300 provision was not quantitative requirement and later proviso of 75 percent in one quarter was not qualitative. Unemployment Insurance Code, § 1281.

3. Constitutional Law ☞92

Social Security and Public Welfare ☞261

Where new statute changed requirements for right to unemployment compensation, and those quarters of base period woman earned money in came before new statute took effect, when woman became unemployed was essential date, and as it was after new statute's effective date, woman, who was not entitled to benefits because of new statute, did not suffer loss of any vested rights. Unemployment Insurance Code, § 1281(a).

4. Constitutional Law ☞121(1)

Before contingency happens upon which right to receive unemployment compensation depends, the terms for eligibility to compensation may be altered within reason without impairment of contract.

Morgan V. Spicer, H. R. Whiting, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., William L. Shaw, Deputy Atty. Gen., Vincent P. Lafferty, Deputy Atty. Gen., for respondents.

DOOLING, Justice.

This is an appeal from a judgment of the Superior Court in and for the City and County of San Francisco denying petitioner-appellant Dora C. Richmond's petition for writ of mandate. By the petition appellant was afforded review of a final administrative decision of the Unemployment Insurance Appeals Board that she did not have a valid claim for benefits under

the California Unemployment Insurance Act.

Appellant was employed in San Francisco for a ten-year period until January 19, 1951, when her employment was terminated. On January 22, 1951, appellant registered for work and filed a claim for benefits with the Department of Employment. Before any benefits were paid under this claim she again became employed. April 10, 1951, she left this employment because of ill health. On April 11, 1951, appellant filed a claim for unemployment insurance disability benefits and received such benefits through October 16, 1951. On October 30, 1951, she reopened her claim for unemployment insurance benefits (filed January 22, 1951) and received these benefits through January 21, 1952. Appellant filed a new claim for unemployment insurance benefits on January 22, 1952. It is the denial of the January 22, 1952, claim that is here in dispute.

The trial court concluded that appellant had not been paid sufficient wages within the twelve month period following the filing of her first claim on January 22, 1951, to entitle her to receive further benefits. This conclusion was based upon sections 52.6 and 53(a) of the Unemployment Insurance Act (now substantially reenacted as sections 1277 and 1281(a), Unemployment Insurance Code).

[1] Certain other provisions of the Unemployment Insurance Act as they affected appellant's claims must be discussed in order to understand the precise problem involved. Section 6(r) of the act (now section 1275, Unempl. Ins. C.) provided that unemployment benefits shall be based on wages paid in the "base period." It defined "base period" for benefit years beginning in November, December, and January as "the four calendar quarters ended in the next preceding month of June." Section 6(q) (now section 1276, Unempl. Ins. C.) defined "benefit year" as "the one-year period beginning with the first day of the week with respect to which the individual first files a valid claim for benefits."

Since appellant filed her first claim on January 22, 1951, her "benefit year" on that claim began in January, 1951, and under the terms of section 6(r) the "base period" for the calculation of her benefits was the four calendar quarters ending June 30, 1950. So when she filed her second claim on January 22, 1952, the "base period" for that claim would be the four calendar quarters running from July 1, 1950, to June 30, 1951. Appellant's wages in that period totaled \$2,145.50 and were distributed as follows:

\$780.10	July—Sept., 1950
711.90	Oct.—Dec., 1950
192.00	To Jan. 22, 1951
415.35	Jan. 22—March, 1951
46.15	April—June, 1951

It is the proper application of sections 53(a) and 52.6 to these wages which is crucial in this case. Section 53(a) provided:

"An individual cannot establish a valid claim or a benefit year during which any benefits are payable unless he has during his base year been paid wages for employment by employers of not less than three hundred dollars (\$300); provided, however, that if more than 75 percent of his base-period wages were paid during a single calendar quarter, he shall not be eligible for benefits unless his total wages during the base period are not less than thirty times his weekly benefit amount." St.1949, p. 2509.

Appellant's record of earnings above set out meets the requirements of this section. During the "base period" July 1, 1950, to June 30, 1951, she was paid wages of not less than \$300 and not more than 75 percent of such wages were paid during any calendar quarter.

However in 1951 the legislature added section 52.6 to the act, stats.1951, pp. 4189-4190. This section became effective on September 22, 1951, and the portion of it pertinent to this case reads: "On and after January 1, 1952, any wages paid prior to the filing of a valid claim and not used

in the computation of the award may be used for the purpose of computing the amount of any other award only if within the 12-month period following the date of the filing of said valid claim the individual was paid sufficient wages to meet the eligibility requirements of Section 53 of this act." St.1951, pp. 4189, 4190.

Since appellant was unemployed after April, 1951, her wages "within the 12-month period following the date" of filing her valid claim of January 22, 1951, encompassed the following items:

\$415.35	Jan. 22—March, 1951
46.15	April—June, 1951.

It is obvious that more than 75 percent of her earnings within the 12-month period following the date of filing her first claim fell in one quarter: January—March, 1951. It is also true that her total wages during this period were less than thirty times what her weekly benefit amount would be. From this the appeals board and the trial court concluded that she did not receive "sufficient wages" within the 12-month period following the date of the filing of her January 22, 1951, claim "to meet the eligibility requirements of section 53(a)" of the act.

We have concluded that section 52.6 compels this finding. The plain meaning of its language is that to be entitled to use the wages paid to her before January 22, 1951, and not used in computing her previous benefits her wages in the year following the filing of her first claim must measure up to the requirements of section 53(a). This they did not do since, as we have noted, over 75 percent of such wages fell in one quarter of that year and the aggregate of all such wages did not equal thirty times her weekly benefit amount.

[2] Appellant attempts an argument that the \$300 provision of section 53(a) is a quantitative requirement and the later proviso of 75 percent in one quarter, etc., is a qualitative one, or in the alternative

that the 75 percent in one quarter, etc., is a condition subsequent to the \$300 requirement. The fact is, however, that section 53(a) has two separate requirements, one that the applicant's total wages must amount to at least \$300 and the second that if 75 percent of the wages were received in one quarter the total of such wages must be not less than thirty times the weekly benefit amount. Applying these requirements to her wages received after January 22, 1951, as provided by section 52.6, such wages meet the first requirement for eligibility but they fail to meet the second one.

[3, 4] Appellant also argues, citing *Kavanagh v. Board of Police P. F. Com'rs*, 134 Cal. 50, 66 P. 36 (a pension case), that appellant had a vested right in her retirement benefits which could not be changed to her detriment by the enactment of section 52.6. Section 52.6 was not made retroactive. It became effective in September, 1951, but by its own terms it only applied "on and after January 1, 1952." Whether the doctrine of vested rights applies to unemployment benefits in the same sense in which it applies to pension rights has not been decided in any case called to our attention, cf. cases in the note in 20 A.L.R. 2d 963, 964. In any event it is recognized in the pension cases that before the contingency happens upon which the right to receive the pension depends "the terms * * * may be altered within reason without an impairment of the contract." *Terry v. City of Berkeley*, 41 Cal.2d 698, 702, 263 P.2d 833, 836, and cases cited. Here the contingency of appellant's being unemployed on January 22, 1952, was the essential one and it occurred several months after the effective date of section 52.6.

Whatever hardship may exist in the particular case the problem is a legislative and not a judicial one.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

Application of the CITY OF SUSANVILLE, a municipal corporation and political subdivision of the State of California, for validation of Proceedings and Proposed Contract under the Provisions of the "Improvement Act of 1911".

Lee C. Hess Company, a corporation,
Respondent, Cross-Complainant
and Appellant.

City of Susanville, a municipal corporation and political subdivision of the State of California, Petitioner, Cross-Defendant and Respondent.

Ann Rathner, as City Clerk of the City of Susanville, California, and Ralph Conway, as Superintendent of Streets of the City of Susanville, California, Cross-Defendants and Respondents.

Civ. 8801.

District Court of Appeal, Third District,
California.

July 15, 1955.

Rehearing Denied Aug. 2, 1955.

Hearing Granted Sept. 8, 1955.*

Action brought by city to determine validity of proceedings theretofore taken under Improvement Act of 1911. The Superior Court, Lassen County, Bertram D. Janes, J., entered judgment declaring all proceedings taken to be valid, and contractor appealed. The District Court of Appeal, Van Dyke, P. J., held, *inter alia*, that where city council passed resolution declaring contractor to be lowest bidder and awarding to contractor contract for work under Improvement Act of 1911, contract was thereby complete, and, in absence of fraud, mutual mistake or some other ground of rescission, city was without power to rescind its action and award contract to second lowest bidder.

Judgment reversed.

1. Municipal Corporations ⇨374(1)

Where city council passed resolution awarding to contractor contract for work under Improvement Act of 1911, and, four days later, city council in special meeting passed resolution rescinding first award and awarded contract to second lowest bidder, contractor did not lose its right to object to rescinding action taken by council or to

* Opinion vacated 290 P.2d 520.

litigate issue of validity of city's proceedings on ground that it had not appealed to city council by exercising its administrative remedies. Streets and Highways Code, § 5100 et seq.

2. Administrative Law and Procedure ⇨229

Where an administrative remedy is provided by statute, relief must be sought from administrative body and remedy exhausted before courts will act, and a court violating this rule acts in excess of jurisdiction.

3. Administrative Law and Procedure ⇨229

Where a statute provides an administrative remedy and also provides an alternative judicial remedy the rule requiring exhaustion of the administrative remedy has no application if the person aggrieved, and having both remedies afforded him by the same statute, elects to use the judicial one.

4. Municipal Corporations ⇨330(1)

Improvement Act of 1911 was originally enacted and has maintained its place in statute books because of fixed legislative policy that fairness, efficiency and security in construction of public works can best be attained by statutory scheme which would require that such contracts for such work must be let at competitive bidding. Streets and Highways Code, § 5100 et seq.

5. Contracts ⇨22(1)

In the letting of contracts for the doing of public works where the legislative body or the administrative officer is required by statute to call for bids and must under competitive bidding condition let the contract to the lowest responsible bidder, the making of the award gives rise to a contract between public body or agent and successful bidder. Streets and Highways Code, § 5100 et seq.

6. Municipal Corporations ⇨354

Where city council passed resolution declaring contractor to be lowest bidder and awarding to contractor contract for work under Improvement Act of 1911, contract was thereby complete, and, in absence of fraud, mutual mistake or some other ground of rescission, city was without power to rescind its action and award con-

tract to second lowest bidder. Streets and Highways Code, § 5100 et seq.

7. Municipal Corporations Ⓒ336(1)

Statute requiring that notice of award of a contract for doing of public works shall be published by clerk was not intended as a method whereby communication of the acceptance by city should be given to bidder, but is limited in its effect to the notification which is required to be given to property owners interested who for ten days after the giving of such notice are by statute given right of taking over work themselves by entering into a written contract to do so at the price at which award had been made to bidder. Streets and Highways Code, § 5248.

8. Municipal Corporations Ⓒ336(1)

Insofar as interested parties, such as bidders, are concerned, notice may be presumed as to resolution of city council making award of contract for the doing of public works. Streets and Highways Code, § 5100 et seq.

9. Declaratory Judgment Ⓒ395

On appeal from action brought by city to determine validity of proceedings theretofore taken under Improvement Act of 1911, District Court of Appeal could not assume that, if the proceedings were declared valid, there would be on the part of city any refusal to perform ministerial acts, and, therefore court would not mandate that city affirmatively perform any acts. Streets and Highways Code, § 5100 et seq.

Clewe, Blade & McDonald, Robert W. Anderson, Oroville, for appellant.

Sturgis, Den-Dulk, Douglass & Henes, Oakland, and Donald P. Cady, City Atty., Susanville, for respondent.

VAN DYKE, Presiding Justice.

The City of Susanville adopted a resolution of intention to do certain public work within its boundaries, proceeding under the Improvement Act of 1911, now contained in Division 7, Part 3, of the Streets and Highways Code, § 5100 et seq. All prescribed action was duly taken, up to and including a call for bids, and Lee C. Hess

Company, a corporation, submitted the lowest bid. The city council passed a resolution declaring Hess Company to be the lowest responsible bidder and awarding to it the contract for doing the work. Four days later, and acting upon mistaken advice by the Assistant Director of the Department of Professional and Vocational Standards that Hess Company was not a properly licensed contractor, the city council held a special meeting attended by all its members, but without any notice to Hess Company, and thereat passed a resolution declaring that Hess Company had not been qualified to bid the work and purporting to award the contract to one Katsaros, a bidder whose bid had been next lowest to that of Hess Company.

In this case the trial court found that the Hess Company had been properly licensed at all material times. The first resolution awarding the contract of Hess Company directed, as required by the statute, that the city clerk publish notice of that award, but no notice was published. The second resolution directed the publication of notice of award to Katsaros, and that publication was made, and a proposed formal written contract was delivered to Katsaros. At this point, and before the formal contract was executed by Katsaros, the city began this action under the provisions of chapter 10 of said division 7 of said Streets and Highways Code, to determine the validity of proceedings theretofore taken. The code provides that at any time after bids have been received, and prior to the date fixed for the beginning of the work, the legislative body conducting the proceedings may bring an action in the superior court to determine the validity of the proceedings and the validity of any contract entered, or to be entered into pursuant thereto. Any contractor to whom a contract has been awarded may also bring the action. The action is declared to be in the nature of a proceeding in rem and anyone interested is given the right to appear and "contest the validity of such proceedings and contract or uphold the same." Section 5268. Hess Company answered the city's petition, asserting that the contract had been awarded to it and declaring its willingness

to enter into the formal written contract in accordance with the award. It asked that the legislative body and other city officials be mandated to recognize it as the contractor for the work and to proceed to deal with it in that capacity. The trial court found in favor of the city, declaring all proceedings taken to be valid, including the second resolution which, in effect, rescinded the prior resolution awarding the contract to Hess Company and adjudging that a contract executed by the city and Katsaros would be a valid contract. All relief asked by Hess Company was denied. From that judgment Hess Company has appealed.

[1] In support of its appeal Hess Company contends that when the city council made the award to it a binding contract between the city and the Hess Company arose; that the city's power to act further in the matter of making an award had been exhausted and that its action rescinding the award was a nullity. It contends further that the meeting at which the second and rescinding resolution was passed was an illegal meeting in that it was not held at the city hall as prescribed by law. Before examining these contentions we will consider the claim of the city that Hess Company lost all right it might have had to object to the rescinding action taken by the counsel or to litigate the issue of the validity of the city's proceedings because it had never appealed to the city council, that is to say, had not exercised its right to administrative remedies which the city contends was afforded it by the relevant statutes. The contention cannot be sustained.

[2,3] It is, of course, well settled that where an administrative remedy is provided by statute relief must be sought from the administrative body and the remedy exhausted before the courts will act; and that a court violating the rule acts in excess of jurisdiction. *Abelleira v. District Ct. of Appeal*, 17 Cal.2d 280, 292, 109 P.2d 942, 132 A.L.R. 715. It is equally well settled that where a statute provides an administrative remedy and also provides an alternative judicial remedy the rule requiring exhaustion of the administrative remedy has no application if the person aggrieved, and having both remedies afforded him by the

same statute, elects to use the judicial one. *Scripps Memorial Hospital, Inc., v. California Emp. Comm.*, 24 Cal.2d 669, 673, 151 P.2d 109, 112, 155 A.L.R. 360. Said the Supreme Court there:

"If it may be said that there was here an administrative remedy provided by this statute and by the rules of the commission which was available to the respondent it cannot be said that that remedy was exclusive or that its exercise was a necessary precedent to the use of the other remedy expressly given by the statute. None of the cases cited in support of the usual rule go to the extent of holding that that rule applies as against another remedy expressly provided in the same statute, which creates the administrative remedy."

[4] Before considering the contentions of Hess Company upon the merits, it should be said that the Improvement Act of 1911 was originally enacted and has maintained its place in the statute books because of a fixed legislative policy that fairness, efficiency and security in the construction of public works can best be attained by a statutory scheme which would require that such contracts for such work must be let at competitive bidding. From the beginning to the end the provisions of the Improvement Act of 1911 are mainly aimed at securing such competitive bidding; and the courts have consistently construed the act with that legislative purpose in mind. Legislative bodies must follow the act and no attempt upon their part to claim authority to act except strictly in accord therewith can be successful. The act contemplates that before bids are invited the public improvement shall be thoroughly planned; that detailed and exhaustive plans and specifications of the work shall have been adopted; and that every material term and condition of the proposed contract shall have been stated, all to the end that where contractors are invited to bid they will know exactly what they are proposing to do under the contract they offer to enter into. The statute does require that after an award has been made a formal written contract shall be executed and appropriate bonds furnished for faithful performance

of the work and for the payment of sub-contractors, laborers and materialmen. But so well have all things been stated in the plans and specifications, in the proposal for bids, in the information and instructions to bidders, in the notice inviting bids and in the required bid forms that the formal contract is a brief document referring to these preceding writings for a statement of the obligation of the parties; these writings being expressly made a part of the formal contract.

[5] It has long been decided in this and other states and in the courts of the United States that in the letting of contracts for the doing of public works where the legislative body or the administrative officer is required by statute to call for bids and must under competitive bidding conditions let the contract to the lowest responsible bidder, the making of the award gives rise to a contract between the public body or agent and the successful bidder. In *Garfield v. United States*, 3 Otto 242, 93 U.S. 242, 23 L.Ed. 779, a case involving an award of a contract for carrying mail, it was said:

"The Court of Claims holds that the proposal on the part of Garfield, and the acceptance of the proposal by the Department, created a contract of the same force and effect as if a formal contract had been written out and signed by the parties. Many authorities are cited to sustain the proposition. We believe it to be sound, and that it should be so held in the present case."

In *United States v. Purcell Envelope Co.*, 249 U.S. 313, 39 S.Ct. 300, 301, 63 L.Ed. 620, a case involving an award to the company on its bid for furnishing stamped envelopes to the Postoffice Department, the court said in discussing the *Garfield* case:

"* * * It passed upon a transaction of the Post Office Department and decided that a proposal in accordance with an advertisement by that department and the acceptance by it of the proposal 'created a contract of the same force and effect as if a formal contract had been written out and

signed by the parties.' And for this, it was said, many authorities were cited but it was considered so sound as to make unnecessary review of or comment upon them.

"* * * In the present case it insisted his [Attorney General's] action is not so subordinate, that he has discretion, and when exercised it is paramount, his action being 'quasi judicial,' the contract not having been consummated, and that, therefore, it was within his power to review and set aside the decision of his predecessor. We are unable to concede the fact or the power asserted to be dependent upon it. There must be a point of time at which discretion is exhausted. The procedure for the advertising for bids for supplies or services to the government would else be a mockery—a procedure, we may say, that is not permissive but required (section 3709, R.S. [Comp.Stat.1916, sec. 6832]). By it the government is given the benefit of the competition of the market and each bidder is given the chance for a bargain. It is a provision, therefore, in the interest of both government and bidder, necessarily giving rights to both and placing obligations on both. And it is not out of place to say that the government should be animated by a justice as anxious to consider the rights of the bidder as to insist upon its own. And, we repeat, there must be some point at which discretion ceases and obligation takes its place. That point is defined in the *Garfield* Case, and that the definition is applicable to the case at bar is illustrated by the findings of the Court of Claims."

In *State v. Toole*, 1901, 26 Mont. 22, 66 P. 496, 499, it was said:

"* * * The duty imposed is to award the contract to the lowest responsible bidder, unless the bids be rejected. This the statute commands it to do; and whenever, after a compliance with the statutory prerequisites essential to the valid acceptance of a bid, it has regularly awarded the con-

tract, there spring into existence vested rights, which the board cannot destroy or impair."

In *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60, 67, it was said:

"The last act to be done by the president is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed."

On the nature of a bid under the Improvement Act the Supreme Court of California said in *M. F. Kemper Construction Co. v. City of Los Angeles*, 37 Cal. 2d 696, 700, 235 P.2d 7, 10:

"Once opened and declared, the company's bid was in the nature of an irrevocable option, a contract right of which the city could not be deprived without its consent unless the requirements for rescission were satisfied."

In *Williams v. City of Stockton*, 195 Cal. 743, 748-749, 235 P. 986, 988, where Williams had submitted a bid for construction of a city hall, the council had accepted the bid and had awarded the contract to him, it was said concerning the situation thus arising:

"* * * The discretion of the city's governmental body, which alone could determine whether or not the contract should be awarded, had been exercised.
* * * The contract was awarded in all respects as required by law.
* * * Under such circumstances the appellant [Williams] became vested with a right to have the contract signed as directed by the council."

The court said further, at page 751, quoting from *Donnelly on the Law of Public Contracts*, section 143:

"* * * 'When an award has once been made the public body has no discretion but to execute the contract. The rights of the parties then become fixed, and the power to cancel the

Cal.Rep. 285-286 P.2d-31

award or reject the bids does not exist. The obligation of the contract made cannot thus be impaired at the option of one of the contracting parties.'"

The following is from 3 *McQuillin on Municipal Corporations*, 2nd ed., p. 1229. sec. 1328:

"While it is true that a municipal corporation has discretion as to the time and manner of making corporate improvements and the purchase of supplies, still when this discretion has been exercised and a contract made relative thereto, the legislative function has been exhausted, and the duty has become purely ministerial, and a contract so made cannot be impaired at the option of the municipality. Hence, when a bid has been accepted by the proper authorities, such acceptance cannot be revoked."

[6] Applying the foregoing, we hold that the Hess Company's bid had been accepted and the contract awarded to it by regular action of the city council in strict pursuance of the statutory scheme. All the essentials of contract were present and Hess Company was entitled as of right to have the further proceedings take their statutory way. The city was without power, in the absence of fraud, mutual mistake or some other ground of rescission, none of which is claimed to have existed, to rescind its action and to take the contract from Hess Company and award it to Katsaros.

Respondent argues that since the statutes require that "Notice of the award of the contract shall be published by the clerk", Sts. & H. Code, § 5248, this fixes the way, and the exclusive way, in which the acceptance of the bidder's proposal can be communicated to the successful bidder and that until this has been done no contract has arisen. Says respondent:

"The provisions of the Civil Code of the State of California provide the essentials of a contract. These essentials are:

"(a) Offer;

"(b) Acceptance;

"(c) Communication by each to the other." (Citing sections 1550, 1565 and 1581 of the Civil Code.)

[7, 8] We think the Streets and Highways Code section referred to was not intended by the legislature as a method whereby communication of the acceptance by the city should be given to the bidder, but on the contrary that it is limited in its effect to the notification which is required to be given to the property owners interested who for ten days after the giving of such notice are by the statute given the right of taking over the work themselves by entering into a written contract to do so at the price at which the award had been made to the bidder. The language of the statute bears this out. The section does not say that the notice by the clerk is a notice to the bidder of the city's acceptance of his offer, but on the contrary is a notice of the award itself. The award is treated as having been made and so far as the bidder be concerned any of the usual methods of conveying that information to him could be followed. Indeed, since the resolution making the award is the public act of a public body, it is a matter of which notice may be presumed so far as interested parties are concerned. It appears in the case at bar that the president of Hess Company was present when the bids were opened and the award was made.

[9] Appellant asks that this Court not only reverse the judgment of the trial court but go further and mandate the city council, its members, its clerk and the city's superintendent of streets to proceed to notice the award to appellant, and if within the ten days allowed the property owners themselves do not take over the work, then to go further and enter into the formal contract with appellant and permit it to proceed to perform the work. We think it would not be proper for this Court to so order. This is a special statutory proceeding whereunder a legislative body or one who has been awarded a contract by such body for the doing of public work may, without refusing to go forward, set at rest all questions concerning the legality of what has been done by bringing this action. The matter of whether or not the

legislative body or any member of that body or employee of the city has refused to perform ministerial duties is not before the Court. The sole issue is the legality of what has been done. We cannot assume that if by the court these proceedings are declared to be valid and the contract declared to have been awarded to Hess Company, there will be any refusal to perform ministerial acts arising because of that situation. We, therefore, decline to go further than to decide the issues of legality of proceedings tendered by the petition filed by the city. The proceedings were valid to the point to which they had been taken when the award was made to the Hess Company and were invalid beyond that point.

The judgment appealed from is reversed.

FINLEY, Judge pro tem., concurs.



134 Cal.App.2d 345

BEVERLY HILLS HOTEL CORPORATION,
a corporation, Plaintiff and
Appellant,

v.

HILTON HOTELS CORPORATION, a corporation, and **The Beverly Hilton Corporation,** a corporation, Defendants and Respondents.

Civ. 20957.

District Court of Appeal, Second District,
Division 1, California.

July 13, 1955.

Hearing Denied Sept. 8, 1955.

Action by hotel against another hotel, under construction, to restrain its use of a name. The Superior Court, Los Angeles County, Allen T. Lynch, J., entered judgment denying an injunction, and plaintiff hotel appealed. The District Court of Appeal, Drapeau, J., held that the names "The Beverly Hills Hotel," and "The Beverly Hilton," were not so confusing so as to

render it probable that they would mislead persons possessing ordinary powers of perception.

Judgment affirmed.

Doran, J., dissented.

1. Trade-Marks and Trade-Names and Un-fair Competition ⇨3(1)

Words in common use are common property, and may be used by others in combination with other descriptive words, provided combination does not render it probable that persons possessing ordinary powers of perception will be misled.

2. Trade-Marks and Trade-Names and Un-fair Competition ⇨70(3)

The names "The Beverly Hills Hotel," and "The Beverly Hilton", were not so confusing so as to render it probable that they would mislead persons possessing ordinary powers of perception.

3. Trade-Marks and Trade-Names and Un-fair Competition ⇨71

Where words have acquired a fanciful meaning, a meaning that has no connection with their common meaning, it may be more properly said that such meaning is their primary meaning in so far as their use in business is concerned and that their common meaning has dropped into the background.

4. Trade-Marks and Trade-Names and Un-fair Competition ⇨9

When a geographical name is not used in a geographical sense, but is used in a fictitious sense merely to indicate ownership, independent of location, it may be a good trade-mark or trade-name.

5. Trade-Marks and Trade-Names and Un-fair Competition ⇨71

Under circumstances, the name "Beverly Hills Hotel" never acquired any special significance or secondary meaning in mind of public apart from its original meaning as a geographical and descriptive term.

Freston & Files, and Eugene D. Williams, Los Angeles, Ralph E. Lewis and H. R. Kelly, Los Angeles, of counsel, for appellant.

G. Bentley Ryan and Sidney Traxler, Los Angeles, for respondents.

DRAPEAU, Justice.

By this action, the Beverly Hills Hotel Corporation seeks to enjoin defendants from using the name "The Beverly Hilton" for a new hotel nearing completion and located in the City of Beverly Hills.

Plaintiff owns and operates the Beverly Hills Hotel which was built and commenced operations in 1912. It is situate on an eleven acre tract in a residential district of the City of Beverly Hills. When it was opened the city had not been incorporated, and the area involved was located in a subdivision of the County of Los Angeles known as Beverly Hills. The city was incorporated in 1914.

The business of plaintiff is confined to this hotel which is a large one of the luxury type, including exclusive shops and bungalows located on the grounds. It has been operated for over forty years as "The Beverly Hills Hotel" and also as "Beverly Hills Hotel and Bungalows."

In 1950, defendant Hilton Hotels Corporation purchased an eight and a half acre tract of land about one mile distant from plaintiff's hotel: at the intersection of Wilshire and Santa Monica Boulevards in the City of Beverly Hills. This location is zoned for business.

About two years later, defendants announced that an ultra-modern, luxury hotel would be constructed at this location and that it would be called "The Beverly Hilton Hotel". Defendants inaugurated a general publicity and advertising campaign for the hotel under that name.

In November, 1952, Mr. Hernando Courtright, plaintiff's president, wrote to Mr. Conrad Hilton, president of defendant Hilton Hotels Corporation, stating: "In view of the similarity of sound and appearance with 'Beverly Hills' we earnestly request that you do not use this name." And it was suggested that the name be modified to "Hilton-Beverly", in order to obviate confusion.

During the ensuing correspondence, Mr. Hilton indicated some of the reasons for

naming the new hotel "The Beverly Hilton Hotel", such as the policy of the corporation to name new hotels with a geographical designation preceding the name of Hilton. In August, 1953, Mr. Hilton advised plaintiff that it had been decided to drop the word "Hotel" and use the name "The Beverly Hilton", which "should eliminate any confusion."

At the time of trial, the Hilton Hotels Corporation operated eighteen hotels throughout the United States and foreign countries. It also had six hotels under construction, including The Beverly Hilton.

The evidence presented consisted largely of affidavits filed by both parties. By stipulation these were considered by the trial court in addition to oral testimony of two witnesses, one of whom was Mr. Hilton.

It was disclosed thereby that plaintiff had spent very large sums of money for local and national advertising and publicity. Also that construction material intended for defendants' hotel was mistakenly delivered to the Beverly Hills Hotel; and that newspapers had confused the names by referring to plaintiff's hotel, when intending to refer to defendants' hotel.

Defendant Hilton Hotels Corporation produced evidence to the effect that from 1947 through 1953, its total cost of advertising and related expenses was over five millions of dollars. Also, that it was its practice to name or change the names of hotels as they were acquired or constructed to include the name Hilton, for instance the Caribe Hilton in Puerto Rico and the Castellana Hilton in Madrid.

Pages of telephone directories were introduced showing many names of business enterprises which used the word "Beverly" or "Beverly Hills" as a part of their names. Among them were listed the names of two hotels located in Beverly Hills: Beverly Wilshire Hotel and Beverly Carleton Hotel.

At the conclusion of the trial, the court found, among other things, that the words "Beverly Hills" have been "since 1907, and still are, geographical; that the word

'Hotel' has been since long prior to the year 1912, and still is, descriptive of a certain type of business; that the words 'Beverly Hills Hotel' have been since the year 1912, and still are, geographical and descriptive of the place and nature of the business conducted by the plaintiff and its predecessors."

That the use of the name "Beverly Hills Hotel" by plaintiff had not resulted in said name acquiring any secondary meaning, or any special significance in the mind of the public generally or of the hotel going public in particular. And that the words "Beverly Hills Hotel" have "not acquired any meaning different from their original lexicographical meaning as a geographical and descriptive term * * *

"That for twenty-seven (27) years there has existed in the City of Beverly Hills * * * two major hotels, one of which is that now owned by the plaintiff, and that there has existed substantial confusion in the public mind between said two hotels for said period of time; that in consequence neither plaintiff's hotel, nor the other major hotel, have achieved special significance in the public mind, and the name of neither hotel has become invested with, or achieved secondary meaning."

The court further found that there is no confusing similarity either in visual appearance or in sound between the name "Beverly Hills Hotel" and the name "The Beverly Hilton"; and the use of the name "The Beverly Hilton" by defendants has not and will not tend to mislead and deceive, or result in a likelihood of confusion between the two hotels, in the mind of the public in general or the hotel going public in particular.

From the facts found the court concluded that the use of the name "The Beverly Hilton" does not infringe upon plaintiff's use of its name, or violate any of plaintiff's rights. That it does not constitute any unfair, fraudulent or improper use of said name, or violate any legally protectible interest of plaintiff in its name.

From the ensuing judgment denying the injunction, plaintiff appeals.

In seeking a reversal of the judgment, appellant relies upon the following propositions:

1. The holding that the names herein involved are not confusing cannot be supported.

2. The holding that appellant's name had no secondary meaning and could not have protection is clearly erroneous.

In connection with its first point, appellant urges that the finding of no confusion is directly in conflict with the evidence that instances of confusion had already occurred and would probably occur in the future.

In *Schwartz v. Slenderella Systems of California*, 43 Cal.2d 107, 271 P.2d 857, 860, appellant Schwartz was engaged in selling women's apparel in Los Angeles. He started to use the name "Slenderella" in Hollywood in 1939. When respondent, who operated a chain of weight-reducing salons throughout the United States, commenced using the name "Slenderella" in Los Angeles, appellant sought to enjoin such use.

By reason of the similarity in names, Schwartz had received some misdirected mail and telephone calls intended for Slenderella Systems. Some of his customers had gone to respondent's salons in the belief that Schwartz operated women's clothing stores at those locations.

Appellant contended that "To hold that confusion of source as to his products and the respondent's services will be unlikely * * * is to ignore the factual instances of confusion shown by the evidence. He asserts that the trial court has negated the serious aspects of such confusion. Here the parties cater to the same class of the public, the argument continues, 'and it is not difficult to perceive that both appellant and respondent are competing for the same purchasing dollar.'"

In its opinion affirming the denial of an injunction, the Supreme Court stated, 43 Cal.2d at pages 112, 113 and 114, 271 P.2d at page 860, as follows:

"The senior appropriator may protect, by injunction, his trade name 'within the limits fixed by the likelihood of confusion of pro-

spective purchasers.' Rest., Torts, § 730, comment b; *MacSweeney Enterprises, Inc., v. Tarantino*, supra, at 106 Cal.App.2d (504) 512-513, 235 P.2d 266; *Winfield v. Charles*, supra, at 77 Cal.App.2d (64) 70-71, 175 P.2d 69. Although many factors may enter into a determination of whether the use of a specific trade name is likely to result in a confusion of source, the question is primarily one of fact to be determined from all of the circumstances of a particular case. *MacSweeney Enterprises, Inc., v. Tarantino*, supra, 106 Cal.App.2d at page 513, 235 P.2d 266; *Winfield v. Charles*, supra, 77 Cal.App.2d at page 71, 175 P.2d 69; *Pohl v. Anderson*, 13 Cal.App.2d 241, 242, 56 P.2d 992; see 63 C. J. Trade-Marks, Trade-Names, and Unfair Competition, 414-418, § 112.

* * * * *

"Although factual instances of confusion may support a determination that confusion of the public is likely from the use of identical or similar trade names, they do not compel that conclusion as a matter of law.
* * *

"The situation of the parties is one from which differing conclusions reasonably may be drawn. Although a contrary determination might be supported by the evidence, the trial court has decided against the likelihood of confusion of source. When the entire record is considered, it fully supports that determination."

[1] Also, as stated in *Fidelity Appraisal Co. v. Federal Appraisal Co.*, 217 Cal. 307, 317, 18 P.2d 950, 954: "The doctrine is so well settled by a multitude of cases that it is not necessary to cite specific cases, that words in common use are regarded as common property, and may be used by others in combination with other descriptive words, provided they are not so used in combination with other descriptive words, symbols, or designs as to render it probable that they would mislead persons possessing ordinary powers of perception."

[2] The trial judge correctly applied this standard in coming to his ultimate conclusion that "persons possessing ordinary powers of perception" would not be con-

fused between appellant's name: The Beverly Hills Hotel, and respondent's name: The Beverly Hilton.

As its second point on this appeal, appellant asserts as error the trial court's finding that its name has not acquired a secondary meaning and therefore is not entitled to protection.

In this connection, appellant argues that "Proof of secondary meaning consists in precisely the things which the Court has here found and which are facts concerning the long operation, the advertising and the building up of a reputation under the name and the fact that the hotel has been and is popularly and generally known and referred to and identified by such name. Under such facts, appellant becomes entitled to the protection of its name as a matter of law."

The special significance of a designation or trade name customarily referred to as the "secondary meaning" is discussed in 3 Rest., Torts, sec. 716 (b), as follows:

"Whether or not a designation has acquired this special significance is a question of fact in each case. No particular period of use is required. In some cases the special significance is not acquired even after an extended period of use; in others it is acquired after a brief period. The issue in each case is whether or not in fact a substantial number of present or prospective purchasers understand the designation, when used in connection with goods, services or a business, not in its primary lexicographical sense, but as referring to a particular person or association. Long continued use of the designation is evidence from which this 'secondary meaning' may properly be inferred, but the inference is rebuttable."

[3] As said in *Eastern Columbia, Inc., v. Waldman*, 30 Cal.2d 268, 271, 181 P.2d 865, 867: "Where words have acquired * * * a fanciful meaning—a meaning that has no connection with their common meaning, it may be more properly said that such meaning is their primary meaning in so far as their use in business is concerned. Their common meaning has dropped into the background."

[4] Also in *Katschinski v. Keller*, 49 Cal.App. 406, 408, 193 P. 587, 589: "When a geographical name is not used in a geographical sense, but is used in a fictitious sense merely to indicate ownership, independent of location, it may be a good trademark or trade-name."

The outstanding examples of geographical names which have acquired a secondary meaning are those of "Waltham" and "Elgin", both names of watches.

In *American Waltham Watch Co. v. United States Watch Co.*, 173 Mass. 85, 53 N.E. 141, 43 L.R.A. 826, defendant was enjoined from use of the name Waltham. Plaintiff, a manufacturer of watches, had acquired a great reputation and had used the word originally in a geographical sense in connection with his watches. However, the word by long use has come to have a secondary meaning as a designation for watches which the public has become accustomed to associate with the name.

Likewise in *Elgin Nat. Watch Co. v. Loveland*, C.C.Iowa, 132 F. 41 where the geographical name "Elgin" acquired a secondary meaning in the watch and jewelry trade, its original meaning dropping into the background.

[5] In the circumstances presented by the instant cause, it is clear that the name Beverly Hills Hotel never acquired any specific significance in the mind of the public apart from its original meaning as a geographical and descriptive term.

The judgment is affirmed.

WHITE, P. J., concurs.

DORAN, Justice.

I dissent.

I am in entire accord with appellant's contentions as to the facts as well as the law. Business ethics are precious. The violation of these ethics by such unprincipled and unwarranted conduct should not only be prevented but denounced. To hold otherwise only tends to encourage them. In my opinion the appellant's position should be upheld.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

134 Cal.App.2d 352

**L. C. FAUS and Mary G. Faus, Plaintiffs
and Respondents,**

v.

**PACIFIC ELECTRIC RAILWAY CO., a corporation, et al., Defendants and
Respondents,**

**John D. Bicknell Bagg et al., Defendants and
Cross-Complainants, Respondents,**

County of Los Angeles, Intervener-Appellant.

**J. Benton VAN NUYS et al., Plaintiffs and
Respondents,**

v.

**PACIFIC ELECTRIC RAILWAY CO., a corporation, et al., Defendants and
Respondents,**

**County of Los Angeles, Intervener-Appellant.
Civ. 20762, 20763.**

District Court of Appeal, Second District,
Division 2, California.

July 13, 1955.

Quiet title actions involving railroad right-of-way strip in center of city street. The county's motions for leave to intervene were denied and the county appealed. The District Court of Appeal, Fox, J., held that the county had no such direct, immediate or proximate interest in the actions, or such interest in the success of the city which was a party to the actions, as would give the county right to intervene, though the county had, pursuant to statute, declared that acquisition of such strips for public street purposes was of general county interest and had allocated to several cities funds for such purposes.

Orders affirmed.

1. Parties ⇨43

Right of third person to intervene in a pending action is purely statutory and is not matter of absolute right, but may be permitted by leave of court when petitioner shows facts which satisfy requirements of code provision authorizing intervention. West's Ann.Code Civ.Proc. § 387.

2. Parties ⇨40(2)

Under statute providing that any person having "interest" in matter in litigation or in success of either party may intervene in action, the "interest" must be in the matter in litigation and of such direct or immediate character that intervenor will either gain or lose by direct legal operation and effect of judgment and it must be an interest which is proper to be determined in the action. West's Ann.Code Civ. Proc. § 387.

See publication Words and Phrases, for other judicial constructions and definitions of "Interest".

3. Quietling Title ⇨30(1)

Fact that county, which sought to intervene in quiet-title actions, probably had such "interest" as would have permitted joinder as party plaintiff did not per se entitle county to enter cases as intervenor. West's Ann.Code Civ.Proc. § 387.

4. Quietling Title ⇨30(1)

County had no such direct, immediate or proximate interest in actions to quiet title to railroad right of way strip in center of city street or such interest in success of city which was party to the actions as would give county right to intervene in the actions, though county had, pursuant to statute, declared that acquisition of such strip for public street purposes was of general county interest and had allocated funds to several cities for such purpose. West's Ann.Code Civ.Proc. §§ 387, 1241; Streets and Highways Code, § 1680.

Harold W. Kennedy, County Counsel, and Milnor E. Gleaves, Deputy County Counsel, Los Angeles, for appellant.

Paul Overton, Holbrook, Tarr, Carter & O'Neill, W. Sumner Holbrook, Jr., Francis H. O'Neill, Los Angeles, for respondents.

Chapman, Frazer & Lindley, D. W. Chapman, Los Angeles, for respondents and cross-complainants.

FOX, Justice.

From judgments denying its motions for leave to file complaints in intervention in the above entitled actions, the County of Los Angeles appeals. The parties are agreed that the essential issues are identical with respect to both matters and that the cases be considered together on appeal.

The salient facts are these: Beginning in the year 1903 and continuing until September, 1951, the defendant Pacific Electric Railway Company (hereinafter called the Company), and its predecessors in interest, had used the property here in controversy, a long, narrow strip of land located in the middle of Huntington Drive, in the City of San Marino, as part of its right of way for the operation of inter-urban street cars and trains. Huntington Drive is an east-west public highway within Los Angeles County and carries a substantial amount of traffic as it traverses parts of Los Angeles, South Pasadena, Alhambra, San Marino, Arcadia, and unincorporated County territory. After the Company had abandoned certain rights of way in Los Angeles County on November 6, 1951, the Board of Supervisors of Los Angeles County passed a resolution asserting that the acquisition and preservation for public street purposes of such rights of way was of general county interest, section 1680, Streets & Highways Code.¹ Thereafter, during the fiscal years 1952 to 1954, inclusive, the Board made budgetary allocations of \$900,000 as financial aid for such purposes to several cities.

Plaintiffs in both of the matters before us filed their respective complaints on July 21, 1953, seeking to quiet title in themselves to the separate abandoned right of way strips on Huntington Drive in the City of San Marino. The defendant City of San Marino and the Company filed answers denying the plaintiffs' claims and the City of San Marino asserted present ownership and right to possession and use of the disputed strips. Both cases were first set down for trial on May 12, 1954, but were continued until July 26, 1954, because of a death in the family of one of the

Company's counsel immediately prior to the time originally scheduled for trial. About the middle of July the Company moved for a further continuance to effect a substitution of counsel while the City of San Marino moved to substitute City Attorney Martin in the place of the private firm representing it. Both of the new counsel for the defendants Company and City requested additional time to prepare for the trial. A continuance of the cases was granted to October 27, 1954.

On September 13, 1954, the City of San Marino adopted a resolution requesting the County of Los Angeles to extend legal, engineering and other services necessary to the defense of the instant actions. On October 6, 1954, the Board of Supervisors adopted a resolution to the effect that the acquisition of the abandoned rights of way involved in these appeals for public street purposes was of general county interest, directed that legal and engineering services be furnished the City of San Marino, and authorized the County Counsel to intervene in both actions on behalf of the County. On the following day, the County Counsel and one of his deputies, Milnor E. Gleaves, were substituted as attorneys of record for the City of San Marino in place of City Attorney Martin. On October 8, 1954, Mr. Gleaves filed notice that he would move for a 30-day continuance on October 13, 1954, to prepare himself for these matters. On the same day, Mr. Gleaves petitioned for leave to intervene in both actions. On October 13, 1954, a continuance was granted to January 25, 1955.

On October 14, 1955, the County's motion to intervene in these actions came on for hearing. The County filed therewith a proposed "Complaint in Intervention," re-

1. Section 1680 provides in part: "The board of supervisors of any county may, by a resolution adopted by a four-fifths vote of its members, determine that any of the following activities are of general county interest and that county aid shall be extended therefor:

"(a) The laying out, opening, construction, improvement, maintenance, repair, or altering of all or any part of any street within a city * * *

"(f) The acquisition of any real property or interest therein, rights of way or other property necessary for any of the purposes mentioned in this section."

County funds may be disbursed for public street improvements when a determination has been made by its Board of Supervisors that the project is one of general county interest. *City of Oakland v. Garrison*, 194 Cal. 298, 304, 228 P. 433.

citing the details of the actions taken by the Board of Supervisors as previously set forth, alleging the County's general interest in the matter and in the success of the City of San Marino in this litigation. No property interest in the disputed land is claimed by the County and the prayer asks for no relief in favor of the County against any of the parties to the action.² After taking the matter under submission, the trial court made its orders on November 22, 1954, denying the County the right to intervene. Following the County's appeal, this court issued a writ of superseas on December 16, 1954, suspending proceedings below until further order.

The sole question presented is whether the trial court properly refused leave to the County to become a party to the proceedings below. The County contends it "has an interest both in the matter in litigation and in the success of the City of San Marino sufficient to entitle it to intervene." This contention is refuted, however, by a long line of decisions, to which we will subsequently refer, defining the nature of the "interest" a stranger to the record of a pending cause must have before leave to intervene may be granted.

[1,2] The right of a third person to intervene in a pending action is purely statutory. *Chase v. Evoy*, 58 Cal. 348, 355; *Horn v. Volcano Water Co.*, 13 Cal. 62, 70. Intervention is not a matter of absolute right, but may be permitted by leave of court when the petitioner shows facts which satisfy the requirements of section 387 of the Code of Civil Procedure, the statute authorizing intervention by one not originally a party to an action. In *re Yokohama Specie Bank, Ltd.*, 86 Cal.App.2d 545, 555, 195 P.2d 555. Section 387 provides in part that at any time before trial, any person who has an interest in the mat-

ter in litigation or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding. The word "interest" is of crucial significance and has a definite legal meaning in intervention proceedings. It is well settled that the interest referred to must be "'in the matter in litigation and of such a direct or immediate character that the intervenor will either gain or lose by the *direct legal operation and effect* of the judgment.'" (Emphasis added.) *Allen v. California Water & Tel. Co.*, 31 Cal.2d 104, 109, 187 P.2d 393, 395; *Bechtel v. Axelrod*, 20 Cal.2d 390, 392, 125 P.2d 836; *Jersey Maid Milk Products Co. v. Brock*, 13 Cal.2d 661, 665, 91 P.2d 599; *Elliott v. Superior Court*, 168 Cal. 727, 734, 145 P. 101. Not only must the interest be direct rather than consequential, but "it must be an interest which is proper to be determined in the action in which the intervention is sought." *Isaacs v. Jones*, 121 Cal. 257, 261, 53 P. 793, 794, 1101; *Bechtel v. Axelrod*, *supra*; *Jersey Maid Milk Products Co. v. Brock*, *supra*; *Schwartz v. Schwartz*, 119 Cal. App.2d 102, 104, 259 P.2d 33.

An analysis of a few representative cases furnishes graphic illustration of the rule that the "interest" of which the statute speaks must involve such an immediate and direct claim upon the very subject matter of the litigation that the intervenor will either gain or lose by the *direct operation* of the judgment that may be rendered therein. In *Allen v. California Water & Tel. Co.*, *supra*, the City of Coronado sought to intervene in an action involving rights to underground waters of a river basin. The City was obtaining water from the defendant water company pursuant to contract, and asserted its right to intervene on the ground that an adverse decision would affect its water supply. The Su-

2. The prayer of the proposed complaint reads: "Wherefore Interventioner, County of Los Angeles, Prays that plaintiff take nothing by this action, and that the Court adjudge and decree that Defendant, City of San Marino is the owner in fee simple of the real property described in 'Plaintiffs' complaint as amended' herein or, in the alternative, that said city is the owner of an ease-

ment for public street purposes thereover; that the Court adjudge and decree that said plaintiffs be forever barred from asserting any right, title or interest of any nature adverse to the rights of said city therein; and that said interventioner be awarded its costs of suit herein, and any other relief as may seem just and proper under the law."

preme Court affirmed the trial court's denial of leave to intervene, resting its decision on the grounds, among others, that the City's interest was indirect. The court stated, 31 Cal.2d at page 109, 187 P.2d at page 395: "Here the city of Coronado has not such an 'interest' * * * as would give it a right to intervene. It has no direct interest or claim to any of the waters involved in the litigation. * * * Defendant is in no position to claim and never has asserted the attachment of a public use. The city of Coronado, one of its customers, cannot claim and in fact has no greater right in the waters than has defendant itself. * * * The city stands in the same position as that of other water users whose needs are served by defendant either partially or wholly from Tia Juana Basin sources. Its interest is indirect and consequential. Such an interest may not properly be asserted in the supplemental proceedings. It may not therefore serve as a proper subject for intervention."

In *Bechtel v. Axelrod*, 20 Cal.2d 390, 125 P.2d 836, Axelrod was sued as guarantor on a note whose maker had defaulted. Mrs. Axelrod petitioned to intervene, contending that plaintiff, in the event of a favorable judgment, intended to satisfy it out of the community property. In sustaining the disallowance of the petition, the court stated, 20 Cal.2d at pages 392-393, 125 P.2d at page 837: "The interest mentioned in the Code which entitles a person to intervene in a suit between other persons must be in the matter in litigation and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment." * * * Application of these principles to the present case compels the conclusion that the intervener did not possess an interest legally sufficient to sustain her intervention in the suit which was instituted against her husband for the purpose of adjudicating his liability as the accommodation maker upon the promissory note. The wife would neither gain nor lose by the direct legal operation and effect of a money judgment rendered against her husband, the defend-

ant Axelrod. * * * Granting that it was the plaintiff's intention, in the event of his recovery, to attempt to satisfy his judgment from the community property, it is entirely conceivable that the defendant Axelrod might decide to discharge the indebtedness by payment from his separate funds or that the plaintiff might not in fact initiate proceedings to enforce collection. From these observations it is manifest that the intervener's interest in the instant action was remote and contingent and was not of the direct and immediate character required by law to support her intervention."

[3] In *Jersey Maid Milk Products Co. v. Brock*, 13 Cal.2d 661, 91 P.2d 599, plaintiff brought an action to enjoin the Director of Agriculture enforcing certain regulations applying to the dairy industry. Other producers and distributors of dairy products sought to intervene on behalf of the plaintiff, contending they would be affected by the outcome of the case. In declaring their interest to be too indirect to justify intervention, the court pointed out, 13 Cal.2d at pages 664-665, 91 P.2d at page 601: "Any judgment rendered in said action will have no direct effect whatever upon any person other than the parties to said action. * * * This judgment would in no way be binding upon the interveners as long as they are not parties to said action, and they will be as free to pursue their business after the rendition of said judgment, as they were before. They, therefore, would not gain or lose by the direct operation of the judgment. The legal operation of said judgment will have no direct effect upon interveners. It is true there may be an adjudication that said act is a valid legislative enactment which might serve as a precedent upon any action instituted against interveners for the violation of the terms of said act and to that extent it might be said that the interveners have an interest in the matter in litigation, but as the judgment so rendered would have no binding effect upon the interveners, as it would upon the parties to this proceeding, and would in no way directly affect them, their interest is

not a direct but a mere consequential interest in the matter in litigation.”³

In *City of Alhambra v. Jacob Bean Realty Co.*, 138 Cal.App. 251, 31 P.2d 1052, the city sought to condemn defendant's land for a proposed reservoir. The owner of adjoining land was not permitted to intervene, though her land was threatened with depreciation if the reservoir was built. The court stated, 138 Cal.App. at page 252, 31 P.2d at page 1052: “The complaint here showing no direct interest in the litigation, but only a consequential interest in the probable use of the property if plaintiff is successful, and no possibility of gain or loss from the direct legal effect of any judgment that might be rendered, we fail to see that any right to intervene is shown * * *.” In *La Mesa Lemon Grove & Spring Valley Irr. Dist. v. Halley*, 195 Cal. 739, 235 P. 999, certain residents of an irrigation district sought to intervene in a mandamus proceeding brought by the irrigation district to compel the officers thereof to sign and attest certain bonds. The grounds of intervention were that the bonds were invalid. Although the bonds, if issued, would constitute a lien on their property, the court held that their interest in the mandamus proceeding was too remote and contingent, since only after a sale of the bonds would the lien arise. The court stated, 195 Cal. at pages 741-742, 235 P. at page 1000: “It is difficult to see how the petitioning interveners can gain or lose by any judgment which may be entered in that proceeding. If the writ be granted, the enforcement of the judgment would not directly affect their property interests. The bonds, when signed and attested, would not be a lien on their property, although, if thereafter sold, they may lead to the creation of a lien [citation]. Nor would compliance with the writ, if issued, create a cloud upon their title. If

the respondents sign and attest the bonds they must be sold before the lands of the proposed interveners may be taxed to pay the principal and interest thereof. * * * The bonds may never be sold. The present plans for the acquisition of an additional water supply and a distributing system may be abandoned. It is clear that the interest of the petitioning interveners is remote and contingent and not of the direct and immediate character required by law.”

[4] Measuring the County's right to intervene by the well-settled propositions set forth above, it is clear that its interest in the pending cases is not direct, immediate or proximate but is simply consequential and indirect. The actions at bar are suits to quiet title to real property. The County's proposed complaint in intervention asserts no right, title or interest in that property in itself, neither does it ask for any specific relief in favor of the County. Its prayer requests that the court find that title is in the City of San Marino. It is thus obvious that the County does not stand in the position of one interested in the outcome or result of an action because it has any legal right in the subject matter of the litigation which will be directly and immediately affected by the operation of the judgment or because of any interest which is proper to be determined in the action in which intervention is sought. It is true that under 1680 of the Street and Highway Code the Board of Supervisors is empowered to determine the existence of a *general* county interest in a street within a city as a legal condition precedent to the appropriation of county funds for the improvement of such street. But the mere passing of a resolution by the Board of Supervisors evincing such general interest on a particular property is not the equivalent of an interest answering the description required by section 387 as a *sine qua*

3. It may be observed in passing that under section 387 of the Code of Civil Procedure, the petitioners probably had such an “interest” as would have permitted their joinder as parties plaintiffs although such “interest” did not entitle them to enter the case as interveners. The court recommended that the proposed interveners might desire to file

briefs as *amici curiae*, which would give them ample opportunity to be heard on all of the legal issues in the original action. It is noteworthy that in the cases at bar, the County Counsel is actively in charge of the litigation in behalf of the City of San Marino and may be expected to zealously safeguard County interests against plaintiffs' claims.

non for the exercise of the right of intervention in litigation between others regarding the ownership of said property. The County is a stranger to the property here in question. It has no "interest" of such a direct and immediate character that it will either gain or lose by the direct legal operation and effect of any judgment that may be rendered in the within actions. *Jersey Maid Milk Products Co. v. Brock*, supra; *Allen v. California Water & Tel. Co.*, supra. It has no "interest" therein that may be determined by those actions nor any rights which can be directly enlarged, diminished or foreclosed by any judgment rendered. *Isaacs v. Jones*, supra; *City of Alhambra v. Jacob Bean Realty Co.*, supra; *Lindsay-Strathmore Irr. Dist. v. Wutchumna Water Co.*, 111 Cal.App. 707, 710, 296 P. 942; *In re Estate of Olcese*, 1 Cal.App.2d 72, 78, 36 P.2d 215.

The County's argument that if the City prevails County funds will not have to be expended for the acquisition of the strips for street purposes, does not transform the County's interest into one that is of a direct or immediate character such as required by the law to support intervention. *Bechtel v. Axelrod*, supra; *La Mesa Lemon Grove & Spring Valley Irr. Dist. v. Halley*, supra; *People v. Brophy*, 49 Cal.App.2d 15, 34, 120 P.2d 946. This possibility, that additional county funds might ultimately have to be expended in the event of a judgment adverse to the City, may be an indirect or consequential result of such judgment, but it certainly would not flow directly therefrom. *Allen v. California Water & Tel. Co.*, supra. Furthermore, in the event title were found to be in the plaintiffs, the City might well elect to acquire title itself to the strips from the owners by condemnation proceedings, section 1241, Code Civ.Proc., or the owners might be willing to dedicate the strip for public purposes. But however that might be, in all events the County's petition for intervention must fail for lack of the requisite interest under the authorities cited.

The County also maintains that it comes within the purview of section 387 because

of its interest in the success of the City in the quiet title actions. But as pointed out in *Bernheimer v. Bernheimer*, 87 Cal. App.2d 242, 247, 196 P.2d 813, 816, the interest in the success of a party must likewise be of "such a present, direct and immediate character that the intervener will either gain or lose by the *direct* effect of the judgment." (Emphasis added.) That such interest is here absent appears from the foregoing discussion.

The orders are affirmed.

MOORE, P. J., and McCOMB, J., concur.



134 Cal.App.2d 403

Elmer ADAMS and Rose Adams, his wife,
Plaintiffs and Respondents,

v.

CARUSO ENTERPRISES, Inc., a corporation,
Commercial Credit Corporation,
et al., Defendants,

Caruso Enterprises, Inc., Appellant.

Civ. 20800.

District Court of Appeal, Second District,
Division 1, California.

July 18, 1955.

Buyers' action for rescission of automobile conditional sales contract. The Superior Court of Los Angeles County, Clyde C. Triplett, J., entered judgment for buyers, and dealer appealed. The District Court of Appeal, White, P. J., held that statute requiring time price differential and unpaid balance be set out was not satisfied in contract where such figures could only be determined by mathematical computations but that damages had been incorrectly computed.

Judgment affirmed as modified.

1. Sales 52(5)

In buyers' action to rescind automobile conditional sale contract, on ground that

completed documents did not conform to agreement between parties, evidence supported trial court's findings that there had been no meeting of minds between the parties. West's Ann.Civ.Code, § 2982.

2. Sales ⇨461

Statute requiring that in automobile conditional sales contracts, time price differential and unpaid balance be set out was not satisfied where such figures could be determined only by mathematical computations. West's Ann.Civ.Code, § 2982.

3. Sales ⇨130(4)

Court, in granting buyers' rescission of automobile conditional sales contract, wherein it ordered that rental value of new automobile be charged against buyers, properly deducted from such sum rental value of automobile which they had traded in, even though automobile dealer was not in business of buying vehicles for its own use, in view of fact that rescission was ordered because of dealer's own wrongful conduct.

Roger J. Pryor, Compton, for appellant.

Stanley Moffatt, South Gate, for respondents.

WHITE, Presiding Justice.

By their first amended complaint plaintiffs alleged that on November 8, 1953, in Los Angeles County, they entered into a conditional sales contract with defendant Caruso Enterprises Inc., under the terms of which they agreed to buy a certain 1953 Dodge Coronet automobile from said defendant, that the latter agreed to sell the vehicle to plaintiffs for a total cash price of \$3460.77, less \$1,075 net allowance for plaintiffs' 1949 Plymouth automobile, leaving an unpaid balance due of \$2,385.77. That said balance was to be paid off at the rate of \$49.43 monthly and plaintiffs expressly informed said defendant that they could not afford a contract that called for payment of more than \$50 per month. It was then alleged, "That the terms and conditions of said sale were written down on a white memo by Defendant Caruso Enterprises' agent and then said agent had these Plaintiffs sign blank yellow contract forms

which said Defendant Company agreed to fill out in accordance with the white memo terms and conditions." That at the time of the transaction here in question, plaintiffs delivered to defendant seller their Plymouth automobile and took delivery of the Dodge car upon the representations, understanding and agreement with defendant seller that the balance due on the contract would amount to no more than \$2,385 and that the installment payments would not exceed \$50 per month. That subsequently, "Plaintiffs received through the mail copies of filled in conditional sales contracts with coupon book calling for said \$2,385.00 plus \$100.00 for insurance (which Plaintiffs understood they were to pay) and \$500.00 finance charges totaling \$2,985.00 instead of \$2,485.00 as agreed, and calling for payments of \$99.43 instead of \$49.43 as agreed, per month." Assignment of the contract to defendant Commercial Credit Corporation is then alleged. The complaint further charged that on December 24, 1953, plaintiffs served defendants with written notice of rescission of the contract and offered return to defendants of the Dodge automobile upon delivery to plaintiffs of their Plymouth car, but the defendants refused to rescind the contract.

The second cause of action adopted the averments of the first and then alleged that upon receipt of the "completed contract", which provided for \$500 in excess of the orally agreed price, and with payments of \$99.43 per month instead of the \$49.43 per month as agreed at the time of sale, the plaintiff, Elmer Adams, went personally to Mr. H. J. Caruso, president of the Caruso Enterprises Inc., and protested that the written contract was not in accordance with the oral agreement and the written memo made by the Company's agent at the time of sale, and said plaintiff reiterated the fact that he had informed said Caruso Company at the start that he could not possibly buy any car for more than \$50 per month.

Whereupon the said H. J. Caruso personally agreed that if plaintiffs would pay \$49.43 per month for three months, he would rewrite said agreement in accordance with plaintiffs' demands. That at that time the

said Elmer Adams offered to pay said Caruso the first four monthly payments at \$49.43 in advance but the said Caruso then refused to perform this new agreement. It is then alleged that plaintiffs paid to defendant Commercial Credit Corporation, as agent of the co-defendant, two monthly payments of \$49.43, each "on the new oral agreement made by Mr. Caruso, but with the understanding that said payments were on account of a total balance due of \$2,485.00". The third cause of action asked for a declaratory judgment setting forth the rights and duties of the respective parties.

By their answer defendants denied that the monthly installments under the contract were to be in the sum of \$49.43, and alleged said payments were to be at the rate of \$99.43, per month; denied any oral agreement or contract, and denied generally other allegations of misrepresentation or fraud.

Plaintiffs filed their first amendment to the aforesaid first amended complaint, alleging failure to comply with certain provisions of Civil Code, section 2982, and specifically that no executed copy of said contract was ever delivered.

Defendant then filed its answer and counterclaim, containing general denials, and counterclaiming for plaintiffs' use of said car for 182 days, or \$1,820.

During the trial, by leave of court, plaintiffs filed their second amendment to the first amended complaint to conform to proof made at the trial. In this amendment plaintiffs indicated that they elected to stand on their demand for rescission and abandoned their former allegations for reformation of the contract or declaratory relief.

Following trial before the court sitting without a jury judgment was rendered against defendant Caruso Enterprises Inc., for \$812.50 and against defendant Commercial Credit Corporation for \$247.15. Judgment against the last named defendant was satisfied and is therefore not involved in this appeal. From the judgment rendered against it, defendant Caruso Enterprises Inc. prosecutes this appeal.

Concerning the factual situation surrounding this litigation, plaintiffs testified that on November 8, 1953, they went to the

place of business of defendant Caruso Enterprises Inc., where they orally agreed with said defendant to buy a 1953 Dodge automobile for a cash price of \$3,460.77, plaintiffs to be given a net allowance of \$1,075 for their 1949 Plymouth, leaving an unpaid cash balance of \$2,385.77 plus \$100 for insurance, with no finance charges, and payments to be \$49.43 a month; that payments of \$99.43 were never mentioned; that it was agreed that payments would never exceed \$50 a month; that \$150 was deducted from the original allowance of \$1,225 for their Plymouth for rewriting the contract after three payments of \$49.43.

Defendant's witnesses DeWitt Leftwich and Henry Joseph Caruso denied any oral agreement contrary to the terms of the written documents.

Following the foregoing conversation, and on the same day thereof, a document consisting of an original white copy and a yellow carbon copy was prepared and signed by plaintiff Elmer Adams and an agent of defendant Caruso Enterprises Inc. The yellow copy was delivered to plaintiff Elmer Adams and the original white copy was retained by defendant Caruso Enterprises Inc. This litigation is predicated upon and the present appeal must be decided on the basis of this document. Plaintiffs testified they signed the document entitled "Conditional Sales Contract" in blank and at no time received a copy thereof. However, as to that document, defendant Caruso Enterprises Inc., in its brief states, "This defendant never introduced such a document into evidence and at no time in these proceedings has this defendant claimed the same to be the contract between the parties, but merely that it was signed by plaintiffs in blank with the understanding it would be filled in later according to their agreement." With reference to a later oral agreement testified to by plaintiff Elmer Adams as having been made with Mr. Caruso, the latter denied it.

That the aforesaid white original and yellow copy, concededly the contract between the parties, do not contain the same factual data is manifest from an inspection of them. As pointed out by plaintiffs, "* * *" it will be noted that the date on the white original is 11/15/53 whereas

it is 11/8/53 on the carbon copy. As for the yellow carbon copy given to Plaintiff Elmer Adams, many figures were left out as compared with the original, especially the date for beginning of the monthly payments to wit: This is said to be Jan. 3, 1954 in the original but is entirely omitted from the yellow copy. The figures concerning the allowance to the buyer for his Plymouth car are badly mixed up and do not correspond, and the company's witness at the trial admitted that many of those figures were inserted in the white original after it had been signed by the Plaintiff Mr. Adams and the copy delivered to him. For example on the yellow copy there is an allowance of \$400.00 and then to right of this figure the figures \$250.00 and \$150.00 are inserted without explanation; and in the original white copy the figure \$400.00 that was originally in the contract is crossed out and the words 'Less payoff \$240.72' inserted. Then in the white copy the net allowance is set forth as being \$975.00 whereas it is \$875.00 in the yellow copy."

Another confusing aspect of the contract is that in the body of the instrument the monthly payment is set forth as \$99.43, while at the bottom appears the following, \$150 pre-pay 1st 3 payments to \$49.43—Rewrite". At the trial the last mentioned item was explained by defendant Caruso Enterprises Inc., to mean that it would pre-pay \$150 from the trade-in allowance on behalf of plaintiffs, thus reducing the latter's first three payments from \$99.43 to \$49.43 each and then the contract could be rewritten.

Upon the foregoing rather complicated factual situation, the court, on conflicting evidence, made findings as follows: "* * * that on November 8th, 1953, Plaintiffs entered into an agreement with Defendant Caruso Enterprises Inc., for the purchase of a 1953 Dodge Coronet four-door automobile for a total cash price of \$3,460.77 and Plaintiffs traded in their 1949 Plymouth automobile as a down payment for a net allowance of \$1,075.00, leaving an unpaid balance of \$2,385.77 plus \$100.00 for insurance which Plaintiffs agreed to pay.

"That no completed Conditional Sales agreement was ever executed by the parties

but a form was signed in blank and the only signed contract that was ever delivered to Plaintiff Elmer Adams was the pink purchase order which was incomplete and was not signed by Plaintiff Rose Adams and was contradictory in its terms as to the amount of the monthly payments, to wit: \$49.43 being at the bottom and \$99.43 in the body of the purchase order.

"That Plaintiffs offered to rescind said agreement as not complying with their understanding of the agreement and tendered back said car on December 24th, 1953, which offer was refused by the Defendants.

"That Plaintiffs made 5 payments of \$49.43 to the Defendant Commercial Credit Corporation in accordance with their understanding of said agreement, in addition to the said down payment, and then said last named Defendant refused to take further payments in said sum claiming the payments should be \$99.43, and said corporation repossessed said automobile on or about May 26th, 1954."

From the foregoing findings and as conclusions of law as to defendant Caruso Enterprises Inc., the court determined, "That there was no meeting of minds between the parties and therefore no valid contract and that said contract did not comply with Section 2982 of the Civil Code of California.

"That Plaintiffs are entitled to get back from Defendant Caruso Enterprises Inc., their down payment represented by said Plymouth automobile valued at \$1,225.00 less the sum of \$412.50 being the difference in the rental value of the two automobiles, or a net sum of \$812.50. * * *

[1] Whatever may be said of appellant's attack upon the sufficiency of the evidence to support the findings, it is manifest that the conclusion arrived at by the court that "there was no meeting of minds between the parties" is amply supported by substantial evidence as was the conclusion that the contract, viz., the white original memorandum and the yellow copy thereof delivered to respondents, did not comply with section 2982 of the Civil Code. This section provides in part that the con-

tract " * * * shall recite the following separate items as such, in the following order:

* * * * *

[2] "7. The amount of the time price differential." Appellant in its brief admits that, "Assuming, for the time being, that we must look to the yellow copy for compliance with Section 2982(a), the only provisions not explicitly set forth in separate figures are the time price differential and the unpaid balance." Appellant, however, insists that by mathematical computation of the figures appearing on the contract respondents could have ascertained what was the unpaid balance contemplated on the time price differential. But that is not substantial compliance with section 2982 of the Civil Code which requires that the contract "recite" the time price differential. Estrada v. Alvarez, 38 Cal.2d 386, 388, 240 P.2d 278.

The very purpose of the code section would be defeated and nullified if the buyer was required to determine the time price differential by a mathematical process arrived at from an analysis of the seller's figures. The law requires that this item must be recited in the contract and not left to a mathematical compilation by the buyer.

Finally, appellant asserts that the measure of damages found by the court is erroneous. In this regard, the court arrived at the amount of its judgment against appellant in the following manner. Respondents' down payment represented by their Plymouth automobile traded in at \$1,225, less the difference between the rental values of the two automobiles at \$412.50, amounting to a total of \$812.50.

It is true, as contended by appellant, that under the contract the net allowance to respondents was \$1075, as pleaded and admitted by the latter in their second amendment to the first amended complaint, and not \$1,225. The judgment should therefore be modified with reference to the down payment represented by the trade-in of respondents' Plymouth automobile, and the sum represented thereby should be \$1075 instead of \$1,225.

[3] With reference to the second item, appellant contends that the court was not authorized to deduct any sum for use of

respondents' Plymouth automobile which was traded in. Appellant's position is that the Plymouth automobile was traded in and credit given in lieu of cash—that appellant was not in the business of buying motor vehicles for its own use but sells vehicles immediately on its used car lot. But appellant overlooks the fact that by reason of its own wrongful conduct, respondents were deprived of the use of their Plymouth automobile. We perceive no violation of either justice or equity in the action of the court wherein the loss of use of the respective vehicles was equalized.

For the foregoing reasons, the judgment as to appellant Caruso Enterprises Inc., is modified by reducing the amount thereof from \$812.50 to \$662.50, and as so modified the judgment is affirmed. Respondents to recover costs on appeal.

DORAN and DRAPEAU, JJ., concur.



134 Cal.App.2d 382

Ruth G. WILSON, Plaintiff and Respondent,
v.

Sam ZEMEN, Max Zemen and Sophie Zemen, Individually and doing business under the fictitious name and style of "William Penn Hotel", William H. Dunn, Individually and doing business as Pacific Elevator Company, Pacific Elevator Company, a corporation, Pacific Elevator Company, a copartnership, Otis Elevator Company, a corporation, Otis Elevator Company, a copartnership, et al., Defendants.

Sam Zemen, Max Zemen and Sophie Zemen, Individually and doing business under the fictitious name and style of William Penn Hotel and Otis Elevator Company, a corporation, Appellants.

Civ. 4892.

District Court of Appeal, Fourth District,
California.

July 14, 1953.

Action against hotel operators and two elevator companies to recover for injuries

sustained by plaintiff when elevator in which she was riding fell to basement of hotel. The Superior Court, San Diego County, M. Monroe, J., entered judgment for plaintiff against hotel operators and one of elevator companies, and that elevator company appealed. The District Court of Appeals, Mussell, J., held that evidence was sufficient to support trial court finding that work done by one elevator company in installing shackles on elevator in question was defectively and negligently done and that such negligence was proximate cause of injury to plaintiff.

Judgment affirmed.

1. Appeal and Error ⚭1010(1)

Where finding of trial court on fact is supported by substantial evidence, it will not be disturbed on appeal.

2. Negligence ⚭134(6, 11)

In action against hotel operator and two elevator companies to recover for injuries sustained by plaintiff when elevator in which she was riding fell to basement of hotel, evidence was sufficient to support trial court finding that work done by one elevator company in installing shackles on elevator in question was defectively and negligently done and that such negligence was proximate cause of injury to plaintiff.

3. Negligence ⚭134(11)

In action against hotel operators and two elevator companies to recover for injuries sustained by plaintiff when elevator in which she was riding fell to basement of hotel, evidence was sufficient to support trial court finding that fall of elevator was not caused by any work or repairs done or by any negligence on part of elevator company in charge of current inspection and repair of elevator involved.

4. Negligence ⚭61(1)

Liability may be imposed upon defendant where his negligence is one of several contributing factors, each of which is proximate cause of injury.

5. Negligence ⚭136(25)

Question of proximate cause is ordinarily one of fact and determination of such issue by jury will be upheld if it expresses

reasonable conclusion drawn from evidence.

6. Negligence ⚭61(1), 62(1)

If injury is caused by concurrent effect of two separate wrongful acts, each is proximate cause of injury and neither can operate as efficient intervening cause with regard to other, and neither party can escape liability so long as his own negligent act is one of proximate causes of injury.

7. Negligence ⚭10

One test for determining issue of negligence is whether person of ordinary prudence should have foreseen or anticipated that someone might be injured by his action or nonaction.

8. Negligence ⚭62(3)

Even if action of hotel operators in failing to replace elevator shackles from 1946 until 1952 was negligent, such action was not superseding one exonerating liability of elevator company which had negligently installed shackles in 1946.

9. Carriers ⚭318(3)

Negligence ⚭134(11)

In action against hotel operators and two elevator companies to recover for injuries sustained by plaintiff when elevator in which she was riding fell to basement of hotel, evidence was sufficient to support trial court finding that failure of elevator safety device was not caused by negligence of any of parties to action.

Higgs, Fletcher & Mack, San Diego, for appellant Otis Elevator Co.

J. A. Donnelley and Richard P. MacNulty, San Diego, for respondent.

MUSSELL, Justice.

This is an action for damages for personal injuries sustained by plaintiff on March 16, 1952, when an elevator in which she was riding as a passenger fell to the basement of the William Penn Hotel in San Diego. Defendants Sam Zemen, Max Zemen and Sophie Zemen, copartners, operated the hotel as lessees. Defendant William H. Dunn, individually and doing business as Pacific Elevator Company, serviced and inspected the elevator in said hotel

from October, 1949, to and including the date of the accident. Otis Elevator Company installed new hoisting cables in the elevator and shackled or socketed them to the cab in October, 1946, and made periodic inspections, minor repairs and adjustments to the elevator until October, 1949, when its contract was terminated.

The trial court, after trial without a jury, entered judgment in favor of plaintiff and against the defendants Zemen, William Penn Hotel and the Otis Elevator Company for the sum of \$17,500, and costs, and in favor of William H. Dunn, doing business as Pacific Elevator Company, and against plaintiff for costs. Defendant Otis Elevator Company appeals from the judgment. The defendants Zemen filed a notice of appeal herein on May 4, 1954. However, they have filed no brief herein and their appeal is therefore dismissed. Rule 17(a), Rules on Appeal.

At the time of the accident the elevator was operated by an employee of defendants Zemen and plaintiff was being taken from the lobby to the first floor, when the hoisting cables attached to the elevator cab failed and the elevator fell to the bottom of the shaft, seriously injuring the plaintiff. The extent of her injuries and the amount of the judgment are not in dispute. The principal question for our determination is whether there is substantial evidence to support the trial court's finding that: "In October, 1946, when Otis Elevator Company installed the cables and shackled or socketed them to the cab of the elevator, the work done by said Otis Elevator Company was defectively and negligently done and was not in accord with sound engineering practices and principles; and that said negligence on the part of Otis Elevator Company was a proximate cause of the fall of the elevator and the resulting injury to plaintiff."

[1] The elevator was suspended from two hoisting cables which were shackled to the crosshead of the elevator. These shackles are applied by inserting the ends of the wire cables in bronzed thumbs or thimbles, separating the strands of the cables and turning them back in toward the cables and filling the thimbles with babbitt.

In December, 1946, defendant Otis Elevator Company had installed new hoisting cables for the elevator involved and had shackled them to the cab. After the installation of these new cables in 1946 no new shackles were applied and it is these shackles which failed at the time of the accident. There is a sharp conflict in the testimony as to whether the work of shackling in 1946 was done in a workmanlike manner or was negligently done. However, where, as here, the finding of the trial court in that connection is supported by substantial evidence, it will not be disturbed on appeal. *Berniker v. Berniker*, 30 Cal.2d 439, 444, 182 P.2d 557.

Mr. Otto Wartenweiler, vice-president and chief engineer of Smith-Emery Company, which maintains testing laboratories and does physical testing covering all the building materials and chemical testing on all industrial materials, testified that on or about April 4, 1952, pieces of the hoisting rope and the sockets attached to the ends and taken from the elevator involved were submitted to him for examination; that he examined the fractured ends of the ropes and the babbitt cores in the sockets; that in his opinion the condition of the fractured ends and the condition of the babbitt core with the strands exposed indicated there was insufficient contact and bond between the strands and the babbitt metal; that instead of having a 100% bond or contact between the rope strands and the babbitt metal there was an estimated contact of around 25% to 30%; that approximately 75% did not make contact; that the fact there was insufficient bond resulted in uneven distribution of the load which the ropes were supposed to carry; that it also resulted in movement between the core and the socket; that both factors tended to produce fatigue in the wires; that this condition was entirely due to the original installation and that the original installation was not done in accordance with sound engineering practices; that he also observed that the core was loose in the socket, resulting in play or wear; that the failure of the cable was caused by the process of some of the strands being not firmly held in the babbitt, which placed so much strain on the

other strands that some of them were pulled out or broken and that the imperfect condition of the babbitt core permitted movement of the individual strands which added to the fatigue of the strands themselves.

[2] Parts of the hoisting cables showing the fractures and the sockets were before the court for examination of the witnesses and the court and were introduced in evidence. While there was testimony contrary to that of Mr. Wartenweiler, it merely created a conflict for the determination of the trial court. We conclude that there was sufficient evidence to support the quoted finding.

Appellant next contends that the fall of the elevator and the resulting injuries to plaintiff were due solely and proximately to the negligence of defendants Zemen, doing business as William Penn Hotel and of defendant William H. Dunn, doing business as Pacific Elevator Company.

[3] The court found that the fall of the elevator was not caused by any work or repairs done or by any negligence on the part of William H. Dunn, doing business as Pacific Elevator Company, and this finding is supported by substantial evidence. The record shows that Dunn serviced the elevator from 1949 to the date of the accident. He greased and oiled it and made the necessary inspections and such repairs as were directed by the operators of the hotel. If in his inspection a repair was indicated it was discussed with the Zemens before the work was done. The failure of the cables and sockets was not caused by any work or repairs done by the Pacific Elevator Company. There was testimony to the effect that ordinary weekly inspections of the elevator and cables would not disclose the condition of the cables within the sockets and further testimony that the safety device was working properly when tested by Dunn. There has been no appeal from the judgment in favor of Dunn and appellant's contention that the accident was caused by his negligence cannot be sustained.

The court found that the defendants Zemen were negligent and careless in failing to cause the cables to be reshackled between October, 1946, and the date of the

accident and that the fall of the elevator, and the resulting injuries to plaintiff, was the proximate result of the combined negligence of Otis Elevator Company and Zemens, doing business as William Penn Hotel. There is no dispute here as to the finding of negligence on the part of the defendants Zemen but it is contended by appellant that the accident was due solely and proximately to their negligence and that of Dunn. The record indicates that if the shackles had been renewed prior to the accident, then the negligence of appellant would not have resulted in any injury to plaintiff. However, there was testimony to the effect that there was uncertainty as to just when the shackles should have been renewed and that in many cases shackles remained without renewal during the life of the cables to which they were attached. Appellant therefore should have anticipated the probability that considerable time might elapse before they were renewed and reshackled. *Mosley v. Arden Farms Co.*, 26 Cal.2d 213, 216, 157 P.2d 372, 158 A.L.R. 872. In *Dahms v. General Elevator Co.*, 214 Cal. 733, 742, 7 P.2d 1013, 1017, the court instructed the jury as follows:

"If you find from the evidence that the defendant General Elevator Company did undertake to repair the elevator in the Wilson Building and certain machinery or appliances used in connection therewith, and if you further find that any such repairs were carelessly and/or negligently made so that said elevator was in an unsafe and dangerous condition for use on the 23rd day of April, 1927, and if you further find that said unsafe and/or dangerous condition, if any, was unknown to plaintiff Charles Dahms, and if you further find that any such unsafe or dangerous condition was the proximate cause of the alleged injuries to the plaintiff Charles Dahms, then I instruct you that your verdict must be against the General Elevator Company, a corporation, and in favor of the plaintiff, Charles Dahms."

Commenting on this instruction, the court said:

"The instruction is proper in all respects and contains all the elements necessary for a recovery by plaintiff. The instruction informed the jury that they must find that defendant negligently repaired the elevator, and that such negligence proximately contributed to the injury before they could find for the plaintiff. These were the only two elements necessary under the reasoning above given."

[4,5] In the instant case the finding that the negligent installation of the cables by appellant in 1946 proximately contributed to plaintiff's injuries is supported by the evidence, and as is said in *DeCorsey v. Purex Corporation*, 92 Cal.App.2d 669, 675, 676, 207 P.2d 616, 620:

"It is too well settled to admit of question that 'Liability may be imposed upon a defendant where his negligence is one of several contributing factors, each of which is a proximate cause of the injury.' *Westover v. City of Los Angeles*, 20 Cal.2d 635, 128 P.2d 350, 352. Also that the question of proximate cause is ordinarily one of fact and that the determination of the issue by the jury will be upheld if it expresses a reasonable conclusion drawn from the evidence. *Smith v. Schwartz*, 14 Cal.App.2d 160, 164, 57 P.2d 1386, and cases cited." See also *McEvoy v. American Pool Corp.*, 32 Cal.2d 295, 298, 195 P.2d 783.

[6-8] Appellant argues that the negligence of defendants Zemen and Dunn intervened and insulated the negligence, if any, of appellant Otis Elevator Company and in this connection cites *Stultz v. Benson Lumber Co.*, 6 Cal.2d 688, 59 P.2d 100. In that case plaintiff sued for personal injuries sustained when he fell from a collapsing scaffold on which he was working. A plank of lumber, crossgrained and so filled with knots as to be unsafe for the purpose, was used in the construction of the scaffolding and caused it to collapse. It was alleged that the defective plank was manufactured and sold to plaintiff's employers by the defendant Benson Lumber Company and that the unsafe and defective

condition of the plank and its unsuitability for the purpose was known to the lumber company and to plaintiff's employers. The court held that the negligence of the Newbys was an intervening cause which served to break the chain of causation between the alleged negligence of defendant Benson Lumber Company and the injury suffered by plaintiff and that the demurrer of the lumber company to the complaint was properly sustained. The question of whether the defendants Newbys' acts in constructing the scaffold with the defective lumber had they been without knowledge of its defective condition would still have been an efficient intervening act of negligence was not decided. In the instant case appellant apparently contends that since there was testimony to the effect that elevator hoisting cables should be reshackled every two years and that defendants Zemen had failed to have this done, that their failure in this connection was an intervening cause excusing the original negligence, if any, when the cables were installed in 1946. However, there is no evidence in the record that defendants Zemen knew or should have known that the reshackling of the cables in 1946 by appellant was negligently done. If an injury is caused by the concurrent effect of two separate wrongful acts (as found by the court herein) each is a proximate cause of the injury and neither can operate as an efficient intervening cause with regard to the other, and neither party can escape liability so long as his own negligent act is one of the proximate causes of the injury. *Fagan v. Union Pacific R. Co.*, 85 Cal.App.2d 583, 586, 193 P.2d 776. In *Mosley v. Arden Farms Co.*, supra, 26 Cal.2d 216, 157 P.2d 374, it is held that "It is well settled that one test for determining the issue of negligence is whether a person of ordinary prudence should have foreseen or anticipated that someone might be injured by his action or nonaction." In the instant case a reasonable inference is that appellant should have foreseen and anticipated that the cables installed by them might be used for several years without reshackling and that the cables as installed might not hold. Under these circumstances, even if we assume that there was some in-

intervening agency in the chain of causation, such agency was not a superseding one exonerating the appellant. *Mosley v. Arden Farms Co.*, supra, 26 Cal.2d 218, 157 P.2d 374, 375. *McEvoy v. American Pool Corp.*, supra, 32 Cal.2d 298, 299, 195 P.2d 785, 786.

[9] There was evidence that at the time of the accident herein the safety device on the elevator jammed and failed to function, breaking the safety cable. However, the trial court held that this failure of the safety device was not caused by the negligence of any of the parties to the action and the evidence supports this holding. The device was inspected from time to time and apparently was in good condition. The evidence also indicates that at the time of the accident one of these cables whipped sufficiently so that the safety device failed to operate and that this was a circumstance not reasonably to be anticipated.

The judgment is affirmed. The appeal of defendants Zemen is dismissed.

BARNARD, P. J., and GRIFFIN, J., concur.



134 Cal.App.2d Supp. 889

Helen Barbara ARMSTRONG et al.,
Plaintiffs and Appellants,

v.

TRANSCONTINENTAL LAND & WATER
COMPANY, a corporation, et al.,
Defendants and Respondents.

Civ. A. 8676.

Appellate Department, Superior Court,
Los Angeles County, California.

June 29, 1955.

Actions by numerous purchasers against number of vendors to recover money paid for land in a certain county. The Municipal Court, Los Angeles Judicial District, granted motion of one of vendors for change of venue and purchasers ap-

pealed. The Appellate Department, Los Angeles County, Shaw, P. J., held that where complaint set out each purchaser's cause of action in a separate count and one of vendors cross-complained against some of purchasers and sought affirmative declaratory relief asking for quieting of title, motion for change of venue to Superior Court of county in which land situated was properly granted.

Affirmed.

1. Courts ⇨472(6)

Where purchasers sued vendors for money paid and one of the vendors cross-complained asking for affirmative declaratory relief, cross-complaints were within the jurisdiction of some Superior Court, and not of any municipal court. *West's Ann. Code Civ.Proc.* §§ 89, subd. 2, 689, 1060.

2. Courts ⇨475(1)

Venue ⇨5(1)

When vendor cross-complained against some of purchasers asking for affirmative declaratory relief, cross-complaints constituted in legal effect independent actions, and jurisdiction of actions was in Superior Court of county in which land was situated notwithstanding fact that actions to recover money paid were commenced in municipal court. *West's Ann.Const.* art. 6, § 5; *West's Ann.Code Civ.Proc.* §§ 392(1) (a), 396.

3. Courts ⇨483

Where numerous purchasers joined together to sue several vendors for money paid for land and each purchaser's cause of action was set out in a separate count and one of the vendors cross-complained against several of the purchasers thereby placing venue of action in another county and court, all of the purchasers' actions were transferred to other county and court, notwithstanding fact many of purchasers were not affected by the cross-complaints. *West's Ann.Code Civ.Proc.* § 396.

Homer C. Compton, Los Angeles, for appellants.

Gendel & Raskoff and Douglas Badt, Los Angeles, for respondents.

SHAW, Presiding Judge.

This is an appeal by the plaintiffs from an order of the Municipal Court of the Los Angeles Judicial District, made on defendants' motion, transferring this action from that court to the Superior Court of Kern County for trial.

The order was made under, and this appeal requires us to consider and apply that part of Section 396 of the C.C.P. which reads as follows:

"If an action or proceeding is commenced in or transferred to a court which has jurisdiction of the subject matter thereof as determined by the complaint or petition, and it thereafter appears from the verified pleadings, or at the trial, or hearing, that the determination of the action or proceeding, or of a counterclaim, or of a cross-complaint, will necessarily involve the determination of questions not within the jurisdiction of the court, in which the action or proceeding is pending, the court, whenever such lack of jurisdiction appears, must suspend all further proceedings therein and transfer the action or proceeding and certify the pleadings (or if the pleadings be oral, a transcript of the same), and all papers and proceedings therein, to a court having jurisdiction thereof which may be agreed upon by the parties, or, if they do not agree, to a court having such jurisdiction which is designated by law as a proper court for the trial or determination thereof."

By the amended complaint in this action, filed before the order of transfer, 47 plaintiffs join in suing 4 corporations and 11 individuals, as well as fictitiously named defendants. This amended complaint is divided into 33 so-called "counts", each of which, after setting forth a cause of action to recover, after a rescission, money paid by the plaintiffs therein named to all of the defendants, adds thereto a cause of action for money had and received in the same amount. Each of these "counts" names one or two, or in one case,

three, of the total number of plaintiffs as the particular plaintiffs concerned with that "count", no plaintiff being named as plaintiff in more than one "count". Each of these "counts" seeks to recover money paid by the particular plaintiffs named therein to the defendants for the purchase of land in Kern County, the purchase being induced by fraud. The amount involved in each "count" is less than \$3,000. The fraud is alleged in great detail in "Count" 1, it being a general scheme to defraud the public and all the plaintiffs, and these allegations are adopted by cross-reference in the other "counts". This amended complaint is an unusual form of pleading, but its sufficiency is not before us for consideration. It appears to be within the jurisdiction of the municipal court, since each of the "counts" is for less than \$3,000, and no set of plaintiffs named in one of them has any interest in any of the others. C.C.P. § 689; *Emery v. Pacific Employers Ins. Co.*, 1937, 8 Cal.2d 663, 666, 67 P.2d 1046.

One of the defendants, Continental Subdivisions, Inc., filed a cross-complaint against the two persons named as the plaintiffs in "Count" 4 of the amended complaint. This cross-complaint was designated as a "cross-complaint for declaratory relief." It alleged that the cross-defendants agreed to buy from the cross-complainant land in Kern County, being the same land described in "Count" 4 of the amended complaint, that the cross-complainant had been served with a notice of rescission by the cross-defendants, but denied their right to rescind and asked for a declaration that no such right existed. This cross-complaint further alleged that the cross-defendants were in default in their payments, and that under the contract of sale the cross-complainant was entitled to terminate the right of the cross-defendants to buy the land and had done so, that the cross-complainant is the owner of the land referred to, and prays that the court declare the cross-defendants' rights to the real property are forfeited and ended.

A like cross-complaint was filed by the same cross-complainant against the two

persons named as plaintiffs in "Count" 5 of the amended complaint.

[1] Viewing these two cross-complaints as actions for declaratory relief, they are within the jurisdiction of some superior court, not of any municipal court. C.C.P. § 1060; *Ralphs Grocery Co. v. Amalgamated Meat, etc.*, 1950, 98 Cal.App.2d 539, 542, 220 P.2d 802. They cannot be brought within the jurisdiction of the municipal court under the provisions of subd. 2 of Section 89 C.C.P., as merely defensive matter, for they plainly call for affirmative relief in favor of cross-complainant.

[2] Inquiring what superior court has jurisdiction of this action with its cross-complaints, we look at Section 5 of Art. VI of the California Constitution, and there we see it ordained that "all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated." These cross-complaints amount in effect to actions to quiet title; indeed they ask for judgments to that effect. Speaking of this constitutional provision, the court in *Miller & Lux v. Kern County Land Co.*, 1903, 140 Cal. 132, 134-135, 73 P. 836, 837, held that it applies only to the commencement of an action, saying: "A construction that will make the determination of the question of jurisdiction depend upon what may be done by the defendant subsequent to the commencement of the action is not to be favored." But here the court was speaking of matters alleged in an answer only. Moreover, the construction which the court said was not to be favored constitutes the

very framework of that part of section 396 now under consideration, and it is not likely that the court would have held as it did had there been such a statute. Furthermore, it was held in *Pacific Finance Corp. v. Superior Court*, 1933, 219 Cal. 179, 183, 25 P.2d 983, 90 A.L.R. 384, that a cross-complaint is in effect a separate action independent of that of the plaintiff. We conclude, therefore, that the cross-complaints in question constituted in legal effect independent actions, jurisdiction of which is in the Superior Court of Kern County.

By considering the provisions of section 392(1) (a), C.C.P., we reach the further conclusion that the action should be sent to the Superior Court of Kern County as the proper court for the trial of the actions containing these cross-complaints. They seek to determine rights and interests in real property situated in that county. *Rice v. Schubert*, 1951, 101 Cal.App.2d 638, 226 P.2d 50.

[3] Many of the plaintiffs are not affected at all by the cross-complaints under discussion, but when they elected to join their cases in one action with those of all the other plaintiffs, instead of suing separately, as they might have done, they joined their fate with that of the others, and must abide by the transfer of the action which becomes necessary as to the others. Section 396 C.C.P. "deals with an action and provides for its transfer from one court to another *as a unit* and not otherwise." *Cook v. Winklepleck*, 1936, 16 Cal.App. Supp.2d 759, 767, 59 P.2d 463, 467.

The order is affirmed.

BISHOP and SWAIN, JJ., concur.

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SECOND SERIES



45 Cal.2d 46

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Frank YRIGOYEN, Defendant and
Appellant.

Cr. 5682.

Supreme Court of California.

In Bank.

July 29, 1955.

Defendant was convicted of issuing a check with intent to defraud and knowledge that there were not sufficient funds or credit for its payment. The Superior Court, Lassen County, Ben V. Curler, J., rendered judgment on the verdict, and defendant appealed. The Supreme Court, Gibson, C. J., held that the trial court's failure to give an instruction that to justify conviction on circumstantial evidence, facts and circumstances must not only be entirely consistent with theory of defendant's guilt, but inconsistent with any other rational conclusion, was error resulting in miscarriage of justice, in view of conflicting evidence respecting defendant's intent to defraud payee of check.

Judgment reversed.

Opinion, 276 P.2d 633, vacated.

1. False Pretenses ⇨49(2)

In prosecution for issuance of check with intent to defraud and knowledge that there were not sufficient funds or credit for its payment, evidence was sufficient to show that there were not enough funds in defendant's bank account to cover check when it was issued or presented and that no credit arrangement was made for its payment and to warrant inference that

defendant knew of depleted condition of account, so as to support jury's implied finding that he intended to defraud payee. Pen.Code, § 476a.

2. Criminal Law ⇨824(1)

In criminal case, trial court, on its own motion, must instruct jury on law relating to facts and matters vital to proper consideration of evidence.

3. Criminal Law ⇨824(9)

In criminal case, trial court, on its own motion, must give instruction embodying principle that to justify conviction on circumstantial evidence, facts and circumstances must not only be entirely consistent with theory of defendant's guilt, but inconsistent with any other rational conclusion.

4. Criminal Law ⇨784(1)

Where circumstantial evidence is substantially relied on for proof of defendant's guilt of crime charged, adequate instructions on rules governing application of such evidence must be given jury.

5. Criminal Law ⇨784(1)

An instruction embodying principle that to justify conviction on circumstantial evidence, facts and circumstances must not only be entirely consistent with theory of defendant's guilt, but inconsistent with any other rational conclusion, must be given jury, where defendant's criminal knowledge is shown only by circumstantial evidence.

6. Criminal Law ⇨824(9)

In prosecution for issuance of check with intent to defraud and knowledge that there were not sufficient funds or credit for its payment on presentation to drawee bank, trial court's failure to give jury instruction that to justify conviction on circumstantial evidence, facts and circum-

stances must not only be entirely consistent with theory of defendant's guilt, but inconsistent with any other rational conclusion, was error resulting in miscarriage of justice, in view of conflicting evidence respecting defendant's intent to defraud payee, though defendant did not request such instruction. Pen.Code, § 476a.

J. Everett Barr, Yreka, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier and Frederick G. Girard, Deputy Attys. Gen., for respondent.

GIBSON, Chief Justice.

A jury found defendant guilty of issuing a check with intent to defraud and with knowledge that there were not sufficient funds or credit for its payment upon presentation in violation of section 476a of the Penal Code.¹ He appeals from the judgment of conviction, claiming that the evidence does not show guilty knowledge or intent to defraud and that the trial court erred in failing to give an instruction on circumstantial evidence.

On October 7, 1950, defendant gave Pierre Mendiboure a check drawn on a Healdsburg bank in the sum of \$11,260 as final payment on the purchase price of cattle. At the time the check was issued, and also when it was presented for payment on October 14, there was less than \$1,100 in the account which defendant maintained in that bank. The check was dishonored because of insufficient funds.

After contracting with Mendiboure to purchase the cattle, defendant agreed to resell them to John Lucas. Defendant and Lucas testified that they went to the

Healdsburg bank on October 5, where Lucas made out a check in defendant's favor for \$8,000, as a partial payment, and that defendant instructed the manager to deposit the check in the account for the purpose of covering a check to be given to Mendiboure. Lucas took delivery of the cattle on October 9 and that afternoon gave defendant's bookkeeper a check in the sum of \$5,566 for the balance of the resale price. The bookkeeper testified that the next morning he went to the bank to deposit the \$5,566 check, that he there saw the \$8,000 check which had not yet been deposited, and that he then deposited both checks.

The bank manager testified that to his knowledge defendant made no credit arrangement to honor the Mendiboure check. The only day in October on which there were sufficient funds in the account to pay the check in question was the 10th when the sum of \$13,566 received from Lucas was deposited. Several checks drawn on the account were cashed between the 10th and the 14th including two totaling over \$10,000 issued by defendant to the Modoc Auction Company and paid at the bank in Healdsburg on the 11th and 13th. It is not clear from the record whether these two checks were drawn before or after the check in question.

During the two and one-half years which elapsed between dishonor of the check and the filing of the information in this action, defendant gave Mendiboure eight registration slips for motor vehicles to "secure him" and also paid him \$3,000 to apply against the amount defendant owed him.

[1] The evidence is sufficient to show that there were not enough funds in the

1. Section 476a of the Penal Code provides in part: "Any person who for himself or as the agent or representative of another or as an officer of a corporation, willfully, with intent to defraud, makes or draws or utters or delivers any check, or draft or order upon any bank or depository, or person, or firm, or corporation, for the payment of money, knowing at the time of such making, drawing, uttering or delivering that the maker or drawer or the corporation has not sufficient funds in, or credit with said bank or depository, or person, or firm, or corporation, for

the payment of such check, draft or order, in full upon its presentation, although no express representation is made with reference thereto, is punishable by imprisonment in the county jail for not more than one year, or in the state prison for not more than fourteen years.

* * * The word 'credit' as used herein shall be construed to mean an arrangement or understanding with the bank or depository or person or firm or corporation for the payment of such check, draft or order. * * *

account when the check in question was issued or presented and that no credit arrangement was made for its payment. It can be inferred that defendant knew the depleted condition of the account, and, under the circumstances, the record supports the implied finding that he issued the check with intent to defraud Mendiboure. *People v. Wallin*, 34 Cal.2d 777, 780, 215 P.2d 1; *People v. Rose*, 9 Cal.App.2d 174, 175-176, 48 P.2d 1009; see *People v. Boyce*, 87 Cal.App.2d 828, 829-830, 197 P.2d 842.

[2-5] The principal question is whether, in the absence of a request by defendant, the trial court erred in failing to give an instruction that to justify a conviction on circumstantial evidence, the facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion. In a criminal case the trial court is required to instruct the jury of its own motion upon the law relating to the facts of the case and upon matters vital to a proper consideration of the evidence. *People v. Buffum*, 40 Cal.2d 709, 724, 256 P.2d 317 [requiring an instruction on the necessity for corroboration]; *People v. Putnam*, 20 Cal.2d 885, 890-891, 129 P.2d 367 [requiring a cautionary instruction in a case involving a sexual offense]. In accordance with this rule we declared in *People v. Bender*, 27 Cal.2d 164, 174 et seq., 163 P.2d 8, that the court on its own motion must give an instruction embodying the principle that to justify a conviction on circumstantial evidence the facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion. See also *People v. Koenig*, 29 Cal.2d 87, 93, 173 P.2d 1. It is true that in the *Bender* case proof of guilt was entirely circumstantial, whereas in the present case there was direct evidence that defendant issued the check without sufficient funds in or credit with the bank, and circumstantial evidence was relied upon to show his criminal knowledge and intent. However, in the *Bender* case, it is stated that where circumstantial evidence is substantially relied upon for proof of guilt, adequate instructions on the rules governing

the application of such evidence must be given. 27 Cal.2d at page 175, 163 P.2d at page 15. And it has been held that the instruction must be given where criminal knowledge is shown only by circumstantial evidence. *People v. Candiottio*, 128 Cal.App.2d 347, 355-356, 275 P.2d 500. Cases holding that the instruction need not be given, even upon request, where circumstantial evidence is only incidental or corroborative are not, of course, applicable here. See *People v. Jerman*, 29 Cal.2d 189, 197, 173 P.2d 805; *People v. Alexander*, 92 Cal.App.2d 230, 235, 206 P.2d 657.

[6] The evidence with respect to defendant's intent to defraud Mendiboure is conflicting. Had the instruction in question been given, the jury might have concluded that the circumstantial evidence, while entirely consistent with defendant's guilt, was also consistent with a rational conclusion that he was innocent. Upon an examination of the entire record, we are of the view that the failure to give the instruction resulted in a miscarriage of justice.

The judgment is reversed.

SHENK, CARTER, TRAYNOR and
SCHAUER, JJ., concur.



Matter of the Arbitration between GRIF-
FITH COMPANY, a corporation,
Plaintiff and Appellant,
and

SAN DIEGO COLLEGE FOR WOMEN, a
corporation, Defendant and
Respondent.

L. A. 23725.

Supreme Court of California.

In Bank,

July 1, 1955.

Rehearing Granted July 27, 1955.*

Proceeding to vacate arbitration award.
The Superior Court, Los Angeles County,
* Opinion vacated 289 P.2d 476.

William R. McKay, J., entered judgment affirming award, and the unsuccessful party appealed. The Supreme Court, Carter, J., held that chairman of arbitration panel could properly submit his opinion to an attorney to check his legal conclusions before submitting opinion to panel.

Judgment affirmed.

Opinion, 280 P.2d 203, vacated.

1. Arbitration and Award ⇨30

Chairman of arbitration panel could properly submit his opinion to an attorney to check his legal conclusions before submitting opinion to panel.

2. Arbitration and Award ⇨30

Arbitrator's right to seek independent advice in arbitration proceedings is not dependent upon all members of arbitration panel seeking such advice as a body.

3. Appeal and Error ⇨1008(1)

Reviewing court will not disturb implied findings of fact made by trial court in support of order any more than it will disturb express findings upon which a final judgment is predicated.

4. Appeal and Error ⇨931(3), 1008(1, 3)

Where there is conflicting evidence, reviewing court will presume that trial court found every fact necessary to support its order that the evidence would justify and so far as trial court has passed on credibility of witnesses or weight of evidence, its implied findings are conclusive regardless of whether evidence is oral or documentary.

5. Appeal and Error ⇨996, 1011(2)

Where issue is tried on affidavits, rule on appeal is that those affidavits favoring contention of prevailing party establish not only facts stated therein but also all facts which reasonably may be inferred therefrom, and where there is substantial conflict in facts stated, determination of controverted facts by trial court may not be disturbed.

6. Arbitration and Award ⇨53

Where arbitration was conducted under rule requiring that award be made in writing and signed by majority of arbitra-

tors, the two arbitrators concurring in award could properly sign award out of presence of third arbitrator who had previously seen award and announced that he would dissent therefrom.

7. Arbitration and Award ⇨53

Even though the Code of Civil Procedure provides that arbitration award must be in writing and acknowledged or proved in same manner as deed for conveyance of real estate, award which was notarized only at the time the first of two signing arbitrators had signed award would not be overturned where unsuccessful party had not shown that he was prejudiced by such procedure. West's Ann.Code Civ.Proc. § 1287.

8. Arbitration and Award ⇨53

Where arbitration was conducted under rule providing that award should be delivered simultaneously to each party procedure whereby, as soon as chairman of arbitration panel had received acknowledged copy of award from other signing member, he had had his secretary dictate award to secretary for unsuccessful party's attorney and thereafter he called prevailing party's attorney and announced the award had been signed was proper.

9. Arbitration and Award ⇨76

Where arbitration was conducted under rule providing that hearing could be reopened at any time before award, at discretion of arbitrators or upon request of party for good cause shown, failure to reopen at request of one arbitrator would not require that award be vacated when request to reopen for reception of new evidence was accompanied by no offer of proof and, on review, unsuccessful party had not shown what competent evidence was excluded by reason of denial of motion.

10. Arbitration and Award ⇨73

Merits of controversy between parties to arbitration are not subject to judicial review.

11. Arbitration and Award ⇨61

Award, entered in arbitration proceeding, commenced by contractor against college for which it was constructing buildings to recover damages allegedly occasioned by delays owing to college's changing plans

which denied damages on ground that contractor had not established what proportion of his damages was attributable to college's fault was not arbitrary, harsh or inequitable. West's Ann.Civ.Code, §§ 3300, 3301.

12. Arbitration and Award ⇨57

Award, entered in arbitration proceeding commenced by contractor against college for which it was constructing buildings to recover damages allegedly occasioned by delays owing to college's changing plans, which denied damages on ground that contractor had not established what proportion of his damages was sufficiently coextensive with issue submitted for arbitration.

13. Arbitration and Award ⇨66

In judicial review of arbitration proceeding, it must be presumed that all matters within submission to arbitration were laid before arbitrators and passed upon by them. West's Ann.Code Civ.Proc. § 1963, subd. 18.

14. Arbitration and Award ⇨66

Both before superior and appellate courts every intendment of validity must be given to arbitration award and burden is upon one claiming error to support his contention.

Gibson, Dunn & Crutcher, Ira C. Powers and Richard L. Wells, Los Angeles, for appellant.

Bodkin, Breslin & Luddy, Los Angeles, Martin & Mahedy and O'Neill P. Martin, San Diego, for respondent.

Joseph Scott, Los Angeles, *amicus curiæ* on behalf of respondent.

CARTER, Justice.

Plaintiff Griffith Company appeals from an order denying its motion to vacate an arbitrators' award and from a judgment entered on an order confirming the award in favor of defendant college.

A construction contract entered into between the parties provided for the erection of certain college buildings for defendant by plaintiff on a cost plus and maximum price basis. The contract provided that all disputes subject to arbitration should be settled by arbitration under the "Standard Form of

Arbitration Procedure of the American Institute of Architects." The work was delayed beyond the date set for substantial completion and a dispute arose. Plaintiff demanded arbitration and eventually an arbitration panel was agreed upon: Mr. McKittrick, a contractor, was named by the plaintiff; Mr. J. Howard Ziemann, an attorney, was named by the defendant; and the two nominees selected the third, Paul B. Young, as chairman. After several hearings at which evidence and briefs were considered, Mr. Young, as chairman, with Mr. Ziemann concurring, agreed on an award in defendant's favor. Mr. McKittrick dissented in a written opinion in which he (among other things) accused Mr. Young of not having arrived at his decision by his own independent thought but through the work of an "outside attorney," or, in other words, of misconduct sufficient to justify setting aside the award. Mr. McKittrick's affidavit, as well as those of Mr. Young and Mr. Ziemann are on file.

We said in *Sapp v. Barenfeld*, 34 Cal.2d 515, 523, 212 P.2d 233, 239, that "Although an arbitrator cannot impeach the award by testifying to his fraud or misconduct, his testimony is admissible to show what matters were submitted for decision and were considered by the arbitrators." This is, apparently, the general rule. In *Commercial Arbitrations and Awards*, by Sturges, it is said:

"While ordinarily an arbitrator may not testify to his own acts of mistake or misconduct any more than he may to those of the members of the arbitral board generally, to establish a cause sufficient to defeat or vacate an award, it has been held that the complaining party may take such testimony of an arbitrator when it implicates the other party in the alleged misconduct, partiality, bias, or corrupt action.

"Again, in the case of a dissenting arbitrator, the award not being his, it is uniformly held that he may testify as to the bias, partiality or other misconduct of the arbitrators who rendered the award in question the same as any other witness." § 365, p. 787.

McKittrick, the dissenting arbitrator, by affidavit, stated that Mr. Young, prior to full discussion by the panel members, had submitted the matter to an unnamed attorney who had drafted an opinion; that Mr. Young, at a meeting, signed the original and gave it and a copy thereof to McKittrick; that Mr. Young and Mr. Ziemann desired then and there to make an award but because of Mr. McKittrick's opposition, agreed to a further meeting. At the next meeting, McKittrick moved, on behalf of plaintiff, to reopen the proceedings to permit further testimony on the "items of damage"; that the motion was denied. It is also claimed that Mr. Young and Mr. Ziemann did not sign the award in each other's presence; that the acknowledgment of Mr. Young's signature was made prior to the time he signed it; that the award was not delivered simultaneously to all arbitrators; that the award went outside the issues of the arbitration proceeding. It is also contended that Mr. Young was guilty of prejudicial misconduct in refusing to reopen the proceedings to permit additional testimony on the part of Mr. McKittrick.

Mr. Young's affidavit shows that he took his tentative written opinion to the meeting with him; that it was in a sealed envelope which was not opened until after four and one-half hours of discussion between the three of them. It was also averred that hearings had been held on May 20th, June 15th, June 22nd, June 23rd, June 24th, and July 13th, July 14th, July 15th, July 16th; that briefs were filed on the law and the facts. It is further stated that after hearing the evidence and considering the briefs, Mr. Young formed a tentative opinion of his own and that he then consulted an attorney with whom he had previously discussed the matter so that his opinion could be checked to determine that "it was not grossly erroneous so far as the law was concerned"; that upon being advised by the attorney that his opinion was not erroneous, he dictated the tentative opinion to his secretary from his own notes; that the language thereof was his own except for the citations of legal authority which he had obtained from the attorney; and that "said opinion and the award of the arbitrators

were the result of affiant's own judgment and that of said J. Howard Ziemann.

"That during the course of the hearings affiant had informed both his fellow arbitrators that he intended to seek legal confirmation of whatever opinion he might arrive at, and no objection was made by either."

Article 40 of the agreement between the parties provides that any dispute subject to arbitration shall be submitted to arbitration in accordance with the provisions of the Standard Form of Arbitration Procedure of The American Institute of Architects and the "prevailing arbitration law."

It is argued by plaintiff that Mr. Young's conduct in privately consulting an attorney constituted misconduct such as would justify vacating the award. In *Sapp v. Barenfeld*, supra, 34 Cal.2d 515, 521, 212 P.2d 233, 238, substantially the same point was raised. We said there:

"[T]he arbitrators, to determine the amount of the award, consulted *ex parte* with C. L. Weeks, a skilled cost appraiser, for an estimate of the labor and material cost of remedying the defects. They checked his estimate with several building supply firms and adopted it in making their award after this independent investigation. The award was the result of the arbitrators' own judgment, based, however, on information acquired in this manner.

"There is no error in such procedure. Although a hearing is required on disputed questions of fact, arbitrators may inform themselves further by privately consulting price lists, examining materials and receiving cost estimates. *Sturges, Commercial Arbitration and Awards*, § 217, p. 495. This procedure may be *ex parte*, without notice or hearing to the parties, for 'it is entirely proper for arbitrators, in a case requiring it, to obtain from disinterested persons of acknowledged skill such information and advice in reference to technical questions submitted to them, as may be necessary to enable them to come to correct conclusions, provided that the award is the result of their own judgment after obtaining such information.' 1 *Mechem, Agency*, § 310, p. 229;

City of Omaha v. Omaha Water Co., 218 U.S. 180, 198, 30 S.Ct. 615, 54 L.Ed. 991; California Annual Conf. of M. E. Church v. Seitz, 74 Cal. 287, 295, 15 P. 839; Dore v. Southern Pac. Co., 163 Cal. 182, 189, 124 P. 817; Simons v. Mills, 80 Cal. 118, 120, 22 P. 25; Foster v. Carr, 135 Cal. 83, 86, 67 P. 43; Rives-Strong Bldg., Inc., v. Bank of America, 50 Cal.App.2d 810, 814-817, 123 P.2d 942; Gord v. F. S. Harmon & Co., 188 Wash. 134, 140, 61 P.2d 1294; Liggett v. Torrington Bldg. Co., 114 Conn. 425, 432, 158 A. 917; Koepke v. E. Liethen Grain Co., 205 Wis. 75, 77, 236 N.W. 544; Twin Lakes Reservoir & Canal Co. v. Platt Rogers, Inc., 112 Colo. 155, 147 P.2d 828; City of Bangor Savings Bank v. Niagara Fire Ins. Co., 85 Me. 68, 76-77, 26 A. 991, 20 L.R.A. 650, 35 Am.St.Rep. 341. It is immaterial whether the subject of the appraisal is the only matter in dispute or is part of a broader submission. Gord v. F. S. Harmon & Co., supra; Hegeburg v. New England Fish Co., 7 Wash.2d 509, 110 P.2d 182; City of Bangor Savings Bank v. Niagara Fire Ins. Co., supra; Sturges, supra, § 217, pp. 495-498." See, also, Sampson Motors, Inc., v. Roland, 121 Cal.App.2d 491, 494, 263 P.2d 445.

[1-5] In view of the foregoing, there appears to be no good reason why Mr. Young should not have talked the matter over with an attorney to check his legal conclusions. There was no showing made by plaintiff that the attorney was not a disinterested person. We made no requirement in the Sapp case that all arbitrators must act as a body when seeking independent advice and it would appear that such a requirement would be unnecessarily burdensome and could lead to absurd results. The conclusion of the trial court in refusing to vacate the award is an implied finding that he believed the affidavit of Mr. Young wherein it was stated that his opinion was reached through his own independent thought and was not that of any other person. "An appellate court will not disturb the implied findings of fact made by a trial court in support of an order, any more than

it will interfere with express findings upon which a final judgment is predicated. When the evidence is conflicting, it will be presumed that the court found every fact necessary to support its order that the evidence would justify. So far as it has passed on the weight of evidence or the credibility of witnesses, its implied findings are conclusive. This rule is equally applicable whether the evidence is oral or documentary. In the consideration of an order made on affidavits involving the decision of a question of fact, the appellate court is bound by the same rule as where oral testimony is presented for review." 4 Cal.Jur.2d § 614, p. 495; People v. Western Meat Co., 13 Cal.App. 539, 544, 110 P. 338; Maselli v. E. H. Appleby & Co., Inc., 117 Cal.App.2d 634, 638, 256 P.2d 618; Jones v. Lindsey, 114 Cal.App.2d 237, 239, 250 P.2d 153; Schreiber v. Hooker, 114 Cal.App.2d 634, 640, 251 P.2d 55; Paulekas v. Paulekas, 117 Cal.App.2d 73, 77, 254 P.2d 941. When an issue is tried on affidavits, the rule on appeal is that those affidavits favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and where there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed. Hayutin v. Rudnick, 115 Cal.App.2d 138, 140, 251 P.2d 707.

[6] Paragraph 14 of the Standard Form of Arbitration provides that the award is to be made in writing and signed by a majority of the arbitrators and that it shall be acknowledged when the prevailing law so requires. It is contended by plaintiff that Mr. McKittrick was not permitted to participate in the making of the award, or to see a copy thereof, and that the arbitration panel did not meet when the award was made. Mr. Young's affidavit shows that at the close of the meeting when he opened his written opinion, he gave copies thereof to each of the other arbitrators; that no award was made that day, but a meeting was arranged for the following day; that he and Mr. Ziemann signed the opinion that day; that the next day a meeting was had with Mr. Young and Mr. Ziemann adhering to the conclusion previously reached and Mr.

McKittrick dissenting therefrom; that Mr. Young asked Mr. Ziemann to prepare the formal award since he was an attorney; that Mr. McKittrick said he would not sign the award. It was further stated that a tentative meeting was arranged for the following day to sign the award but that Mr. Young was unable to be there because of another business engagement; that Mr. Ziemann prepared and signed the award and delivered it by messenger to Mr. Young's office where it was signed, having been previously acknowledged by the notary in Mr. Ziemann's office. Plaintiff's contention is, apparently, that Rule 14 (heretofore set forth) required all the arbitrators to have been together at the time the award was signed. Rule 14 does not specifically so require. Mr. McKittrick had announced his refusal to sign the award and that he would dissent therefrom. There appears to be no reason why it was necessary that he be present when the other two arbitrators signed. It has been held that the arbitrators, having met in consultation at the time of their final decision of the case upon the merits, were not required to meet again for the mere purpose of signing the award. *Campbell v. Inhabitants of Upton*, 113 Mass. 67, 71; *Robinson v. Bickley*, 30 Pa. 384; *Sturges*, supra, § 219, p. 509.

[7] Section 1287 of the Code of Civil Procedure provides that the award must be in writing and acknowledged or proved in "like manner as a deed for the conveyance of real estate." While the manner in which Mr. Young signed the award is not approved practice, plaintiff has not shown that it was prejudiced thereby.

In *Williston v. City of Yuba City*, 1 Cal. App.2d 166, 169, 170, 36 P.2d 445, 447, an acknowledgment was taken by an officer out of the presence of the grantor. The court held: "The deed of conveyance was not invalid between the parties thereto merely because it was not acknowledged by the grantors. The purpose of an acknowledgment to a deed is evidentiary in character and is required so as to entitle the instrument to be recorded or to render it competent evidence without further proof. 9 Cal. Jur. 113, sec. 18; *Gordon v. City of San Diego*, 108 Cal. 264, 41 P. 301; *Knaugh v.*

Baender, 84 Cal.App. 142, 257 P. 606; section 1161, Civ.Code. The fact that the deed in this case was irregularly acknowledged out of the presence of the grantors is immaterial except for the purpose of determining whether the grantors intended to presently convey their title to the land therein described when the deed was handed to Mr. Weis for the purpose of delivering it to the grantee. There is sufficient evidence in the record to support the finding of the court to the effect that the deed was delivered by the grantors for the purpose of conveying title to the property without any condition or contingency attached thereto, and that the delivery of the deed was absolute." See, also, 1 Cal.Jur.2d § 28, p. 500.

[8] Rule 14 of the Standard Form of Arbitration provides that the award shall be delivered simultaneously to each party. Mr. Young's affidavit shows that shortly before 4 p. m. on October 2nd, he received the award which had been signed and acknowledged by Mr. Ziemann; that shortly thereafter he received a phone call from plaintiff's attorneys and that he had his secretary dictate the award to the attorneys' secretary; that thereafter he called defendant's attorney and announced that the award had been signed by him and Mr. Ziemann; that thereafter a copy of the award was delivered to Mr. McKittrick and the original mailed to defendant's attorney. It appears, therefore, that each party was notified at the earliest possible opportunity and as nearly simultaneously as could be expected. Rule 14 was substantially complied with.

[9] It is next contended that Mr. Young was guilty of misconduct in refusing Mr. McKittrick's motion to reopen for the purpose of producing additional evidence. Rule 11 of the Standard Form provides that "The hearing may be reopened at any time before the award is required to be made at the discretion of the arbitrators or upon the request of a party for good cause shown." After Mr. Young had disclosed his tentative opinion, Mr. McKittrick asked for a continuance until the next day to give him an opportunity to consult with "his people." At the time set for the continuance, he moved to reopen. He made no offer of

proof by affidavit. Rule 11 leaves the matter of reopening to the discretion of the arbitrators, or a majority thereof, and plaintiff has not shown what competent and material evidence was excluded by reason of the denial of its motion, *Moore v. Griffith*, 51 Cal.App.2d 386-389, 124 P.2d 900, or that Mr. Young and Mr. Ziemann were guilty of an abuse of discretion.

[10] Plaintiff contends that the decision is arbitrary, harsh and inequitable; that it is contrary to law; and that it is not co-extensive with the issues submitted. The merits of the controversy between the parties are not subject to judicial review. *Pacific Vegetable Oil Corp. v. C. S. T., Ltd.*, 29 Cal.2d 228, 233, 174 P.2d 441; *Kerr v. Nelson*, 7 Cal.2d 85, 59 P.2d 821; *Loving & Evans v. Blick*, 33 Cal.2d 603, 204 P.2d 23; 5 Cal.Jur.2d § 52, p. 120.

It was held in *Crofoot v. Blair Holdings Corp.*, 119 Cal.App.2d 156, 165, 260 P.2d 156, 160, that "The opinion and award of the arbitrator are the sole guide to the evidentiary facts upon these appeals. The court is not called upon to review the evidence produced before the arbitrator, and such is not included in the record on appeal. The record consists of the opinion and award of the arbitrator, of the pleadings in the various court actions, and the proceedings upon confirmation of the award."

The "*Opinion of the Chairman, Board of Arbitration*" sets forth the issues and result as follows:

"Griffith Company, a corporation, hereinafter referred to as the Contractor, entered into an agreement with San Diego College for Women, a corporation, hereinafter referred to as the Owner, on July, 1950, whereby the Contractor agreed to furnish labor and materials for the purpose of constructing a College for women in the City of San Diego. Under the agreement work was to begin on August 1, 1950, and the construction was to be substantially completed by September 1, 1951. The Contractor agreed to perform its services for the cost of the work and materials furnished, plus a 3 per cent fee,

the total price not to exceed \$2,995,000.00. The project was actually not completed until October of 1952, about 14 months beyond the contractual termination date, and the Contractor's records indicate that the cost for labor and materials exceeded the contract price, plus authorized extras, in the sum of \$152,239.58. In this proceeding the Contractor alleges that the Owner's delay in furnishing detailed drawings was the sole cause for the over-all delay in completing the job, and resulted in damage to the Contractor in the amount expended in excess of the contract price, plus profit, in the sum of \$108,190.37, or total damages in the sum of \$260,429.95.

"The evidence discloses that the owner requested several contractors to bid on the job and that Griffith Company submitted the lowest bid. However, the total amount of the Griffith bid exceeded the Owner's budget, and the Owner through its Architect, conferred with Griffith Company for the purpose of eliminating certain items in order to reduce the total cost of the job. After a figure had been reached, which was agreeable to the Owner, the Architect prepared an addendum to the specifications setting forth the changes that were to be made. On page 1 of addendum 3, it is provided that:

"'Original plans will be revised to incorporate the above changes.'

Both the Owner and the Contractor were fearful that certain materials might not be available unless the job was begun immediately because of the Korean war which had just begun. Consequently, the Contractor agreed to go ahead and start the work without waiting for final working drawings incorporating the changes that were made with the understanding that the drawings would be provided during the progress of the work. The Owner offered evidence to prove that the Architect had informed the Contractor that the working drawings would not be completed for six months. This, the

Contractor denies. Article 3 of the contract provides that:

"The Architect shall furnish with reasonable promptness, additional instructions, by means of drawings or otherwise, necessary for the proper execution of the work."

"Actual construction on the job site began on August 8, 1950. A carpenters' strike prevented the Contractor from obtaining skilled carpenters until September 7, 1950. The Contractor introduced evidence to prove that because of delays in obtaining plans the work progressed very slowly during the first four months of the building operation. Consequently, on December 12, 1950, the Contractor wrote to the Architect complaining of these delays and, among other things, stated:

"Lack of plans and information will require us to take more than three months to do work which normally should require three weeks.

"* * * This type of operation is expensive and accomplishes little.
* * *

"At the present time lack of plans and information prevents us from starting any other units. * * *

"In this letter the Contractor requested a conference with the Owner, and such a conference was subsequently held. The subject matter of that conference is in dispute but, thereafter, and on December 18, 1950, the Architect wrote to the Contractor and stated that he believed that the conference had answered the problems raised in the letter of December 12. On December 19, 1950, the Owner granted the Contractor a three months' extension of time within which to complete the project. It should be noted no increase in contract price was demanded or received by the contractors at the time this Change Order was formalized.

"The Contractor's evidence indicates that the job was delayed throughout its entire life because of the Owner's failure to promptly furnish plans and

information necessary to the Contractor. Some 52 Change Orders were executed, but these are not included in the Contractor's claim since prices were adjusted at the time each Change Order was executed. No evidence was introduced indicating the Contractors requested time extensions by reason of the changes, with the exception of Change Order No. 3 extending the contract time to December 1, 1951. No evidence was introduced indicating the Contractors were not satisfied with the various Change Order monetary increases. No evidence was introduced indicating the Contractors requested a Change Order for the delays caused by the late delivery of plans and details during the construction period of the contract.

"The Owner has introduced evidence to prove that many other factors, such as labor disputes, material shortages, contractor delays, etc., contributed to the over-all delay of the job. The Chairman of the Board is of the opinion that all of these factors contributed in some degree to delay the job.

"It is the Chairman of the Board's conclusion that the Contractor may not recover because, First, it did not comply with the provisions in the contract pertaining to the filing of claims, and, Second, he is unable to ascertain what proportion of the costs, over and above the contract price, is attributable to the Owner's neglect, and what proportion is attributable to other factors.

"First, he decides that Article 16 of the contract has no application to these proceedings. That article is limited to claims for extra costs caused by positive instructions, not by the failure to give instructions. Article 31 of the contract does apply. It provides that either party shall be reimbursed for damages caused by the

"wrongful act or neglect of the other party, or of anyone employed by him,

"Claims under this clause shall be made in writing to the party liable

within a reasonable time at the first observance of such damage, and not later than the time of final payment.

* * *

"The letter of December 12, 1950, does indicate dissatisfaction with the manner in which plans were furnished. The letter also indicates that 'this type of operation is expensive and accomplishes little.' But the letter does not specifically register a claim. It requests a conference. Immediately after the conference a three month extension of time was granted, with no increase in contract price, and at least to some degree, this extension of time was predicated upon the carpenters' strike over which the Owner, of course, had no control. Thereafter, no further written notice was given by the Contractor either to the Architect or to the Owner directly. There is evidence to indicate that many oral complaints were made, but it is not unusual in a large construction operation for both the Architect and the Contractor to orally complain to one another about the progress of some of the work. In the opinion of the Chairman of the Board such oral complaints would not put the Owner on notice of the fact that his actions were causing excessive costs which would result in the assessment of damages against him. The purpose of Article 31 is to give the Owner notice so that he may change his course of conduct if, in fact, that course of conduct will result in additional costs. I believe that the Owner never had this opportunity in this case.

"Moreover, the Contractor agreed to start the operation without the customary working drawings usually available at the outset of a job. There was bound to be some delay because of this and, hence, the mere fact that the job was being delayed would not in itself give the Owner notice that his activities might be contributing to that delay.

"But irrespective of the question of liability, *we could not award damages in this case because the Contractor has*

not established what proportion of the total damages were due to the failure of the Owner to promptly furnish plans. As I understand the law, this Board is not empowered to arbitrarily assess damages. Article 1(g) of the contract provides that:

"The law of the place of the building shall govern the construction of this contract."

"Section 3300 of the California Civil Code provides that:

"The measure of damages for the breach of an obligation arising from contract * * * is the amount which will compensate the party aggrieved for all the detriment *proximately caused thereby*, or which in the ordinary course of things, would be likely to result therefrom." (Emphasis supplied.)

"Section 3301 provides:

"No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and *origin*." (Emphasis supplied.)

"In the case of *Austin v. Roberts*, 130 C[al.]A[pp.] 328, 333 [20 P.2d 97, 99], the Court stated:

"Conceding that plaintiff suffered a loss of profits, there is no evidence showing what part of that loss was caused by the wrongful acts of any of the defendants and what part was caused by the sale of [his property] * * *. The burden of making the proof rested on the plaintiff." See also, *J. J. Kelly Co. v. United States*, 1947, 69 F.Supp. 117, 118, 107 Ct.Cl. 594.

"As a matter of fact Chairman of the Board concludes that the execution of 52 Change Orders caused some delay. We also conclude that certain labor disputes, material shortages, difficulties with suppliers, and contractor delays contributed to some extent in the over-all delay in completing the job. Since I was unable to ascertain what portion of the over-all delay is attributable to these various factors I am unable to determine the Contractor's damages, if any.

"The Chairman of the Board, therefore, recommends this Board decide in favor of the defendant, San Diego College for Women, and against the plaintiff, Griffith Company. Both parties shall pay their costs and Attorneys' fees." (Emphasis added.)

This opinion was signed by Mr. Young and concurred in by Mr. Ziemann. The award followed the recommendation of the opinion.

[11] It is at once obvious from a reading of the chairman's opinion that it is not "arbitrary, harsh and inequitable" any more than any other decision is so to the losing party. The decision is argued to be contrary to law in that Mr. Young's opinion sets forth that he was unable to ascertain what proportion of the damages was attributable to defendant's fault and that he was therefore unable to determine the damages proximately caused thereby to plaintiff.

In *Sapp v. Barenfeld*, supra, 34 Cal.2d 515, 523, 212 P.2d 233, 239, we held: "Arbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action. *Gerdetz v. Central Oregon Irr. Co.*, 83 Or. 576, 580, 163 P. 980; *Everett v. Brown*, 120 Misc. 349, 198 N.Y. S. 462, 465; *Koepke v. E. Liethen Grain Co.*, 205 Wis. 75, 80, 236 N.W. 544. The claim must be expressly raised at some time before the award." The arbitrators in the instant case were not specifically required to act in conformity with other than the "prevailing arbitration law." In *Crofoot v. Blair Holdings Corp.*, supra, 119 Cal.App.2d 156, 189, 260 P.2d 156, 174, it was held: "Even if the arbitrator decided this point incorrectly, he did decide it. The issue was admitted properly before him. Right or wrong the parties have contracted that such a decision should be conclusive. At most, it is an error of law, not reviewable by the courts." It appears, however, from *Allen v. Gardner*, 126 Cal.App.2d 335, 340, 272 P.2d 99, 102, that the chair-

man did not commit an error of law. It was there said: "Uncertainty as to the fact of damage, that is, *as to the nature, existence of cause of the damage, is fatal.*" (Emphasis added.) The chairman's opinion specifically sets forth the finding that plaintiff had not established what proportion of the total damages were due to the fault of the defendant. It appears therefore that the nature, existence or cause of the damage was uncertain.

[12-14] Plaintiff's contention that the award was not co-extensive with the issues submitted is also without merit. It appears from the record (Mr. Young's affidavit of November 6, 1953) "That said board of arbitrators heard and determined (adversely to defendant) objections to the statement of issues presented by plaintiff on May 20, 1953, and heard and considered plaintiff's evidence in said matter on June 15th, June 22nd, June 23rd and June 24th, and defendant's evidence on July 13th, July 14th, July 15th, and July 16th. * * * " Plaintiff's contention appears to be an attempt to reargue the issues and the evidence. As we have heretofore stated, the merits of the controversy between the parties are not subject to judicial review, *Pacific Vegetable Oil Corp. v. C. S. T., Ltd.*, supra, 29 Cal.2d 228, 233, 174 P.2d 441. "It must be presumed 'That all matters within * * * a submission to arbitration were laid before the arbitrators and passed upon by them.' § 1963 subd. 18, Code Civ.Proc." *Crofoot v. Blair Holdings Corp.*, supra, 119 Cal.App.2d 156, 192, 260 P.2d 156, 175. Further, "Under the 1927 statute, it is well settled that both before the superior and appellate courts every intendment of validity must be given the award and that the burden is upon the one claiming error to support his contention. *Popcorn Equipment Co. v. Page*, 92 Cal. App.2d 448, 207 P.2d 647." *Crofoot v. Blair Holdings Corp.*, supra, 119 Cal.App.2d at page 185, 260 P.2d at page 171.

There is no merit to plaintiff's contention that the award was not that of the arbitration panel but of Mr. Ziemann. It is true that Mr. Ziemann, being an attorney, prepared the formal award but that award merely followed the opinion prepared by

Mr. Young in which Mr. Ziemann concurred. It follows, therefore, that the award was that of a majority of the board of arbitration.

Other contentions made by plaintiff do not merit discussion.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, J., concurs in the judgment.



45 Cal.2d 43

MANNING'S, Inc., a corporation,
Plaintiff and Appellant,

v.

William A. BURKETT, Director of Employment, Defendant and Respondent.

S. F. 19213.

Supreme Court of California.

In Bank.

July 29, 1955.

Proceeding by corporation against director of employment to recover contributions allegedly overpaid to unemployment fund and to obtain readjustment of corporation's account. The Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., sustained demurrer to complaint without leave to amend, and entered judgment for defendant, and plaintiff appealed. The Supreme Court, Gibson, C. J., held that where complaint set forth that, during pendency of protest proceedings, plaintiff paid contributions regularly at tax rates indicated by defendant's computations, and that as result of judgment in protest proceedings defendant was required to adjust plaintiff's contribution rates for periods which elapsed during pendency of action, complaint sufficiently alleged duty on part of defendant to refund or credit any overpayments made by plaintiff during pendency of protest proceedings, and that plaintiff's

failure to allege that proper and timely protests were filed for years in question did not render complaint demurrable, in view of pendency of protest proceedings.

Judgment reversed.

Taxation 543(6)

Where complaint set forth that, during pendency of protest proceedings, plaintiff regularly paid contributions to unemployment fund at tax rates indicated by Director's computations, and that, as result of judgment in protest proceedings, Director was required to adjust plaintiff's contribution rates for periods which elapsed during pendency of action, complaint sufficiently alleged duty on part of Director to refund or credit any overpayments made by plaintiffs during pendency of protest proceedings, and plaintiff's failure to allege that proper and timely protests were filed during years in question did not render complaint demurrable, in view of pendency of protest proceedings. Gen.Laws, Act 8780d, § 41.1, and (c).

Ernest J. Hill and Walter E. Dorn, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., William L. Shaw and Vincent F. Lafferty, Deputy Attys. Gen., for respondent.

GIBSON, Chief Justice.

Plaintiff instituted this proceeding against defendant, the Director of Employment, seeking to recover contributions allegedly overpaid to the unemployment fund and to obtain a readjustment of its account. A demurrer to the complaint was sustained without leave to amend, and judgment was entered for defendant.

The complaint alleged as follows: In 1944 plaintiff commenced an action against defendant which resulted in a judgment ordering a refund to plaintiff of \$22,481 and the removal of charges from its account in the sum of \$45,390 covering the years 1941, 1942 and 1943. The judgment was affirmed on May 11, 1950, in *Manning's, Inc., v. Bryant*, 35 Cal.2d 903, 218

P.2d 7. Defendant paid the judgment and adjusted plaintiff's account, effective as of June 30, 1949. In connection with this adjustment, defendant issued to plaintiff a statement of its reserve account dated May 31, 1950. Plaintiff protested this statement within the time and in the manner prescribed by law upon the ground that defendant failed to make an adjustment of tax rates and contributions for the rating periods from 1943 to 1949. An appeal from disallowance of the protest was taken to the California Unemployment Insurance Appeals Board and was denied. During the calendar years 1944 through 1950, plaintiff paid its contributions regularly at the tax rates indicated by defendant's computations. As a result of the judgment affirmed in *Manning's, Inc., v. Bryant*, 35 Cal.2d 903, 218 P.2d 7, defendant was required to adjust plaintiff's contribution rates for the periods which elapsed during the pendency of the action. If adjustments had been made as of June 30, 1943, plaintiff's tax rate for 1944 would have been decreased from 2.5% to 1.5%, which would have resulted in a reduction of \$17,314.05 in plaintiff's contributions. With respect to 1945, the tax rate would have been decreased from 2% to 1.5%, which would have resulted in a reduction of \$9,365.73 in plaintiff's contributions. It is further alleged that there is now due plaintiff on account of excess contributions the sum of \$26,679.78 and interest thereon, that upon the refund of the excess contributions further adjustment of plaintiff's reserve account balances will be required for the taxable periods after 1945, and that plaintiff's tax rates for these years will not be changed.

It is not disputed that the judgment for plaintiff, affirmed by this court in 1950, covering 1941, 1942 and 1943, affected the contributions plaintiff was required to make for the years 1944 and 1945. Defendant, however, takes the position that a cause of action was not stated in the complaint because of the failure to allege that proper and timely protests were filed by plaintiff in 1944 and 1945.

At the time the overpayments were allegedly made in 1944 and 1945, section 41.1

of the Unemployment Insurance Act provided that an employer was to be furnished "not less frequently than annually" with a statement showing charges and credits to his account, the net balance of his reserve, and his contribution rate for the next succeeding rating period. Such statement was conclusively presumed to be correct unless protested within sixty days of its mailing. Subdivision (c) of the section provided: "In the event that a protest proceeding is pending with respect to any statement provided for above when any contribution becomes due, the employer shall pay the contribution at the rate indicated by the commission's computation. If a determination indicating that a lesser contribution rate should have been computed is subsequently made in favor of the employer, the commission immediately either shall refund to the employer or credit to his account any amount so determined to have been paid in excess of the amount which he would have been required to pay had the computation been made correctly. * * *" Stats. 1941, ch. 940, p. 2535; 3 Deering's Gen. Laws, 1943, pp. 3342-3343, Act 8780d.

The statutory provision requiring that a protest be made within 60 days after the mailing of a statement did not apply to statements furnished to plaintiff during the pendency of the protest proceeding; instead the applicable provision was subdivision (c) quoted above. The second sentence of subdivision (c) was designed to assure an employer of a refund of excess contributions which, under the first sentence, he was required to pay regardless of the pendency of a protest proceeding. As we have seen, the result in the action for refunds covering 1941, 1942 and 1943 affected the rates assessed in 1944 and 1945. Until that action was finally determined, however, plaintiff was not in a position to know the extent, if any, to which the rates assessed in 1944 and 1945 were excessive, and any protests made in those years could not have been properly considered or disposed of by defendant.

The complaint sufficiently alleges a duty on the part of defendant to refund or credit any overpayments made by plaintiff during the pendency of the protest proceeding, and

it was error to sustain a demurrer without leave to amend.

The judgment is reversed.

SHENK, EDMONDS, CARTER,
TRAYNOR and SCHAUER, JJ., concur.



45 Cal2d 907

FOSTER'S LUNCH SYSTEM, Ltd., a corporation, Plaintiff and Appellant,

v.

William A. BURKETT, Director of Employment, Defendant and Respondent.

S. F. 19208.

Supreme Court of California.
In Bank.

July 29, 1955.

Appeal from Superior Court, City and County of San Francisco; Albert C. Woltenberg, Judge.

Fabian D. Brown, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., William L. Shaw and Vincent P. Lafferty, Deputy Attys. Gen., for respondent.

PER CURIAM.

This appeal presents the same problem as that disposed of in Manning's, Inc., v. Burkett, Cal., 286 P.2d 13, and that decision is controlling here.

The judgment is reversed.

45 Cal.2d 908

GANTNER & MATTERN CO., a corporation, Plaintiff and Appellant,

v.

William A. BURKETT, Director of Employment, Defendant and Respondent.

S. F. 19209.

Supreme Court of California.
In Bank.

July 29, 1955.

Appeal from Superior Court, City and County of San Francisco; Albert C. Woltenberg, Judge.

Fabian D. Brown, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., William L. Shaw and Vincent P. Lafferty, Deputy Attys. Gen., for respondent.

PER CURIAM.

This appeal presents the same problem as that disposed of in Manning's, Inc., v. Burkett, Cal., 286 P.2d 13, and that decision is controlling here.

The judgment is reversed.



45 Cal.2d 20

Melchior LINGGI, Plaintiff and Appellant,

v.

Maria GAROVOTTI, Defendant and Respondent.

S. F. 19197.

Supreme Court of California.
In Bank.

July 22, 1955.

Rehearing Denied Aug. 17, 1955.

Proceeding by apartment building owner to condemn a right of way for a sewer line over adjoining land. The Superior Court, Marin County, Thomas F. Keating, J., entered judgment upon an order sustain-

ing a demurrer to complaint, and plaintiff appealed. The Supreme Court, Edmonds, P. J., held that allegation that it was necessary to take easement in order to abate nuisance, the abatement of which had been determined to be for the benefit of the public, sufficiently alleged necessity of condemnation as against general demurrer.

Judgment reversed.

Schauer and Carter, JJ., dissented.

Opinion, 274 P.2d 942, vacated.

1. Pleading ⇨225(2)

In proceeding by apartment building owner to condemn right of way for a sewer line over adjoining land, any deficiency in complaint, attacked by special demurrer on grounds of ambiguity and uncertainty in that it did not appear therein that public sewer system in abutting street was inadequate, could be corrected by amendment, and hence sustaining demurrer to complaint on such ground without leave to amend would be abuse of discretion.

2. Eminent Domain ⇨67

Designating the uses in behalf of which right of eminent domain may be exercised is a legislative function, and legislative declaration that such uses are public will be recognized by courts, but whether, in any individual case, the use is a public use must be determined by the judiciary from facts and circumstances of such case. West's Ann.Const. art. 1, § 13; U.S.C.A.Const. Amend. 14.

3. Eminent Domain ⇨191(3)

In eminent domain proceeding, a statement that the taking is necessary for a public use authorized by law is an essential element of complaint, but a general allegation of necessity is sufficient. West's Ann. Civ.Code, § 1001; West's Ann.Code Civ. Proc. §§ 1238, subd. 8, 1241, 1244.

4. Eminent Domain ⇨191(3)

In proceeding by apartment building owner to condemn a right of way for a sewer line over adjoining land, allegation that it was necessary to take such easement in order to abate nuisance created by inadequacy of existing sewerage facilities,

the abatement of which had been determined to be for the benefit of the public, sufficiently alleged necessity of condemnation as against general demurrer. West's Ann.Civ.Code, § 1001; West's Ann.Code Civ.Proc. §§ 1238, subd. 8, 1241, 1244.

5. Eminent Domain ⇨196

In proceeding by apartment building owner to condemn a right of way for a sewer line over adjoining land, plaintiff must prove by preponderance of the evidence his right and justification for proposed condemnation and a somewhat stronger showing of such requirements is necessary than if condemnor were a public or quasi public entity. West's Ann.Civ.Code, § 1001; West's Ann.Code Civ.Proc. §§ 1238, subd. 8, 1241, 1244.

6. Eminent Domain ⇨196

In proceeding by apartment building owner to condemn a right of way for a sewer line over adjoining land, plaintiff would not have the benefit of conclusive statutory presumption as to public necessity of such improvement, that such property was necessary therefor, and that proposed improvement was planned or located in the manner which would be most compatible with the greatest public good and least private injury. West's Ann.Civ.Code, § 1001; West's Ann.Code Civ.Proc. §§ 1238, subd. 8, 1241, subd. 2, 1244.

7. Eminent Domain ⇨171, 191(1)

Owner of apartment building seeking to condemn a right of way for sewer line over adjoining land may be denied such easement if other remedy is available to him which would be less injurious to private property, but facts negating existence of such remedy need not be alleged in complaint. West's Ann.Civ.Code, § 1001; West's Ann.Code Civ.Proc. §§ 1238, subd. 8, 1241, 1244.

Wallace S. Myers, San Anselmo, for appellant.

Freitas, Freitas & Allen, Freitas, Allen, McCarthy & Bettini and Richard V. Bettini, San Rafael, for respondent.

EDMONDS, Presiding Justice.

Melchior Linggi is endeavoring to condemn a right of way for a sewer line over adjoining land used for residence purposes. His appeal is from a judgment entered upon an order sustaining a demurrer to his complaint.

A two family apartment building stands on land owned by Linggi facing Sir Francis Drake Boulevard. The apartment house is connected with a public sewer in that street which, during certain seasons of the year, according to the complaint, is inadequate to carry off the sewage. At these times, it is alleged, the sewage backs up and overflows on the Linggi property, creating an unhealthy condition and a nuisance.

Adjoining the Linggi property on the south is the residence of Maria Garovotti which fronts on Oak Street. On this street, the complaint asserts, is a public sewer which provides the only adequate outlet for the sewage from the Linggi building. Mrs. Garovotti has refused to convey to Linggi an easement for the construction and maintenance of a pipe line across her property in order to abate the nuisance. Such an easement, the complaint concludes, is for a public use within the meaning of section 1238, subdivision 8 of the Code of Civil Procedure.

The ground of general demurrer is that to give Linggi the right of eminent domain would be in violation both of Article 1, Section 13 of the Constitution of the State, and of the Fourteenth Amendment of the United States Constitution. The demurrer also asserts that the complaint is ambiguous, unintelligible, and uncertain in that it does not appear therein that the public sewer system in Sir Francis Drake Boulevard is inadequate.

[1] Any deficiency in the complaint attacked by the special demurrer could have been corrected by amendment. If the demurrer on these grounds was sustained without leave to amend it was an abuse of discretion. The decisive question, therefore, concerns the sufficiency of the facts pleaded by the complaint to state a cause of

action and the constitutionality of the applicable statutes.

Linggi contends that section 1001 of the Civil Code authorizes a private individual to maintain an action to acquire by eminent domain property for any use specified in section 1238 of the Code of Civil Procedure. As he reads these statutes they allow him to obtain by condemnation an easement over private property for the purpose of connecting his building with the mains of the established public sewer system in Oak Street. Such an easement, he says, would be for a public use.

Respondent asserts that the court, not the Legislature, is the final arbiter of whether the facts of the particular case justify a condemnation for a public use. A public use is not established, the argument continues, unless the public is entitled, as of right, to use or enjoy the property taken. The complaint also is attacked upon the ground that it does not show wherein the taking of property sought to be condemned is necessary, a requirement specified by section 1241, subd. 2, of the Code of Civil Procedure.

Section 1001 of the Civil Code provides:

"Any person may, without further legislative action, acquire private property for any use specified in section twelve hundred and thirty-eight of the Code of Civil Procedure either by consent of the owner or by proceedings had under * * * [eminent domain]; and any person seeking to acquire property for any of the uses mentioned in such title is 'an agent of the State,' or a 'person in charge of such use,' within the meaning of those terms as used in such Title."

In *Moran v. Ross*, 79 Cal. 159, 21 P. 547, partners who owned a railroad sought to condemn private property for a right of way across it. The court said: "[T]he power of the state to condemn land for public uses must, in the main, be exercised by agents; and for that reason this power may be delegated by the legislature of the state either to corporations or individuals who act as such agents, and under legislative control." 79 Cal. at page 160,

21 P. at page 548. After quoting from the provisions of the Code of Civil Procedure governing the right of eminent domain and section 1001 of the Civil Code, the court said: "These provisions of the Codes, taken together, confer upon private individuals the right of eminent domain in this class of cases, in plain and unequivocal terms." 79 Cal. at page 162, 21 P. at page 548.

Similar reasoning has been employed to authorize the use of eminent domain by a private water company, *San Joaquin & Kings River Canal & Irrigation Co. v. Stevinson*, 164 Cal. 221, 128 P. 924, and in *University of Southern California v. Robbins*, 1 Cal.App.2d 523, 37 P.2d 163, a private university was allowed to condemn land for use as part of a landscaping program in connection with its library building.

The respondent particularly relies upon the terms of the applicable statute for her position that, although an individual may maintain an action in eminent domain, the purpose pleaded by the complaint is not one specified by section 1238 of the Code of Civil Procedure. Under that statute, "the right of eminent domain may be exercised in behalf of the following public uses: * * *

"8. Sewerage of any incorporated city, city and county, or of any village or town, whether incorporated or unincorporated, or of any settlement consisting of not less than 10 families, or of any buildings belonging to the State, or to any college or university, *also the connection of private residences and other buildings, through other property, with the mains of an established sewer system* in any such city, city and county, town or village." (Emphasis added.)

[2] A fundamental principle of the law of eminent domain was stated in *University of Southern California v. Robbins*, 1 Cal. App.2d 523, 37 P.2d 163, as follows: "The legislature must designate, in the first place, the uses in behalf of which the right of eminent domain may be exercised, and this designation is a legislative declaration that such uses are public, and will be recognized by courts; but whether, in any in-

dividual case, the use is a public use, must be determined by the judiciary from the facts and circumstances of that case." [citation] 'If the subject-matter of the legislation be of such a nature that there is any doubt of its character, or if by any possibility the legislation may be for the welfare of the public, the will of the legislature must prevail over the doubts of the court.'" 1 Cal.App.2d at pages 525-526, 37 P.2d at page 164.

No appellate court of California has considered the question as to whether an individual may maintain an action under section 1238 of the Code of Civil Procedure for the purpose of acquiring an easement to be used for a sewer connection from a single residence. *City of Pasadena v. Stimson*, 91 Cal. 238, 27 P. 604, was an action by a municipal corporation to condemn a right of way for a sewer over several lots. In upholding the right of the municipality to condemn the land for that purpose, the court said: "A sewer in the neighborhood of dwellings may be an evil, but it is evident that the legislature regards it as a necessary evil, since it allows private property to be taken for the construction of sewers. Sewers are in fact a necessary evil; but when they are planned and constructed with reasonable regard to the results of sanitary teachings they are authorized by statute * * *." 91 Cal. at pages 254-255, 27 P. at page 608.

In *Machado v. Board of Public Works of Arlington*, 1947, 321 Mass. 101, 71 N.E.2d 886, one DiMaggio owned property abutting on the Parkway and adjacent to the land owned by Machado. DiMaggio's residence was serviced by a cesspool, which was declared to be "impractical". His application to the Board of Public Works to have a sewer installed in the Parkway was denied upon the ground that the cost would be prohibitive. DiMaggio renewed his application, suggesting that a pipe line be constructed across Machado's lot and another owned by Machado to the rear of it to connect with a sewer on Decatur Street, a block south of the Parkway. The board, upon condition that DiMaggio bear the cost of the "easement rights", granted the application and condemned an easement

across Machado's two lots. Machado sought certiorari to quash the proceedings. In affirming the judgment, the court held:

"The purpose of the legislature * * was to place in possession of the city council the means of abating nuisances offensive to the community and dangerous to the health of the people. The objects therefore to be accomplished by the exercise of the power it confers are so obviously connected with means to be adopted for the promotion of the general welfare of the community, and in which all citizens have a common interest, that the suggestion of a want of constitutional power in the legislature for its enactment seems to be entirely without foundation.' [Hildreth v. City of Lowell, 11 Gray, Mass., 345, 350, 351.]

"It is true that the immediate purpose of the easement taken in the petitioners' land was to afford DiMaggio access to the sewer in Decatur Street, and it might seem at first blush that he alone was benefited. But actually that is not so. As the return shows, one of the reasons, if not the chief one, which gave rise to his application was the unsatisfactory condition of his cesspool, which the board of health had ordered him to remedy. It requires no discussion to demonstrate that this was a condition of such concern to the health and welfare of the town that its elimination by the means here adopted was a public purpose. This is not a case, therefore, where the taking can be said to be colorably for the use of the town, but really for the benefit of an individual.

"We have not overlooked the fact pressed upon us by the petitioners that at one of the meetings of the respondents, as noted above, DiMaggio assented to a proposal that he 'assume the cost of all easement rights.' But the mere fact that DiMaggio may have agreed to reimburse the town for the cost of the taking would not render it invalid. The essential thing is whether the purpose for which the taking was made was a public one. It is settled that a taking otherwise lawful is not invalid merely because those specially benefited pay for the cost of it either in whole or in part." 71 N.E.2d at page 888.

The respondent attacks the complaint, not only upon the ground that the statute does not authorize condemnation by an individual for his sole use, but also because the facts alleged show no right or necessity to invoke such power in the circumstances pleaded. This argument suggests that the complaint is defective because Linggi does not allege that the public authorities have refused to enlarge the sewer in Sir Francis Drake Boulevard, or that the easement desired is the only, or even the most feasible, route to Oak Street.

[3, 4] Section 1244 of the Code of Civil Procedure, which states the requirements of the complaint in an eminent domain action, specifies only that the plaintiff must allege his right to take the property for public use. That requirement is satisfied by the general allegations in Linggi's complaint of facts showing a proposed taking pursuant to sections 1001 of the Civil Code and 1238(8) of the Code of Civil Procedure. Kern County Union High School Dist. v. McDonald, 180 Cal. 7, 10, 179 P. 180. In addition, section 1241 of the Code of Civil Procedure requires the condemnor to show that the use to which it is to be applied is one authorized by law and that the taking is necessary to such use. This section must be construed in conjunction with section 1244, and a statement of necessity is an essential element of the complaint. See Rialto Irrigation Dist. v. Brandon, 103 Cal. 384, 386, 37 P. 484; Central Pacific Ry. Co. v. Feldman, 152 Cal. 303, 308, 92 P. 849; Laguna Drainage Dist. v. Charles Martin Co., 5 Cal.App. 166, 173, 89 P. 993; Northern Light & Power Co. v. Stacher, 13 Cal.App. 404, 408, 109 P. 896. However, a general allegation of necessity is sufficient. Northern Light, etc., Co. v. Stacher, 13 Cal.App. 404, 408, 109 P. 896; Accord: People v. Thomas, 108 Cal.App.2d 832, 838, 239 P.2d 914; People v. Marblehead Land Co., 82 Cal.App. 289, 297, 255 P. 553. The statement in Linggi's complaint "That it is necessary to take an easement over and across * * * [the Garovotti property] * * * in order to abate the nuisance", the abatement of which has been determined to be for the

benefit of the public, meets the requirement of section 1241. *Spring Valley Water Works v. San Mateo Water Works*, 64 Cal. 123, 28 P. 447, which is relied on by Garovotti, was concerned with the sufficiency of the evidence and not of the pleadings.

[5-7] Upon a trial of the action, it will be necessary for Linggi to prove, by a preponderance of the evidence, his right and justification for the proposed condemnation. A somewhat stronger showing of those requirements is necessary than if the condemnor were a public or quasi public entity. Linggi will not have the benefit of the conclusive presumption "(a) of the public necessity of such * * * public improvements; (b) that such property is necessary therefor, and (c) that such proposed * * * public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury." Code of Civil Procedure, § 1241, subd. 2. He might be denied the easement which he is endeavoring to obtain if other remedy is available to him which would be less injurious to private property. For example, the evidence may show that the proper public authorities have not been asked to enlarge the present facilities in Sir Francis Drake Boulevard and make that line adequate to carry off all of the sewage from Linggi's property. Cf. *Machado v. Board of Public Works*, supra, 71 N.E.2d 886. The proposed route may not be the most direct one to reach the line in Oak Avenue, or possibly another route, although less direct, might be less injurious to all property owners concerned. But such facts need not be alleged in the complaint.

The judgment is reversed.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

The majority declare that "Section 1244 of the Code of Civil Procedure, which states the requirements of the complaint in an eminent domain action, specifies only that the plaintiff must allege his right to take the property for public use. That

requirement is satisfied by the general allegations in Linggi's complaint of facts showing a proposed taking pursuant to sections 1001 of the Civil Code and 1238(8) of the Code of Civil Procedure * * *

In addition, section 1241 of the Code of Civil Procedure requires the condemnor to show that the use to which it is to be applied is one authorized by law and that the taking is necessary to such use. This section must be construed in conjunction with section 1244, and a statement of necessity is an essential element of the complaint. * * *

The statement in Linggi's complaint 'That it is necessary to take an easement over and across * * * [the Garovotti property] * * * in order to abate the nuisance,' the abatement of which has been determined to be for the benefit of the public, meets the requirement of section 1241."

I do not agree that the complaint meets any of the requirements above set forth. On the contrary, the pleading shows: (1) that the plaintiff seeks to take defendant's property for a private use, not a public use; (2) that the proposed taking is for a use not authorized by law and that the taking is not necessary for any use authorized by law; (3) that the nuisance to be abated, if any nuisance at all is shown, is one which is not created by defendant but is created by the plaintiff and by the private use of plaintiff's property; and (4) that any duty to furnish more abundant or extensive sewer facilities to plaintiff and to the private uses of plaintiff's property is not one which the law imposes or can validly impose upon defendant or her property.

The Constitution of this State provides (article I, section 1) that "All men * * * have certain inalienable rights, among which are those of * * * acquiring, possessing, and protecting property" and (article I, section 14) that "Private property shall not be taken or damaged for public use without just compensation * * *," and section 1238 of the Code of Civil Procedure, relied upon by plaintiff, states that "the right of eminent domain may be exercised in behalf of the following public uses: * * *" I think it is clearly

implied from the language above-quoted that private property shall not be taken for a private use, with or without compensation.

Plaintiff alleges in his complaint that "there is erected upon the [parcel owned by him] * * * a certain apartment house * * *; that said apartments, as private residences, require a good, sufficient and healthy sewage disposal system; that heretofore said sewage disposal system has been so constructed as to lead to a public sewage disposal line in Sir Francis Drake Boulevard on the northerly end of said Parcel * * *; that said public sewage system in Sir Francis Drake Boulevard is not adequate to take the line from plaintiff's property * * * during the rainy season * * *. That affiant has been informed and believes and upon such information and belief alleges that the only way plaintiff is able to dispose of sewage collected in his apartment houses * * * will be over and across [defendant's land on which is erected her residence] * * * to the public sewage line in Oak Avenue [on which defendant's land borders]." It is not alleged that plaintiff's multiple-unit property is to be used for other than his private purposes or that rental rates are to be fixed or controlled by a public agency.

It appears to me that for this court to so construe the code sections upon which plaintiff relies, as to permit him to exercise the right of eminent domain upon such allegations will result in the unlawful taking of private property for a private use, rather than a permissible taking for a public purpose, and will offend all sense of pertinent constitutional guarantees. We have only recently ruled that "The Constitution does not contemplate that the exercise of the power of eminent domain shall secure to private activities the means to carry on a private business whose primary objective and purpose is private gain and not public need." (City & County of San Francisco v. Ross (1955) 44 Cal.2d 52, 279 P.2d 529. If the same principle is applied here the judgment must be affirmed.

CARTER, J., concurs.

Raymond E. HILYAR, a minor, by Leslie Earl Hilyar, his guardian ad litem,
Plaintiff and Appellant,

v.

UNION ICE COMPANY, a corporation, and Charles Irwin Ingram, sued as Charles Irwin Ingerman, Defendants and Respondents.

L. A. 23223.

Supreme Court of California.

In Bank.

July 29, 1955.

Action for injuries to five year old boy who was struck by ice truck operating on private streets of trailer court. The Superior Court, Los Angeles County, Wilbur C. Curtis, J., rendered judgment, on nonsuit, for defendant, and plaintiff appealed. The Supreme Court, Carter, J., held, inter alia, that evidence on issue of driver's negligence was for jury but that evidence on plaintiff's contention that ice company was driver's principal was insufficient for jury.

Affirmed in part and reversed in part. Opinion, 279 P.2d 601, vacated.

1. Trial ☞165

A nonsuit may be granted only when, disregarding conflicting evidence, giving to plaintiff's evidence all the value to which it is legally entitled and indulging in every legitimate inference which may be drawn from that evidence favorable to plaintiff's case, there is no evidence of sufficient substantiality to support verdict in favor of plaintiff.

2. Appeal and Error ☞927(3)

On appeal from judgment, in negligence action, entered on nonsuit, reviewing court would look to plaintiff's evidence and inferences to be drawn therefrom, in order to determine whether, as matter of law, there was no evidence of negligence on part of defendant.

3. Negligence ☞4

"Ordinary care" required to be exercised by all persons to prevent others from being injured is the degree of care which

people of ordinarily prudent behavior can be reasonably expected to exercise under circumstances of a given case, and care must be in proportion to danger to be avoided and consequences which might reasonably be anticipated.

See publication Words and Phrases, for other judicial constructions and definitions of "Ordinary Care".

4. Automobiles ⇨245(8)

In action for injuries to five year old boy who was struck by ice truck operating on private streets of trailer court, evidence on issue of whether driver had used degree of care of one using dangerous instrumentality in immediate vicinity of small children was for jury.

5. Automobiles ⇨245(8)

In action for injuries to five year old boy who was struck by ice truck operating on private streets of trailer court, evidence on issue of whether, under circumstances, driver should have sounded horn to insure safe operation was for jury. Vehicle Code, § 671(b).

6. Automobiles ⇨245(57)

In action for injuries to five year old boy who was struck, in daylight, by ice truck operating on private streets of trailer court, evidence on issue of whether driver's failure to sound horn or failure to look more closely for children in his way constituted proximate cause of child's injuries was for jury. Vehicle Code, § 671(b).

7. Automobiles ⇨245(37)

In action for injuries to five year old boy who was struck by ice truck operating on private streets of trailer court, evidence concerning point of impact was sufficient for jury even though there were no eyewitnesses to accident.

8. Principal and Agent ⇨22(1)

Agency cannot be established by declarations of agent not under oath or in presence of principal.

9. Automobiles ⇨245(28)

In action for injuries to five year old boy who was struck by ice truck owned by driver, evidence on plaintiff's contention that company supplying ice was principal of driver was insufficient for jury.

Elconin & Elconin, Benjamin Elconin, Hirson & Horn and Theodore A. Horn, Los Angeles, for appellant.

George P. Kinkle and George P. Kinkle, Jr., Los Angeles, for respondent Union Ice Co.

Crider, Tilson & Ruppé, Los Angeles, and E. Spurgeon Rothrock, Corona, for respondent Ingram.

CARTER, Justice.

This is an appeal by plaintiff from judgments of nonsuit entered in favor of defendants Charles Irwin Ingram (sued as Charles Irwin *Ingerman*) and Union Ice Company for damages for personal injuries.

Plaintiff, a five and a half year old boy, was run over, or hit, and seriously and permanently injured by an ice truck driven by defendant Ingram. The only question involved is whether there was sufficient evidence of negligence on the part of Ingram to permit the case to go to the jury. A subsidiary question is whether there was sufficient evidence of an agency relationship between defendant Ingram and defendant Ice Company to submit that issue to the jury.

There were no eyewitnesses to the accident which occurred in the early afternoon, around two o'clock and the evidence is almost without conflict. The record shows that plaintiff, and his family, lived in a trailer camp or park which was privately owned. The trailer camp contains two north-south roads ("C" and "B") about 20 or 22 feet wide which are unpaved and full of chuck-holes and bumps and ruts. These roads have neither curbs, nor sidewalks and are used by both pedestrian and vehicle traffic. On either side of each street are the trailer houses. There is a road running east and west at the southern end of the camp. The Hilyar trailer was located on the east side of "C" street, the small north-south road on the west side of the camp. The only bath and toilet house in the camp is located in the southwest corner of "C" street at its most northerly end. Plaintiff's mother was visiting in a trailer located on the westerly side of "B" street and had permitted plaintiff to go to the bathhouse alone as he had often

done before if, as she testified, he would come right back. Defendant Ingram, driving a truck bearing the name "Union Ice" in large block letters on both its doors, was delivering ice to the trailer on the southwest corner of "C" street; this trailer was directly opposite that in which the Hilyars lived. Driver Ingram testified that after he had delivered the ice, he walked around from the right side of his truck to the back; that there were children playing around it and that he warned them to get away from the truck; that he then got back "up" on the truck and started the motor; that he "glanced in my mirrors and headed south for a few feet and made my left-hand turn east." This testimony shows that he was driving south, that he turned to the left into the east-west street and proceeded in an easterly direction. He testified that he looked through the mirrors when he started up; that he looked out of the truck to see if there were any children to the right or left of the truck; that he was driving in second gear at from three to four miles an hour; that he did not sound his horn. He testified that he drove along the east-west street until he came to "B" street, a distance of about 65 feet, and that he again made a left-hand turn in order to proceed in a northerly direction on "B" street. The record shows that as he made the turn on to "B" street, he did not sound his horn, nor did he look to see if there were any children on the right, or around the truck and he didn't see any children; that as he was about 20 feet from the corner (where he made the turn) the first he knew that anything unusual had happened was when he heard "some kind of noise in the back" and a little boy (not the injured child) "hollered" at him that something had happened "back there"; that he jumped out of the left, or driver's, seat of the truck and started down toward where the injured child was lying calling for help. The injured child was lying on the road in a prone position about 20 feet from the corner and approximately 2 feet from a picket fence on the easterly side of the street. The record shows that right after the accident defendant Ingram kept yelling "My God! My God! I hit him."

Mrs. Hilyar testified that plaintiff, immediately after the accident, said "I was walking and the truck hit me"; that the accident occurred "not more than ten minutes" after the child had left for the bathroom. The child failed to qualify as a witness and by stipulation a statement made by him to police officers not long after the accident was admitted in evidence. The admitted portion of the statement consisted of the following: "Stated he was walking alongside an ice truck and the truck turned a corner knocking him to the ground and ran over his back. Stated he was also knocked into the fence at his right side. Victim. * * *"

The record shows that defendant Ingram had delivered ice to the trailer court for approximately three years; that he knew children played in the area. It is also shown that the truck was a high-bed model with solid sides and a closed cab some distance from the ground. There were running boards underneath both doors. The over-all length was approximately fifteen feet.

[1,2] Bearing in mind that this is an appeal from judgments of nonsuit and the rule that "* * * a nonsuit may be granted only when, disregarding conflicting evidence, giving to plaintiff's evidence all the value to which it is legally entitled and indulging in every legitimate inference which may be drawn from that evidence favorable to plaintiff's case, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff", *Dunn v. Pacific Gas & Electric Co.*, 43 Cal.2d 265, 268, 272 P.2d 745, 746; *Palmquist v. Mercer*, 43 Cal.2d 92, 95, 272 P.2d 26; *Warner v. Santa Catalina Island Co.*, 44 Cal.2d 310, 282 P.2d 12, we must look at plaintiff's evidence and the inferences to be drawn therefrom in order to determine whether it can be said as a matter of law that there is no evidence of negligence on the part of defendant Ingram.

Ingram was aware that children played in the area of the streets of the trailer camp; he was aware that there were children around his truck when he started to drive from "C" to "B" street; he admitted

he had not sounded his horn; that he did not look for children on the right of the truck, nor around it. From the pictures of the truck in evidence, it could have been logically inferred that because of its height and the distance of the cab windows from the road, that a small child could have been directly in front of the cab, or at either side, without being seen by the driver unless he were keeping a close watch for children. The only direct evidence of care exercised by the driver is his testimony that he looked in his rear-view mirrors for children when he first started up. There is no evidence that after starting he looked out the side windows, or the front windshield. From this the trier of fact could have determined that when looking through the mirrors, he might have missed seeing a small child directly in front of him. There is evidence that at no time did defendant Ingram sound his horn to warn children away from the moving vehicle. From the child's statement that the truck hit him and ran over his back, it could have been reasonably inferred that he was either in front of the truck as it made the turn, or slightly to its left. From defendant Ingram's testimony that he did not see the child, it could have been inferred that he did not see the child because he was not exercising the care commensurate with the danger to be avoided in that he knew small children played in the area and knew, or should have known, that children are unpredictable. *Shannon v. Central-Gaither Union School Dist.*, 133 Cal.App. 124, 23 P.2d 769.

The police officer, Thomas, testified that in Ingram's signed statement to him concerning the accident, he had stated that he was driving between four and five miles an hour. The jury may very well have believed this statement concerning the speed of the vehicle and have concluded that such speed was not the exercise of due care under all the circumstances.

[3] All persons are required to use ordinary care to prevent others being injured as the result of their conduct; ordinary care is that degree of care which people of ordinarily prudent behavior can be reasonably expected to exercise under the cir-

cumstances of a given case. In other words, the care required must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated. *Crowe v. McBride*, 25 Cal.2d 318, 321, 153 P.2d 727; *Hatzakorjian v. Rucker-Fuller Desk Co.*, 197 Cal. 82, 98, 239 P. 709, 41 A.L.R. 1027; *Warner v. Santa Catalina Island Co.*, supra, 44 Cal.2d 310, 282 P.2d 12; *Jensen v. Minard*, 44 Cal.2d 325, 282 P.2d 7.

[4] In *Conroy v. Perez*, 64 Cal.App.2d 217, 224, 148 P.2d 680, 684, it was held that "The presence of children is in itself a warning requiring the exercise of care for their safety. *Seperman v. Lyon Fire Proof Storage Co.*, 97 Cal.App. 654, 275 P. 980. Moreover if the evidence shows that a driver has knowledge of the presence of children he may be held to have been responsible although it appears that he did not see the injured child in time to prevent the injury. See 2 Cal.Jur. Ten Yr. Supp., p. 454. This is especially true where the injury occurs in or about the child's home. *Cambou v. Marty*, 98 Cal.App. 598, 277 P. 365, 367." There can be no question but that here the driver of the ice truck knew that children were playing in the area. He, himself, testified that he had warned the children away from the truck; he also testified that he had not sounded his horn from the time he started it up until the plaintiff was hit. The accident occurred not far from the child's home. It was daylight, the view was unobstructed, and the trier of fact might well have concluded that the driver's conduct under the circumstances, was not the degree of care required of one using a dangerous instrumentality in the immediate vicinity of small children. *Jensen v. Minard*, supra, 44 Cal.2d 325, 282 P.2d 7.

[5] Section 671(b) of the Vehicle Code provides that the driver of a motor vehicle when reasonably necessary to insure safe operation shall give audible warning with his horn. Whether under the circumstances here presented it was "reasonably necessary" to sound the horn to "insure safe operation" should have been a question of fact for the jury. In *Ducat v. Goldner*, 77 Cal.App.2d 332, 335, 175 P.2d 914, 916, it was held that "Appellant had no right to

assume that the road was clear but it was his duty to be vigilant and to anticipate the presence of others in the highway. The fact that he did not know that respondent was in the street is no excuse for his failure to give warning, *Rush v. Lagomarsino*, 196 Cal. 308, 317, 237 P. 1066; *Meyers v. Bradford*, 54 Cal.App. 157, 159, 201 P. 471 * * *." It was there held that the darkness of the streets and the condition of the weather required that a reasonably prudent person should sound his horn to insure the safe operation of his vehicle when turning a corner at a place where a pedestrian might reasonably be expected to be found. In *Freeland v. Jewel Tea Co.*, 118 Cal.App.2d 764, 769, 258 P.2d 1032, it was held that it is ordinarily necessary to exercise greater care for the protection and safety of young children than for adult persons possessing normal and mature faculties, *Conroy v. Perez*, supra, 64 Cal. App.2d 217, 224, 148 P.2d 680; that their conduct is unpredictable and one operating a motor vehicle should anticipate their thoughtlessness and impulsiveness, *Shannon v. Central-Gaither Union School Dist.*, supra, 133 Cal.App. 124, 23 P.2d 769. It was also held that the presence of children is in itself a warning requiring the exercise of care for their safety. The court concluded that where children were known to be playing in the street, the negligence, if any, of the driver of a motor vehicle was a question of fact for the jury. In *De La Torre v. Valenzuela*, 102 Cal.App.2d 586, 228 P.2d 13, it was held to be a question of fact for the jury whether or not under all the circumstances defendant's failure to sound a horn proximately contributed to plaintiff's injury.

[6] It has been held in numerous cases that the issue of proximate cause is essentially one of fact, *De La Torre v. Valenzuela*, supra, 102 Cal.App.2d 586, 591, 228 P.2d 13; *Fennessey v. Pacific Gas & Electric Co.*, 20 Cal.2d 141, 124 P.2d 51; *Mosley v. Arden Farms Co.*, 26 Cal.2d 213, 219, 157 P.2d 372, 158 A.L.R. 872; *Crowe v. McBride*, supra, 25 Cal.2d 318, 321, 153 P.2d 727; *Warner v. Santa Catalina Island Co.*, supra, 44 Cal.2d 310, 282 P.2d 12; *Dunn v. Pacific Gas & Electric Co.*, supra, 43

Cal.2d 265, 277, 278, 272 P.2d 745. Under the circumstances here presented, whether or not defendant driver's failure to sound the horn, or his failure to look more closely for children in his way, constituted the proximate cause of plaintiff's injuries should have been submitted to the jury. As the court said in *Frederiksen v. Costner*, 99 Cal.App.2d 453, 458, 221 P.2d 1008, 1011, whether defendant was negligent in starting his truck without making any further effort to ascertain the conduct and whereabouts of the plaintiff's decedent was a question of fact. "It cannot be said, as a matter of law, that he exercised the degree of care which a reasonable person would have exercised under similar circumstances to protect Cheryl [decedent] from harm. The case presents a question of fact which should have been left to the jury."

[7] Defendant Ingram contends that a verdict and judgment cannot rest upon conjecture and speculation. He argues that there is no evidence concerning the point of impact. In *Dunn v. Pacific Gas & Electric Co.*, supra, 43 Cal.2d 265, 277-279, 272 P.2d 745, it was held that an absence of eyewitnesses and evidence as to the manner in which the accident occurred was not fatal to plaintiff's case. In *Sanders v. MacFarlane's Candies*, 119 Cal.App.2d 497, 500, 259 P.2d 1010, 1012, where a judgment of nonsuit was reversed, and where there were no eyewitnesses, it was said: "It is not necessary, in order to establish a theory by circumstantial evidence, that the facts be such and so related to each other that such theory is the *only* conclusion that can fairly or reasonably be drawn therefrom * * *." *Katenkamp v. Union Realty Co.*, 36 Cal.App.2d 602, 617, 98 P.2d 239. "The plaintiff relying on circumstantial evidence does not have to exclude the possibility of every other reasonable inference possibly derivable from the facts proved. *Vaccarezza v. Sanguinetti*, 71 Cal.App.2d 687, 692, 163 P.2d 470; *Spolter v. Four-Wheel Brake Service Co.*, supra, 99 Cal. App.2d [690] at page 694, 222 P.2d 307." *Sanders v. MacFarlane's Candies*, supra, 119 Cal.App.2d 497, 500, 259 P.2d 1010, 1012; see, also, *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1, 5 A.L.R.2d 91.

Defendant Ingram relies upon *Greene v. Atchison, T. & S. F. Ry. Co.*, 120 Cal.App. 2d 135, 142, 260 P.2d 834, in support of his theory that a judgment for plaintiff here would be the result of conjecture and speculation. In the *Greene* case, plaintiff's decedent was found lying near the railroad tracks. There were no witnesses; there was only the inference, from the position and condition of the body, that a train, or some portion thereof, must have struck the decedent. The court there held that if there was any evidence, including reasonable inferences therefrom, that would support a finding of defendant's negligence, the judgment of nonsuit must be reversed. The *Greene* case is easily distinguished from the one under consideration. Here we have the child's statement to the officers and his mother that the truck ran over him; we have the driver's statement "I hit him!"; we have the driver's statement of his knowledge of children playing in the area and that he did not sound his horn, and that he did not look to the right or left as he made his left-hand turn into "B" street. From this evidence it is reasonably inferable that had he looked, he would have seen the plaintiff, or that had he sounded his horn, he would have warned the child away from the moving truck.

Defendant driver also argues that there is no evidence relating to the point of impact. There is no merit to this argument because from the evidence relating to the condition and position of the child's body, and from his statements to his mother and the police, and from Mrs. Hilyar's testimony that the child was lying about two feet from the picket fence, it could be reasonably concluded that the child was hit close to the corner of "B" street at its intersection with the east-west street about 20 feet therefrom. Because the evidence shows that the child was on his way back from the park bathroom and that there was only the dirt road on which to walk, the inference is that he was walking in the street at the time he was struck by defendant's truck.

Plaintiff contends, and defendant Union Ice Company denies, that an agency relationship existed between Ingram and the company. The record shows that on both

doors of the cab of the truck appeared a shield with the words "Union Ice" in large block letters. Printed in much smaller letters just over the sign, appeared the name "Chas. Ingram" and in letters of approximately the same size, underneath the words "Union Ice" appeared the word "Distributor." The shield on which these words were painted was red, white and blue, apparently the colors of the Union Ice Company. From the photographs, it appears that the words "Chas. Ingram" and "Distributor" had been painted in a rather amateurish fashion, while the words "Union Ice" appeared to have been done professionally. The evidence appears to be without conflict that the truck was owned by Ingram; that Union Ice Company furnished no parts, tires, repairs, or any parking space therefor.

A contract, or agreement, existed between defendant Ingram and defendant Union Ice Company. It was provided therein that Ingram was designated as the "Distributor" and the company as the "Manufacturer." It appeared that Union Ice had entered into similar contracts with other distributors by which they were given certain territories in which to sell ice. The agreement provided that the manufacturer would "sell" ice to the distributor who would "buy" it at certain prescribed prices and sell it at retail at "such reasonable prices as shall yield a reasonable profit unto the Distributor, and in no event at a minimum price lower than that for which the Manufacturer itself sells ice at retail to the same classes of trade as served by the Distributor, as set forth * *" on current schedules. The agreement provided it was to continue for a five year period; that it was not assignable without the manufacturer's consent; and that if the distributor desired to sell his "ice merchandising and distributing business," the manufacturer was to be given ten days notice and an option to purchase at the terms offered by any prospective purchaser. The agreement provided that the distributor was to give his "faithful, active and conscientious personal attention to the sale and distribution" of ice in his own territory. It was provided, also, that he was not to sell out of his territory. Any failure to comply with the terms of the contract was to be

considered a breach thereof for which the contract might be terminated. The contract provided that each distributor was an independent contractor and that it was not intended to create the "relationship of employee and employer, principal and agent, or that of master and servant."

Defendant Ingram testified that he had distributed ice manufactured by Union Ice Company since 1951; that he had handled no other ice; that he took ice out on one day and paid for it the next morning; that he had no regular hours; that at a time when he had employed others, he had not checked with the company. Police officer Thomas testified that Ingram had signed a statement a few hours after the accident in which he had said that he was employed by the Union Ice Company giving its address and phone number. Paul W. Easton, vice president and general manager of the company, testified (by deposition) that distributors were authorized to use the sign "Union Ice Products" on their trucks; and that after the accident defendant Ingram made a report thereof to some official of the company.

Plaintiff relies principally on the case of *Smith v. Deutsch*, 89 Cal.App.2d 419, 200 P.2d 802, in support of his theory that the evidence of agency was sufficient to submit the issue to the jury. Defendant ice company relies upon the case of *Mountain Meadow, etc., v. Industrial Accident Comm.*, 25 Cal.App.2d 123, 76 P.2d 724, as negating the agency relationship. These cases will be discussed.

In the *Smith* case, *supra*, plaintiff was struck by a taxicab painted in the distinctive colors adopted by the cab company for cabs operated by the association. The words "War Veterans Taxicab" [89 Cal.App.2d 419, 200 P.2d 803] were painted on the sides of each cab. It was held that this evidence was sufficient evidence of ownership. An officer of the War Veterans Taxicab Association testified that the association never had a franchise in Los Angeles; that it owned no cabs; that it had no stands from which cabs were dispatched; that it did not direct cabs to any location; that it did not receive a percentage of what the drivers re-

ceived in revenue; that members operated their own cabs; that the driver of the cab in question was not a member of the association. Other evidence showed that the driver drove the cab with the knowledge and consent of defendant association. After the accident, an association supervisor's car drove to the scene, showed his card to police officers and made measurements, etc.; he remained until a tow car removed the taxicab. It was noted by the court that the by-laws of the association showed that the association exercised powers of control over the drivers and that one of the grounds for expulsion of members was the "inability to perform the duties for which the member of this association was expressly employed to do." The court relied on the case of *Cal-las v. Independent Taxi Owners' Ass'n, Inc.*, 62 App.D.C. 212, 66 F.2d 192, in which the "situation [was] almost identical with that in the instant case that the liability of the defendant was a question of fact to be determined by the jury; that it was not a question of law; that plaintiff's case rested on the presumption of ownership arising from the fact that the cab bore its name and colors; that the presumption was evidence and was sufficient to take the case to the jury." The court concluded that the evidence was so complete as to leave no doubt that Deutsch was operating under the direction and control of defendant association. In the case at bar there is no question concerning the ownership of the truck—the evidence is without conflict that it was owned by defendant Ingram.

In the *Mountain Meadow* case, *supra*, there was a contract between the Mountain Meadow Creameries, called the Producer, and one Dodge, called the Distributor. The producer granted to the distributor the right to sell dairy products in a certain territory; the distributor paid cash on delivery of the products to him; the distributor was required to purchase and maintain a delivery truck and to wear uniforms. The contract provided that it was not intended to create the relationship of principal and agent between the producer and the distributor. The contract provided that it might be terminated by giving written notice. The court said: "When we take the contract by its

four corners and construe it as a whole, the conclusion is inescapable that the Mountain Meadow Creameries placed a milk route in possession of Dodge; that Dodge was required to purchase his supplies from the corporation and deliver them to the consumers within the district allotted to him. The corporation occupied the position of a wholesaler who furnished Dodge, a retailer, with an initial list of customers and sold him merchandise at wholesale prices. Dodge, the retailer, delivered these supplies to the customers and collected the retail prices from them." 25 Cal.App.2d at page 127, 76 P.2d at page 726. The termination clause in the contract was construed by the court as not equivalent to the right of discharge possessed by an employer.

[8] It appears to us that the Mountain Meadow case is more nearly analagous to the one under consideration than is the Smith case. In the case at bar, the contradicted facts show a wholesaler-retailer relationship. The only evidence to the contrary is Ingram's statement to the officer that he was "employed" by the Union Ice Company. In *Fesler v. Rawlins*, 43 Cal. App.2d 541, 544, 111 P.2d 380, 382, it was said: "It is axiomatic that agency cannot be established by the declarations of the agent not under oath or in the presence of the principal. As stated in 1 Cal.Jur. 698, 'if the rule were otherwise any rogue could use the name of an honest man to facilitate his roguery'." See, also, *Mechem Outlines Agency*, 3d Ed., § 112, p. 68.

[9] It follows that the nonsuit was improperly granted as to defendant Ingram in that the evidence was sufficient on the issue of his negligence to permit the submission of the cause to the jury. The nonsuit as to the defendant Union Ice Company was properly granted in that there is no evidence of sufficient substantiality on the issue of agency to have permitted the cause to go to the jury.

The judgment in favor of defendant Ingram is therefore reversed, and the judgment in favor of defendant Union Ice Company is affirmed.

GIBSON, C. J., and SHENK, EDMONDS and TRAYNOR, JJ., concur.

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

Harold Dean KINMAN, Defendant and Appellant.
Cr. 5360.

District Court of Appeal, Second District,
Division 1, California.

July 19, 1955.

Rehearing Denied Aug. 1, 1955.

Hearing Denied Aug. 17, 1955.

Prosecution for assault by means of force likely to produce great bodily injury. The Superior Court, Los Angeles County, Allen T. Lynch, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Doran, J., held that evidence that victim had four loose teeth, two black eyes, two cuts requiring stitches, and large bruise, sustained finding that attack had resulted in great bodily injury.

Affirmed.

1. Assault and Battery ⇨92

In prosecution for assault by means of force likely to produce great bodily injury, evidence that victim had four loose teeth, two black eyes, two cuts requiring stitches, and a large bruise, sustained finding that attack had resulted in great bodily injury.

2. Assault and Battery ⇨55

One may be guilty of assault by means of force likely to produce great bodily injury although attack is made by use of hands or fists.

3. Assault and Battery ⇨95

What force is likely to produce great bodily injury is a question of fact to be determined by jury.

4. Assault and Battery ⇨55

Whether a fist would be likely to produce great bodily injury is to be determined by force of impact, manner in which it was used and circumstances under which force was applied.

5. Criminal Law §27, 749

Statute defining offense of assault by means of force likely to produce great bodily injury provides for punishment either in penitentiary or county jail and if defendant is sentenced to penitentiary, offense is a felony, and if sentenced to county jail, a misdemeanor, and whether offense is punishable in penitentiary or county jail is question for trial court. Pen.Code, § 245.

Matthews & Hill, John J. Hamilton, Los Angeles, of counsel, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from "the judgment and sentence".

Appellant was charged by information with assault by means of force likely to produce great bodily injury committed upon Irma Kinman. The jury returned a verdict of guilty and defendant was sentenced to the County Jail for nine months. Mrs. Kinman was divorced from appellant in 1946.

As recited in appellant's brief, Mrs. Kinman arrived home about 4:45 p. m. as was her custom, " * * * she walked about four steps into the kitchen; Mr. Kinman walked out of dining room and turned to face her; she said 'Hello, how are you; I heard you were getting out today'. 'Then I was hit'. 'I guess his fist'; to her knowledge there was no one else present. 'He hit me and I fell down'. 'Where did he hit you?' 'Right in the face. Then I have a vague recollection of being kicked and sort of saying 'Please don't do that'.' She 'must have gotten up and wandered in the hall'.—

"She had not noticed anything in defendant's hands; she does not remember being struck more than one blow; she 'vaguely' remembered the kick; he tore her clothes; her eyes were bloody; she was taken to Santa Monica Emergency hospital; her head was x-rayed; she had four front upper teeth loosened and two black eyes and at trial she had a scar on bridge of nose; the nose had been cut and the doctors

sewed it, and also a cut over right eye; each required two stitches; she also had bruise at base of spine about four inches in diameter. Photographs of witness, taken afterwards on April 19, are Peoples Exhibits 1 and 2; her sweater, Exhibit 3, and dress in Exhibit 4; witness weighed about 90 pounds, is 5 feet tall; defendant weighed usually around 185 lbs., and she thinks he is about six feet one; * * *."

Also, " * * * in the testimony of officer Leo C. Depres, he testified defendant told him 'I saw her in there so I just punched her in the mouth'. I asked him the reason—and he said 'Well one of her boys friends whacked my kid around so I just kicked the hell out of her'—Again: Question by Mr. Matthews: 'Officer, in substance the defendant told you, did he not, he came home and he found out his wife's boy friend was whacking the hell out of his kid? He couldn't find the boy friend, so he took it out on his wife?' A.—'That is correct sir'. The defendant testified on this point that a playmate of his son had told defendant that 'Irma's boy friend beat Steele' (his son). 'I wound up punching her in the eye'. Officer Depres also testified he noticed a slight abrasion or laceration on the first knuckle joints of the index and middle fingers of defendant's left hand and a slight abrasion of the index finger of defendant's right hand."

It is contended on appeal that "The evidence is not sufficient to support the verdict." In this connection appellant argues, "The turning point in this case is: Does the entire picture here show—from the nature and extent of the injuries sustained—"Great Bodily Injury"."

It is further argued, " * * * that the facts here undoubtedly show what should be considered to be a case of battery inasmuch as it is quite apparent that there is no serious or permanent injury inflicted and that the Court would have been well justified in reducing the crime to assault and battery rather than the more serious felony charge.

"The evidence does not disclose exactly what force was used and the only person who was qualified to testify as to the num-

ber of blows struck has reduced the striking to one blow, and a nebulous or hazy conclusion that she might have been kicked. However, nothing positive was testified to by the complaining witness in this case."

[1] Respondent, on the contrary, argues that, "* * * the jury could and did reasonably conclude that a blow and a kick delivered without warning by a man the size of the appellant to a woman the size of Mrs. Kinman, as shown by the evidence, were forces likely to produce great bodily injury to her. From the evidence that she had four loose teeth, two black eyes, two cuts requiring stitches, and a large bruise, the jury could reasonably find that the attack had in fact resulted in great bodily injury, which finding supported their conclusion that the force which had been used was likely to produce such injury."

[2-4] There are many cases on the subject, for example, "Repeatedly the courts of this state have held that one may be guilty of assault by means of force likely to produce great bodily injury although the attack is made by the use of the hands or fists. *People v. Hinshaw*, 194 Cal. 1, 227 P. 156; *People v. Kimmerle*, 90 Cal.App. 186, 265 P. 525; *People v. Blake*, 129 Cal. App. 196, 18 P.2d 399; *People v. Nudo*, 38 Cal.App.2d 381, 385, 101 P.2d 162. What force is likely to produce great bodily injury is a question of fact to be determined by the jury. *People v. Nudo*, supra." *People v. Bumbaugh*, 48 Cal.App.2d 791, 797, 120 P.2d 703, 706.

"Whether a fist would be likely to produce such injury is to be determined by the force of the impact, the manner in which it was used and the circumstances under which the force was applied." *People v. Score*, 48 Cal.App.2d 495, 498, 120 P.2d 62, 65.

[5] Section 245 of the Penal Code provides for punishment either in the penitentiary or the County Jail. If the defendant is sentenced to the penitentiary, the offense is a felony, if sentenced to the County Jail, a misdemeanor. Here the record is a misdemeanor conviction. Whether the offense is punishable in the penitentiary or the

County Jail is a question for the trial court to decide.

That the evidence is sufficient to support the verdict there is no question. An examination of the record reveals no prejudicial errors.

The judgment is affirmed. The attempted appeal from the sentence is dismissed.

WHITE, P. J., and DRAPEAU, J.,
concur.



134 Cal.App.2d 622

Michael D. JEFFERS, Plaintiff and
Appellant,

v.

SCREEN EXTRAS GUILD, Inc., et al.,
Defendants,

Leo Abbey, Claire Andre, George Barton,
Louise Bates, Chris Willowbird, Willie
Bloom, Spencer Chan, Ben Corbett, Harry
"Doc" Evans, Art Flavin, Bess Flowers,
Victor Groves, Don House, Kenner G.
Kemp, Louise Lane, Rita Leonard, Tina
Menard, William H. O'Brien, Rose Plumer,
Snub Pollard, Bobby Priest, George Sow-
ards, and Florence E. Wix, Respondent
Respondents.

Michael D. JEFFERS, Plaintiff and
Appellant,

v.

SCREEN EXTRAS GUILD, Inc., et al.,
Defendants,

Richard H. Dick GORDON, Franklyn Far-
num, Beulah Parkington, Jeffrey Sayre
and Edd X. Russell, Respondents.

Civ. 20550, 20926.

District Court of Appeal, Second District,
Division 2, California.

July 28, 1955.

Libel action. The Superior Court, Los Angeles County, James G. Whyte, J., entered orders granting \$100 to cover counsel

fees to each of thirty-one successful defendants, and plaintiffs appealed. The District Court of Appeal, McComb, J., held that sufficiency of an affidavit must be tested by same rules as those applicable to oral testimony.

Affirmed.

See also 107 Cal.App.2d 253, 237 P.2d 51.

1. Costs ⇨207

Where each of thirty-one prevailing defendants in libel action filed verified cost bills claiming \$100 for each defendant as attorney's fees, and motion to tax cost was then made, plaintiff's affidavits, which were intended to show that defendants had not in fact incurred any attorney's fees, but which contained hearsay statements without evidentiary value, were properly stricken.

2. Affidavits ⇨18

Evidence ⇨318(7)

An affidavit made upon information and belief is hearsay and not proof of facts stated therein.

3. Affidavits ⇨18

Sufficiency of an affidavit must be tested by same rules as those applicable to oral testimony.

4. Libel and Slander ⇨129

Each of the thirty-one defendants, who prevailed in libel action, and who filed verified cross bills claiming \$100 for each of themselves as attorney's fee, were entitled to have taxed as cost \$100 attorney's fees for each, in absence of competent evidence on part of plaintiffs to overcome prima facie case made by such defendants that they had each incurred liability for such fees. West's Ann.Code Civ.Proc. § 836.

5. Costs ⇨207

Verified memorandum of cost was prima facie evidence that cost claimed had been necessarily incurred. West's Ann.Code Civ.Proc. § 836.

6. Libel and Slander ⇨129

To be entitled to recover attorneys' fees, successful defendant in libel action

must show that he has employed an attorney to defend against the action filed and that he has paid or agreed to pay an amount in at least the sum of \$100 for such services. West's Ann.Code Civ.Proc. § 836.

Perry Bertram, Los Angeles, for appellant.

Gilbert, Nissen & Irvin, Los Angeles, for respondents.

McCOMB, Justice.

Two appeals have been consolidated from orders granting \$100 to cover counsel fees to each of 31 successful defendants in an action for alleged libel.

Facts: Each of 31 prevailing defendants were members of defendant Screen Extras Guild, Inc., at the time of the bringing of an action for libel.

Following a judgment in favor of defendants, cost bills were filed and a motion to tax costs was then made. In support of this motion plaintiffs filed three affidavits, one of Attorney Maury, which was "made entirely upon information and belief," and two others, one by Attorney Bertram and another by Walter Bacon. These affidavits were based upon hearsay statements. The purpose of these affidavits was to show that defendants had in fact not incurred any attorney's fees.

The court struck the affidavits as irrelevant, immaterial, founded upon hearsay and based upon information and belief.

[1,2] *Questions:* First: *Did the trial court err in striking the affidavits in support of the motion to tax costs?*

No. An examination of the affidavits discloses that the statements therein were upon information and belief or hearsay evidence. Hence they were devoid of any evidentiary value. An affidavit made upon information and belief is hearsay and not proof of the facts stated therein. (Kellett v. Kellett, 2 Cal.2d 45, 48 [1], 39 P.2d 203; Pratt v. Robert S. Odell & Co., 63 Cal.App. 2d 78, 82 [2], 146 P.2d 504; Moore v. Thompson, 138 Cal. 23, 26, 70 P. 930.)

[3] The rule is also established that the sufficiency of an affidavit must be tested by the same rules as those applicable to oral testimony. (*Bank of America National Trust & Savings Ass'n v. Williams*, 89 Cal. App.2d 21, 23 [2], 200 P.2d 151.)

It is clear that the hearsay statements in the affidavits have no evidentiary value and the trial court correctly struck the affidavits from the record.

[4] Second: *Were defendants entitled to have taxed as costs \$100 attorneys' fees?*

Yes. If a libel action is dismissed or defendant recovers judgment he shall be allowed \$100 to cover counsel fees in addition to other costs. (Code Civ.Proc. sec. 836.)

[5] In the present case counsel filed verified cost bills in which they claimed \$100 for each defendant as attorney's fees. A verified memorandum of costs is prima facie evidence that the costs claimed have been necessarily incurred. (*Fay v. Fay*, 165 Cal. 469, 475, 132 P. 1040; *Meyer v. City of San Diego*, 132 Cal. 35, 36, 64 P. 124; *Murphy v. F. D. Cornell Co.*, 110 Cal.App. 452, 454[2], 294 P. 490.)

It thus appears that defendants have made a prima facie case in support of their claim that they each incurred liability for attorneys' fees in the sum of \$100, and that this prima facie evidence was not overcome by competent evidence of plaintiffs.

[6] In view of this finding of the trial court, supported by competent evidence the requirements set forth in *Wheatland v. Maloney*, 110 Cal.App. 288, 294 P. 499, that as a prerequisite to recovering attorneys' fees by a defendant in a libel action, two facts must be shown: (1) that he has employed an attorney to defend against the action filed, and (2) that he has paid or agreed to pay an amount in at least the sum of \$100 for such services has been met in light of the record before this court.

Affirmed.

MOORE, P. J., and FOX, J., concur.

134 Cal.App.2d 751

In the Matter of Tommy Ray CORRIGAN, a person under the age of twenty-one years.

In the Matter of Christine Joyce CORRIGAN, a person under the age of twenty-one years.

In the Matter of Patricia Ann CORRIGAN, a person under the age of twenty-one years.

Rita Jane CORRIGAN, Respondent and Appellant,
v.

Frank A. COLSTON, Petitioner and Respondent.

Civ. Nos. 20759-20761.

District Court of Appeal, Second District,
Division 2, California,
Aug. 2, 1955.

Probation officer filed petitions to have minor children declared wards of the Juvenile Court, on ground that children had no parent or guardian capable of exercising parental control, and the mother of the children resisted the petitions. The Superior Court of Ventura County, George Francis, J., entered orders and judgments adverse to the mother, and she appealed. The District Court of Appeal, Fox, J., held that evidence sustained finding that mother was incapable of exercising proper parental control over the children and that their welfare required that their care and custody be taken from her.

Judgments and orders affirmed.

1. Infants ☞16.15

Findings of juvenile judge in Juvenile Court proceedings will not be disturbed on appeal where there is substantial evidence to support them.

2. Infants ☞16.1

In wardship proceedings, it is the welfare of the child that is of paramount concern.

3. Infants ☞16.10

Where Juvenile Court has found, on substantial evidence, that welfare of child

requires that his custody be taken from his parents, Juvenile Court may make such an order. Welfare and Institutions Code, § 739(d).

4. Infants ⇨16.15

In reviewing findings of Juvenile Court that welfare of child requires that his custody be taken from his parents, the District Court of Appeal must indulge all reasonable inferences in support thereof. Welfare and Institutions Code, § 739(d).

5. Infants ⇨16.8

On petitions by probation officer to have minor children declared wards of the Juvenile Court, on ground that children had no parent or guardian capable of exercising parental control, Juvenile Court was entitled to take into consideration failure of mother of children to protect the children from serious mistreatment by their father, in determining whether mother was capable of exercising proper parental control. Welfare and Institutions Code, § 700(b).

6. Infants ⇨16.8

On petitions by probation officer to have minor children declared wards of the Juvenile Court, on ground that children had no parent or guardian capable of exercising parental control, Juvenile Court could consider fact that mother of children had sought to deceive the court on two occasions by making statements under oath with knowledge that they were not true. Welfare and Institutions Code, § 700(b).

7. Infants ⇨16.8

On petitions by probation officer to have minor children declared wards of the Juvenile Court, on ground that children had no parent or guardian capable of exercising parental control, evidence sustained finding of Juvenile Court that mother was incapable of exercising proper parental control over the children and that their welfare required that their care and custody be taken from her. Welfare and Institutions Code, § 700(b).

8. Infants ⇨16.1

It is not necessary that conditions be so bad or so notorious as to become a public scandal before Juvenile Court may step

in for protection and welfare of children. Welfare and Institutions Code, § 700(b).

9. Infants ⇨16.1

The capability of a parent to exercise proper parental control of a child is largely determined by external standards and the likely effect continued misconduct will ultimately have on the welfare of a child as it grows up and realizes the significance of such misbehavior rather than the immediate effect on the child, particularly where the child is very young. Welfare and Institutions Code, § 700(b).

10. Infants ⇨16.1

Conduct of parent determines whether parent is capable of exercising proper parental control of children sought to be declared wards of the Juvenile Court. Welfare and Institutions Code, § 700(b).

11. Infants ⇨16.8

On petitions by probation officer to have minor children declared wards of the Juvenile Court, on ground that children had no parent or guardian capable of exercising parental control, Juvenile Court could properly consider mode of living and conduct of mother of children the past few months prior to the hearing as well as up to the time of the hearing. Welfare and Institutions Code, § 700(b).

12. Infants ⇨16.10

On petitions by probation officer to have minor children declared wards of the Juvenile Court, on ground that children had no parent or guardian capable of exercising parental control, Juvenile Court was not required to make specific findings, and general finding that all of the allegations of the petitions were true was sufficient to show facts on which the court exercised its jurisdiction to declare the minors wards of the Juvenile Court. Welfare and Institutions Code, §§ 700(b), 735.

13. Infants ⇨16.10

On petitions by probation officer to have minor children declared wards of the Juvenile Court, on ground that children had no parent or guardian capable of exercising parental control, finding of Juvenile Court that the welfare of the minor children required that their custody be taken

from both parents was in strict compliance with statutes. Welfare and Institutions Code, § 739(d).

Thomas A. Wood and Herbert C. Meade, Los Angeles, for appellant.¹

Roy A. Gustafson, Dist. Atty., Bruce A. Thompson, Deputy Dist. Atty., Ventura, for respondent.

FOX, Justice.

Frank A. Colston, as Probation Officer, filed separate petitions in the Juvenile Court of Ventura County seeking to have the three minor children of Ray Benard Corrigan and his wife, Rita Jane, declared wards of the Juvenile Court under subdivisions (b), (d) and (k) of section 700² of the Welfare and Institutions Code. Mr. Corrigan made no denial and offered no defense. Mrs. Corrigan, however, resisted the petitions. The court found the allegations in each petition to be true and found also that the welfare of each child required that custody be taken from its parents. In the judgments the court ordered that each child be made a ward of the juvenile court and committed each child to the care of the probation officer. Mrs. Corrigan appeals from the judgments and orders.

Appellant correctly says "The only question before this court is whether the said judgments of the lower court are sustained by the record." It is therefore necessary to delineate in some detail the vicissitudes and misfortunes that befell these children for some time prior to the hearing in the trial court.

The Corrigan family lived on a ranch, "Corriganville," in Ventura County until the separation of the father and mother on March 28, 1954. On April 10th the mother,

with the children, registered at the Cottage Lane Motel in Los Angeles under the name of "Johnson." Moses Stiltz, a friend of the mother, was present at the time. While the mother was at the motel, Stiltz saw her almost every day and night. The landlady referred to Stiltz as "Mr. Johnson" in his presence and he did not inform her of his true name. The mother told the children that their lives were in danger and that they must tell people their name was "Johnson." The children referred to themselves as "Johnson" and referred to Stiltz as "daddy."

On about May 11, 1954, the mother, Stiltz and the children left the Cottage Lane Motel. The mother and Stiltz lived together with the children in a motel in Santa Barbara for a period of approximately a week. They were registered as Mr. and Mrs. Stiltz. The mother and Stiltz slept together in the same bed and engaged in sexual intercourse on "numerous occasions." The children were in close proximity during these times.

On May 18th, the mother, Stiltz and the children returned to Cottage Lane Motel. On May 27th and 28th Stiltz remained over night in the motel unit occupied by the mother. On about May 30th the mother and Stiltz were apprehended in bed together, both substantially unclothed. The children were in the next room. The mother testified she did not love Stiltz, but engaged in sexual relations with him because she felt obligated to him. At the time of the hearing on September 28th she still felt obligated to him.

The children, who were respectively 7, 8 and 9 years of age when the petitions herein were filed, were taken out of school by the mother on March 28, 1954, and not returned during that school year.

1. Since the briefs were filed, Moore, Webster, Lindelof & Hughes have been substituted as attorneys for appellant.

2. Section 700 of the Welfare and Institutions Code provides that the jurisdiction of the juvenile court extends to any person under the age of 21 years who comes within any of the following descriptions: "(b) * * * who has no parent or guardian * * * capable of exercising

proper parental control; * * *.

* * * * *

"(d) Whose home is an unfit place for him, by reason of neglect, cruelty, or depravity of either of his parents, * * *.

* * * * *

"(k) Who is * * * in danger of leading * * * [a] lewd, or immoral life."

During the course of the hearing on these petitions on September 28, 1954, the mother of the children admitted that while she was under oath she had not told the truth on two previous occasions.

The evidence indicates that during the time the father and mother lived together on the ranch the father mistreated the children physically and sexually. The mother admitted knowing of such mistreatment. It was only after Stiltz told her that if she did not report this matter to the district attorney he would, that she made such a report but she refused to sign a complaint against the father or otherwise "press charges." The only other protective action she took was to advise the girls to stay out of their father's bed.

There was testimony that the mode of living to which the mother subjected the children caused them to become tense and emotionally upset.

The father and mother were engaged in a bitterly contested divorce suit.

[1-4] In juvenile court proceedings, as in other matters, the findings of the juvenile judge will not be disturbed on appeal where there is substantial evidence to support them. In re Adoption of Ayers, 116 Cal.App.2d 55, 58, 253 P.2d 65. In wardship proceedings it is the welfare of the child that is of paramount concern, In re Halamuda, 85 Cal.App.2d 219, 226, 192 P.2d 781, and when the court has found, on substantial evidence, that the welfare of the child requires that his custody be taken from his parents, the court may make such an order. Welfare and Institutions Code, § 739(d). In reviewing such findings this court must indulge all reasonable inferences in support thereof.

[5] Applying these principles to the conduct and behavior-pattern of appellant, it cannot be said, as a matter of law, that the findings and judgments of the juvenile court are lacking in evidentiary support. Mrs. Corrigan was aware of the father's serious mistreatment of the children for some time while they lived at the ranch, yet she took no decisive and effective action to assure their future protection. It apparently was with hesitation and reluctance

that she reported the father's misconduct at all to the authorities for it was only after Stiltz threatened to report the matter that she contacted the district attorney's office. But then she failed to follow through with any effectiveness because of her unwillingness to sign a criminal complaint or otherwise press the charges. The juvenile judge was entitled to take appellant's conduct and failure to take decisive action to protect the children from serious mistreatment into account in determining whether or not she was capable of exercising proper parental control. In re Halamuda, supra, 85 Cal.App.2d at pages 225-226, 192 P.2d 781.

Appellant's capacity for providing proper parental control for her children does not seem to have improved upon leaving Corriganville. Almost immediately she entered into an adulterous relationship with Stiltz. She caused the children to believe their lives were in danger and instructed them to give a false name and to refer to their relation to Stiltz in an untruthful fashion. She moved from one place to another, keeping the children out of school. She was unable to provide a home for them where they could "live peacefully and grow into normal youth." See, In re Halamuda, supra, 85 Cal.App.2d at page 225, 192 P.2d at page 784. It is understandable that their nomadic life of moral poverty and insecurity caused the children to be tense and emotionally upset.

[6] Appellant's instruction of her children in the technique of deception and untruthfulness appears to be in harmony with her own standards and practices for she sought to deceive the court on two occasions by making statements under oath that she knew were not true. This was a circumstance to be considered by the trial judge together with all the other evidence in arriving at his ultimate decision. See In re Guardianship of Jones, 86 Cal.App.2d 35, 39, 194 P.2d 141.

[7] Appellant's inability to do anything substantially to protect her children from the mistreatment of their father while she lived with him; her unconventional mode of living after she separated from him; and her lack of basic concepts of good citi-

zenship in training her children, furnish ample support for the court's finding that she was incapable of exercising proper parental control over her children and that their welfare required that their care and custody be taken from her.

[8-10] Appellant concedes that she conducted herself "imprudently" with Stiltz but argues there was no evidence "that said conduct was in the presence of the children, or that the children were aware of said conduct or were in any way scandalized by it." It is no doubt true that the children did not have actual knowledge of the admitted intimacies between their mother and Stiltz, but they knew he was occupying the same living quarters with their mother, and their instruction to call him "daddy" would certainly indicate a close family relationship. Furthermore, it is not necessary that conditions be so bad or so notorious as to become a public scandal before a juvenile court may step in for the protection and welfare of the children. The capability of a parent to exercise proper parental control is largely determined by external standards and the likely effect continued misconduct will ultimately have on the welfare of a child as it grows up and realizes the significance of such misbehavior rather than the immediate effect upon the child, particularly where it is very young. It is the conduct of the parent which determines whether he or she is capable of exercising proper parental control. Here the conduct of appellant was such that the trial judge could reasonably find her incapable of exercising proper parental control even though the children were not "scandalized" by her misbehavior.

[11] Appellant also argues that her mode of living and behavior-pattern at the time of the hearing should alone be considered in passing on her capacity to provide proper parental control of her children. In this connection she points out that immediately after the raid on May 30th she took up residence with her children in San Jacinto, California, as a result of arrangements made by her then counsel; that she came back to a motel in Ventura sometime in June on account of the

court proceedings and that she has since been residing with a family in Reseda, California. Her counsel advised the manager of the Ventura motel "to keep Mr. Corrigan out of there, and if Mr. Stiltz showed up, to keep him out" too. Also, counsel testified that "from the moment of the raid up until this time she has never been out of anybody's sight so that anything could happen or any claim could be made." Appellant further asserts that she has not seen Stiltz since the raid except in the court room. As a part of her argument, appellant contends it was improper for the trial judge to take into consideration her prior conduct in passing on her capacity to provide proper parental control for her children. It was, of course, proper to consider her mode of living and conduct up to the time of the hearing, but it was also proper for the trial judge to take into account the other incidents referred to herein—all of which had occurred during the past few months. In *Dupes v. Superior Court*, 176 Cal. 440, 168 P. 888, 889, a juvenile court matter, it is said, at page 442, that "In passing upon the question regarding the fitness or unfitness of the mother, the court will be aided by evidence of her conduct in the past * * *." To the same precise effect is *In re Holt*, 121 Cal.App.2d 276, 279, 263 P.2d 50. See, also, *In re Guardianship of Coughlin*, 129 Cal.App.2d 290, 276 P.2d 841.

[12] Appellant makes the incidental argument that she was entitled to specific findings on the several allegations in the petitions. The juvenile court law does not require the making of specific findings. The juvenile judge did, however, make a written finding in each of these cases in the following language: "The court finds that *all* of the allegations of the petition are true * * *" (Emphasis added.) This general finding is sufficient to show the facts upon which the court exercised its jurisdiction to declare the minor a ward. Welfare & Institutions Code, § 735; *In re Ortiz*, 74 Cal.App.2d 810, 814-815, 169 P.2d 664.

[13] In support of the portion of the judgment depriving appellant of the custody and control of each of the children

the court found that "the welfare of the minor requires that her [or his] custody be taken from both parents." This finding is in strict compliance with section 739(d), Welfare and Institutions Code. In re Ortiz, supra, 74 Cal.App.2d at page 815, 169 P.2d 664; In re Holt, supra.

Since the evidence is sufficient to establish that the Corrigan children come within subdivision (b) of section 700, Welfare and Institutions Code, it is unnecessary to consider whether they also come within subdivisions (d) and (k) of that section for, in any event, the judgments must be affirmed.

Each judgment and order is affirmed.

MOORE, P. J., and McCOMB, J., concur.



Gary B. WILLIAMS, Plaintiff and
Appellant,

v.

ROBINSON VAN LINES et al., Defendants
and Respondents.

Civ. 16382.

District Court of Appeal, First District,
Division 2, California.

July 22, 1955.

Rehearing Denied Aug. 19, 1955.

Hearing Granted Sept. 15, 1955. *

Caretaker, who was employed by owner of race horses to care for horses while they were transported by truck, brought action against trucking companies to recover for injuries sustained by caretaker when he fell through open door of truck. The Superior Court, County of Alameda, A. J. Woolsey, J., entered judgment adverse to caretaker, and caretaker appealed. The District Court of Appeal, Nourse, P. J., held that admission of contract between owner of horses and trucking companies relieving trucking companies from

liability to owner of horses for injuries sustained by employees of owners of horses and refusal to give requested instruction of caretaker that contract was not binding on caretaker did not constitute prejudicial error.

Judgment affirmed.

Dooling, J., dissented.)

1. Contracts ⇐188

One is not bound to a contract, to which he is not a party, unless he voluntarily assumes liability under it.

2. Carriers ⇐307(5)

Caretaker, who was employed by owner of race horses to care for horses while they were being transported by truck, was not bound by contract between owner of horses and trucking companies relieving trucking companies from liability to owner of horses for injuries to owner's employees.

3. Appeal and Error ⇐1050(1), 1067

In action against trucking companies by caretaker, who was employed by owner of race horses to care for horses while they were transported by truck, to recover for injuries sustained by caretaker when he fell through open door of truck, admission of contract between owner of horses and trucking companies relieving trucking companies from liability to owner of horses for injuries sustained by employees of owner of horses, and refusal of court to give requested instruction of caretaker that contract was not binding upon caretaker did not constitute prejudicial error.

Robert A. Kaiser, Oakland, for appellant.

Clark & Heafey, Schofield & Hannegan, Oakland, Gerald P. Martin, Oakland, of counsel, for respondents.

NOURSE, Presiding Justice.

This is an action to recover damages for personal injuries. Plaintiff was employed by one Hirsch with four other men as caretakers of a number of race horses being transported from Arcadia, California, to Pleasanton under contract between the

* Opinion vacated 291 P.2d 453.

owner of the horses and the trucking corporations. By agreement the owner of the horses was permitted to send five caretakers along with the horses without extra charge. The complaint alleges that through the negligence of the "defendants" the door of the truck in which plaintiff was riding was not locked and that plaintiff fell through the open door to the pavement causing the injuries. The reference to the defendants is to the two names of the trucking concern. Hirsch, the owner of the horses, and the employer of the caretakers was not sued.

The cause was tried to a jury and resulted in a verdict for the defendants. Plaintiff's motion for a new trial was denied. The appeal is from the judgment alone. The record discloses a most peculiar situation. There is not a word of evidence tending to prove the most essential element of the case—the negligence of any of the defendants. The agreed statement relates to the evidence offered by one of the defendants—the shipper—of his contract with the owner of the horses relating to his obligations and liability—to the owner—for injuries incurred by the horses in the course of the shipment. In the settled statement it is recited that there was sufficient evidence introduced to support a verdict for either party. But nowhere does it appear what that evidence was. There is nothing in the record tending to show how the plaintiff was injured, whose duty it was to see that the doors of the van were kept locked, or who was to blame for the door being open. Nor was there any evidence showing the extent of the injuries claimed by plaintiff.

[1, 2] The only attack made by the appellant relates to the refusal of the trial court to give his proposed instruction relating to the contract between the defendants and the shipper relieving the defendants from liability to the owner of the horses for injuries to the owner's employee. These proposed instructions would

merely inform the jury that the contract between the two defendants and Hirsch was not binding on the plaintiff. This is a mere commonplace. No one is bound to a contract to which he is not a party unless he voluntarily assumes liability under it. The instances where a liability is implied by the circumstances of the particular case are not present here. The contract merely freed Hirsch from liability to the named defendants—the two carriers. It was of course not binding upon the plaintiff. But the plaintiff did not sue Hirsch, hence any matter relating to Hirsch's negligence was not within the issues.

[3] For these reasons we conclude that the admission of the contract in evidence as well as the refusal to give the proposed instruction was not prejudicial.

Judgment affirmed.

KAUFMAN, J., concurs.

DOOLING, Justice.

I dissent. The Rules on Appeal are designed to encourage the use of short records wherever possible. See *Alkus v. Johnson-Pacific Co.*, 80 Cal.App.2d 1, 11 et seq, 181 P.2d 72. Here the only question argued by appellant concerns the effect of the contract between respondents and the shipper and the refusal of the court to give an admittedly proper instruction that such contract could not relieve respondents of liability to appellant for their negligence. To present this question the evidence of respondents' negligence was not necessary so long as the record showed in some fashion that the evidence was sufficient to support a judgment for appellant. The settled statement, which is not attacked by respondents, does this by the recital that there was sufficient evidence introduced to support a judgment for either party. With this recital in the record we are thwarting the purpose of the Rules on Appeal to encourage the use of short records by holding the record insufficient in this particular. (See particularly Rule 52.)

134 Cal.App.2d 572

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Herschel L. BRANCH, Defendant and
Appellant.

Cr. 3095.

District Court of Appeal, First District,
Division 2, California.

July 26, 1955.

Rehearing Denied Aug. 10, 1955.

Hearing Denied Aug. 25, 1955.

Defendant was convicted of possession of a narcotic. The Superior Court, City and County of San Francisco, Eustace Cullinan, Jr., J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Dooling, J., held that fact that defendant accused of violating state narcotics law was arrested by federal officers, whose duty it was to take person arrested without unnecessary delay before nearest available U. S. officer empowered to commit persons charged with offenses against laws of United States, did not preclude state court jurisdiction over such defendant, where federal officers and courts did not in fact ever assert prior jurisdiction over his person.

Affirmed.

1. Courts ☞495

Fact that defendant accused of violating state narcotics law was arrested by federal officers, whose duty it was to take person arrested without unnecessary delay before nearest available U. S. officer empowered to commit persons charged with offenses against laws of United States, did not preclude state court jurisdiction over such defendant, where federal officers and courts did not in fact ever assert prior jurisdiction over his person. West's Ann. Health and Safety Code, § 11500; Fed. Rules Crim.Proc. rule 5(a), 18 U.S.C.A.

2. Criminal Law ☞1037(1)

On appeal from judgment of conviction in prosecution for possession of narcotics, conduct of district attorney complained of by defendant was not open to reviewing court, where no objection had

been made in trial court to his statements and where they were not of such character that admonition of court to jury could not have cured error, if any. West's Ann. Health and Safety Code, § 11500.

3. Criminal Law ☞662(1)

In prosecution for possession of narcotics, defendant was not deprived of any rights because he was not confronted by undisclosed informer who had given federal officers tip on which arrest was made. West's Ann. Health and Safety Code, § 11500.

Harpham & Holt, Albany, by Wilfred J. Harpham, Albany, for appellant.

Edmund G. Brown, Atty. Gen., of the State of California. Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was convicted by a jury of violating section 11500 Health and Safety Code (possession of a narcotic). On the night of July 1, 1954, four federal narcotics agents approached appellant and his wife in the vicinity of Grove and Fillmore Streets in San Francisco. One of the agents testified that as they approached him appellant started to run and tossed something into the street. The agents searched the street and found a bundle of narcotics. The agents impounded appellant's car and took him to the Federal Office Building where he was fingerprinted. After taking him to his apartment, which they searched, the agents took him to the city prison and surrendered him to the custody of the city and county authorities.

This appeal is presented by counsel appointed by this court at appellant's request. Counsel's main argument is that because appellant was arrested by federal officers and because under Fed. Rules Crim.Proc. rule 5(a), 18 U.S.C.A., it is the duty of such officers to take the person arrested without unnecessary delay before the nearest available U. S. Commissioner or other officer empowered to commit persons charged with offenses against the laws of the U. S. the federal courts had ex-

clusive jurisdiction over appellant's person to the exclusion of the courts of the State of California.

[1] While counsel has shown commendable zeal and diligence in the development of this argument it fails to convince us. This is not a contest for jurisdiction over the person between a federal court which first acquired it and a state court later attempting to exercise it in opposition to the federal court, as in *Ableman v. Booth*, 21 How. 506, 62 U.S. 506, 16 L.Ed. 169 and *Tarble's Case*, 13 Wall. 397, 80 U.S. 397, 20 L.Ed. 597, most strongly relied upon by appellant. The federal court here never acquired actual jurisdiction since appellant was never in fact taken before a U. S. magistrate. Whether the federal agents were derelict in their duty in not bringing appellant before a U. S. magistrate is no concern of the state courts. He had committed a crime under state law and he was regularly charged in the state courts with its commission. Whether or not the federal courts could have asserted a prior jurisdiction over his person by reason of his original arrest by federal agents, those courts did not in fact do so. We cannot see how appellant can claim injury by the failure of the federal authorities to assert whatever prior claim to jurisdiction they may have had under the circumstances.

[2] Appellant complains of the conduct of the district attorney in certain particulars. No objection was made in the trial court to the several statements of the district attorney now complained of, and they are not of such a character that an admonition of the court to the jury could not have cured the error if any. They are for this reason not open to appellant on appeal.

[3] One of the agents testified that they were investigating appellant on the night of his arrest because of a tip they had received from an informer. His conviction was based on evidence of the arresting officers that he threw away a package in their presence which was found to contain narcotics. There is no force in the contention that he was deprived of any rights because not confronted by the undis-

closed informer. Additionally, no such contention was made in the trial court, where if at all the informer's identity might have been disclosed.

Appellant is a negro and his wife a caucasian. They were both witnesses. Appellant can have suffered no prejudice by a question, apparently asked in good faith, as to whether an acquaintance whom the wife testified they were on their way to visit when appellant was arrested was "a colored person rather than a caucasian."

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J.,
concur.



134 Cal.App.2d 720

Malcolm Mars DOWNEY, Mildred Sherf and
Ernest Sherf, Plaintiffs and Appellants,

v.

SANTA FE TRANSPORTATION COM-
PANY, a corporation, Defendant
and Respondent.

Civ. 4899.

District Court of Appeal, Fourth District,
California.

Aug. 1, 1955.

Action for injuries to a passenger and death of another passenger in an automobile colliding with defendant railway company's switch engine at a spur track crossing of a highway at night. From a judgment of the Superior Court of San Diego County, C. M. Monroe, J., for defendant notwithstanding a jury's verdicts for plaintiffs, plaintiffs appealed. The District Court of Appeal, Mussell, J., held that defendant's failure to use reasonable care, corresponding to circumstances and commensurate with probable danger to be avoided, in warning highway traffic approaching crossing in direction automobile was traveling, and whether crossing was adequately equipped with warning signs or devices, at

time of accident, were fact questions for jury, and that evidence was sufficient to support verdict.

Judgment reversed.

1. Appeal and Error ⇨907(2)

The District Court of Appeal must presume that evidence not included in record on appeal supports jury's verdict and trial court's judgment.

2. Trial ⇨28(1)

Conditions observed by trier of facts on view of scene of accident involved in action and property bearing on case are independent evidence which may be considered by such trier in arriving at decision.

3. Railroads ⇨350(1)

A railroad operator's negligence is ordinarily a fact question in crossing cases as in other negligence cases.

4. Railroads ⇨312(13)

Conditions respecting ability of traveler on highway to observe train approaching railroad crossing and character of crossing may be basis for conclusion by trier of facts that railroad operator failed to conform to required standard of care respecting warnings of train's approach.

5. Railroads ⇨350(5, 7)

In action for injuries to passenger and death of another passenger in automobile colliding with defendant railway company's switch engine at spur track crossing of highway at night whether defendant failed to use reasonable care, corresponding to circumstances and commensurate with probable danger to be avoided, in warning highway traffic approaching crossing in direction automobile was traveling, and whether crossing was adequately equipped with warning signs and devices, at time of accident, were fact questions for jury.

6. Railroads ⇨348(3)

In action for injuries to passenger and death of another passenger in automobile colliding with defendant railway company's switch engine at spur track crossing of highway at night, evidence was sufficient to support jury's implied finding that defendant

failed to maintain adequate warning signs at crossing.

7. Railroads ⇨350(7)

In action for injuries to passenger and death of another passenger in automobile colliding with defendant railway company's switch engine at spur track crossing of highway at night, whether injured passenger was in position to hear bell or whistle of engine, if sounded, so as to render his testimony that he did not hear either sufficient to raise conflict with positive testimony of members of defendant's train crew that such warnings were given, was fact question for jury.

8. Railroads ⇨312(1)

Persons in charge of switching train owed duty to give notice of engine's approach to and travel over highway at spur track crossing thereof by all warnings reasonably necessary under conditions existing at time and place of collision between automobile and engine at such crossing at night.

9. Railroads ⇨350(7)

In action for injuries to passenger and death of another passenger in automobile colliding with defendant railway company's switch engine at spur track crossing of highway at night, whether persons in charge of train were negligent in performance of their duty to give notice of engine's approach to highway and travel thereover by all warnings reasonably necessary under conditions existing at time and place of accident was fact question for jury.

10. Judgment ⇨199(3.9)

The trial court's rights to set aside jury's verdict and enter contrary judgment is same as court's right to grant nonsuit, so that court should grant motion for judgment notwithstanding verdict for plaintiff only when, disregarding evidence in conflict with plaintiff's evidence, giving such evidence all value to which it is legally entitled, and indulging in every legitimate inference therefrom, court determines that there is no evidence of sufficient substantiality to support verdict.

11. Trial ⇨142

The trial court is not justified in taking case from jury on ground that there is no

evidence of sufficient substantiality to support verdict for plaintiff, unless, as matter of law, no other reasonable conclusion is legally deducible from evidence and any other holding would be so lacking in evidentiary support that reviewing court would be impelled to reverse it on appeal or trial court to set it aside.

12. Railroads ⇨348(1)

In action for injuries to passenger and death of another passenger in automobile colliding with defendant railway company's switch engine at spur track crossing of highway at night, evidence was sufficient to support jury's verdict for plaintiffs.

Augustine, Bryans, Ragen & O'Connor, San Diego, for appellants.

Robert W. Walker, Matthew H. Witteman, Los Angeles, Luce, Forward, Kunzel & Scripps, San Diego, and Leland C. Nielsen, Los Angeles, for respondent.

MUSSELL, Justice.

This action was brought to recover damages as a result of a collision between an automobile and a switch engine owned and operated by the Atchison, Topeka and Santa Fe Railway. Ernest Sherf, Jr., son of plaintiffs Mildred G. Sherf and Ernest Sherf, died as a result of injuries sustained in the accident and plaintiff Malcolm Mars Downey sustained severe cuts and bruises. The case was tried before a jury. Motions for nonsuit and for a directed verdict were denied. The jury returned verdicts for the plaintiffs Mildred G. Sherf and Ernest Sherf, assessing the damages at the sum of \$12,000 and in favor of plaintiff Downey in the sum of \$1,000. After the verdicts were returned and before judgment was entered thereon, defendant made a motion for judgment notwithstanding the verdicts. This motion was granted and plaintiffs appeal from the judgment entered thereon in favor of the defendant.

Appellants contend that the trial court erroneously set aside the verdicts of the jury since there was substantial evidence of defendant's negligence and to support the implied finding of the jury that the

plaintiffs were not guilty of contributory negligence. Defendant concedes in its brief that contributory negligence on the part of Downey and Sherf was not shown as a matter of law. Therefore, the sole issue to be here determined is whether there was substantial evidence that the defendant was negligent.

The accident occurred about 2:00 a. m. on March 20, 1952, on Pacific Highway in the city of San Diego, where this highway is crossed by a spur track belonging to the defendant and leading from its main line into the Convair plant, between Sassafras and Palm Streets. The automobile involved was owned by Dean Russell Myrick and was being driven by him in a southerly direction on Pacific Highway when it collided with defendant's switch engine, which, attached to and leading two box cars, was being backed across Pacific Highway from west to east. Sherf and Downey were guest passengers in the automobile. Sherf was sitting in the front seat next to the driver and Downey in the rear seat at the time of the accident.

Pacific Highway, where it is crossed by the spur track, is a 90-foot, 6 lane, highway, extending northerly and southerly and divided by a raised center island. To the north of the track, approximately 35 feet and on the west side of the highway, there was located a crossarm warning post. This post was directly south of a palm tree, which partially obscured the sign to the view of southbound traffic. About 10 feet north of the spur track, and partially obliterated, there were two parallel white lines on the highway. There was a small circular sign, bearing the letters "R. R." on the west side of the highway, approximately 190 feet north of the track. As shown in plaintiffs' exhibit 10, there are two Convair buildings on the west side of the highway, one south of the track and the other one north of it, the two being approximately 35 feet apart. The spur track runs between the two buildings and to a gate through which trains enter and leave the Convair grounds. There is a pedestrian overpass which crosses the highway about 45 feet south of the track. This overpass has a

clearance of approximately 15 feet and is lighted with 4 electric lights on standards approximately 6 feet high and set on top of the northerly edge of the overpass. There are two street lights on the west side of the highway, one set into the sidewalk about 120 feet to the north of the crossing and the other about 40 feet south of the crossing. Another street light is set into the sidewalk several feet north of the crossing on the east side of the highway. Approximately 300 feet north of the spur track Sassafras Street intersects Pacific Highway from the east and southbound traffic on Pacific Highway is there controlled by electrically operated signals. There is no electrically controlled bell or wigwag signal north of the spur track to warn southbound traffic on the highway of the existence of the crossing.

Myrick was driving south on the highway. When he went through the intersection of Sassafras Street and Pacific Highway the electrically operated traffic signal was green for southbound traffic. He was traveling in the lane next to the center island at a speed of about 35 to 40 miles per hour. On approaching the spur track he applied his brakes and swerved to the left. His car struck the engine approximately 8 feet back from the leading ledge, resulting in the death of Myrick and Sherf and personal injuries to Downey.

William D. Brown, footboard switchman for defendant, testified that he was a member of the switch crew involved in the accident. Before the accident they had been switching on the Convair property west of Pacific Highway. The engine had hold of two cars and was backing up while he rode on the footboard of the leading ledge. The train stopped at the gate to Convair before entering the highway. The headlight of the engine was lit and the automatic bell was ringing. He walked out in the highway with a flare and white lantern and gave the "come ahead" signal. He walked out into the highway in a normal manner into the center of the southbound traffic lanes and north of the tracks. He saw one pair of headlights, southbound, approaching the tracks and they were about two blocks away. He waved the fusee to warn that

car and then proceeded across the highway to stop the northbound traffic. He saw traffic approaching from the south after he had waved the engine on and it started its movement into the track. At that time he again heard the crossing whistle after the engine had started to move. He became aware of an impending crash as he was stopping the northbound traffic. He had preceded the engine about 8 feet as it entered and crossed Pacific Highway and was 3 or 4 feet north of the tracks until he got to the east side of the highway, at which time he crossed to a point 5 to 7 feet south of the tracks and at the approximate east edge of the first northbound traffic lane, where he started to stop the northbound traffic.

William H. Barnet, switchman, testified that as the engine approached the highway he was on the platform of the leading portion of the engine. They stopped at the gate before entering Pacific Highway. It had been raining earlier but it was then clear. The headlight was burning and he heard the automatic bell and air horn while the engine was stopped. He did not leave the platform while the train was stopped but he saw Brown start into the highway waving his lighted fusee signaling the traffic to stop. Brown got 8 or 10 feet into the highway before signaling the engine to start. When it started, Brown continued to swing the fusee, walking across the highway into the northbound traffic lane, staying 8 or 10 feet ahead of the engine as it moved across at about 2 miles per hour. He, Barnet, looked to the north at the gate and could see two or three-tenths of a mile and he continued to look that way until the engine was probably out to the first lane of traffic. He saw one set of lights north beyond Sassafras but did not notice these lights after they got across the first lane of traffic as he was then watching northbound traffic and he had no warning of a collision until the engine stopped. He was aware of Brown's position at all times and Brown had just gotten into the northbound lane with his fusee still lit when the collision took place. The engine stopped instantaneously with the collision, with the drawbar and a portion of the footboard extending

into the inside lane of northbound traffic. When the train stopped he, Barnet, immediately lighted a fusee and started stopping the southbound traffic and turning it around.

John Amon, engineer, testified that he stopped the engine at the gate before entering the highway. The weather was clear, he had the headlight on, he blew the air horn while they were stopped, he blew the whistle and kept blowing it and started into the intersection after Brown gave him the signal. He saw a southbound car coming about 1,000 feet and at that time he, Amon, was just about at the curb. He continued looking to the north until he got into the middle traffic lane and then looked to the south, from which there was traffic approaching. He was going 2 to 3 miles per hour and as the engine was first starting into the northbound traffic lane he heard the squeal of brakes and saw a car coming about 200 feet from the intersection. The automatic bell was operating at all times until after the accident and he continued whistling crossing series as he crossed the highway. The approaching car was traveling from 35 to 50 miles per hour.

Charles L. Olson, fireman, testified that after the train stopped at Pacific Highway Brown proceeded out into it with his white lantern and gave the engine a signal to go ahead; that he could tell the headlight was on because it is a recessed one and he could see the light hit the ground right in front of the engine; that the automatic bell was on and he heard the whistle blow before they started into the highway. As they started out he saw a pair of headlights rounding the curve about two-tenths of a mile north. The engine was traveling at between 2 and 3 miles per hour and the whistle was blowing as they were crossing. He heard the squeal of tires on the car but did not see it after he first observed it two-tenths of a mile away.

Paul Hayes, a police officer, testified that he and another police officer were called to investigate the accident; that as they came south on Pacific Highway they saw flares ahead in the street and a diesel engine of a train broadside across the southbound lanes of Pacific Highway; that they examined

the street and found approximately 45 feet of braking skid in the center southbound lane leading up to the vehicle and also dirt and debris in the street at the tracks. On their arrival all the windows of the car were up, the radio was still on and playing rather loudly. Officer Walker testified that he participated in the investigation of the accident and observed that the ornamental street lights were lit as well as the lights on top of the pedestrian overpass. When he arrived at the scene of the accident he examined the car, found all the windows rolled up and the radio playing. Both he and officer Hayes testified that in their opinion Downey was under the influence of intoxicating liquor.

Downey testified that as they approached the crossing he was sitting in the back seat of the car. He was wide awake and was not sure whether the windows of the car were up or down or whether the radio was playing. Myrick was driving the car in "a good manner" and was not driving fast. The traffic light was green at the Sassafras intersection when they passed through. He did not hear the ringing of a bell of any kind or any whistle or siren and did not hear a warning of any type.

[1] At the close of the evidence the jury was taken to view the premises. As is stated in *Anderson v. State of California*, 61 Cal.App.2d 140, 145, 142 P.2d 88, 90:

"What they saw there is evidence and from its very nature is not incorporated in the written record. We are required to presume that evidence not included in the record supports the verdict and judgment. *Haase v. Central Union High School Dist.*, 27 Cal.App. 2d 319, 80 P.2d 1044. Evidence obtained by the trier of fact viewing the premises has been held sufficient to support a judgment." (Citations.)

It is appellants' first contention that the view of the scene by the jury disclosed that defendant failed to use care commensurate with the probable danger and was therefore guilty of negligence.

[2-4] In *McCarthy v. City of Manhattan Beach*, 41 Cal.2d 879, 889, 264 P.2d 932, 937, in an action wherein plaintiffs sought

a judgment declaring that a zoning ordinance restricting the use of their oceanfront property to beach recreational purposes was null and void as applied to them, the court said: "The trial judge's view of plaintiffs' property with the consent of counsel is evidence in the case and 'may be used alone or with other evidence to support the findings.'" (Citations.) In *Gates v. McKinnon*, 18 Cal.2d 179, 182-183, 114 P.2d 576, 578, it is stated: "The law is clear that when a view of the scene of an accident is made by the trier of facts the conditions observed and properly bearing on the case, [are] independent evidence which may be considered by the trier of facts in arriving at its decision." See also *Anderson v. State of California*, supra, and also *Lauder v. Wright Investment Co.*, 126 Cal.App.2d 147, 151, 271 P.2d 970, 972, where the court said: "The 'view' of plaintiffs' premises, defendants' subdivision, and the topography of the surrounding area was 'independent evidence which could be considered by the trier of facts in arriving at his conclusion and is substantial evidence in support of his findings consonant therewith.'" In *Peri v. Los Angeles Junction Ry. Co.*, 22 Cal.2d 111, 120, 121, 137 P.2d 441, 446, the court held that: "The question of the negligence of the railroad operator is ordinarily one of fact in crossing cases as it is in other negligence cases." And "The conditions with respect to the ability of a traveler on the highway to observe the train approaching the crossing and the character of the crossing may be a basis for the conclusion of the trier of fact that the defendant failed to conform to the required standard of care in respect to the warnings it must give of the approach of the train to the crossing."

[5,6] In the instant case the question of whether the defendant failed to use reasonable care, corresponding to the circumstances, in warning southbound traffic on the highway at the time of the accident was one of fact for the jury. The photographs of the crossing and the other evidence, together with the jury's view of the premises, furnished sufficient substantial evidence to support the implied finding that the defendant failed to maintain adequate

warning signs at the crossing. The evidence shows that the engine would not be visible to southbound traffic until it came out between the two Convair buildings on the west side of the highway; that the opening between these two buildings was only 35 feet; that the pedestrian overpass was approximately 45 feet south of the track; that the crossing sign was partially obscured by a palm tree; that there was no wigwag or warning bell at the crossing; that the Sassafras intersection was only about 300 feet north of the crossing; that the highway was a well traveled, six lane, highway; and the accident happened on a dark night. Under these circumstances we cannot hold as a matter of law that the crossing was adequately equipped with warning signs or devices at the time of the accident and conclude that the determination of this question was one of fact for the jury.

Appellants' next contention is that the evidence reveals that the defendant was negligent in failing to give such warning to southbound traffic on the highway as would amount to reasonable care commensurate with the probable danger to be avoided. This was likewise a question of fact for the jury. In this connection there was evidence that Brown, the footboard switchman, proceeded about 8 feet in front of the engine as it crossed the highway. When he was a few feet from the curb he waved a fusee and then proceeded across the street to warn northbound traffic. He remained across the street warning northbound traffic with his fusee until the accident happened. The jury may well have inferred that the fusee was not a warning to southbound traffic at the time the accident occurred and that defendant's employees failed to properly warn southbound traffic as the engine crossed the highway.

[7-9] There was a conflict in the evidence as to whether the bell on the engine was ringing and the whistle blowing at the time of the accident. The members of defendant's train crew all testified that they heard both the bell and whistle. However, Downey testified that he did not hear the bell or whistle and did not hear a warning of any type. If he was in a position to

have heard the bell or whistle, had either in fact been sounded, his testimony was sufficient to raise a conflict with the positive testimony that such warning was given. *Peri v. Los Angeles Junction Ry. Co.*, supra, 22 Cal.2d 118, 137 P.2d 445. We cannot hold as a matter of law that Downey was not in a position to hear the bell or whistle, if these signals in fact had been given. This question was one of fact for the jury. *Jones v. Southern Pacific Co.*, 74 Cal.App. 10, 26, 239 P. 429; *Switzer v. Atchison, etc., Ry. Co.*, 104 Cal.App. 138, 146, 147, 285 P. 918. It was the duty of those in charge of the train to give notice of the approach of the engine when approaching the highway and its traveling over the highway by all warnings reasonably necessary under the conditions existing at the time and place of the accident. *Lund v. Pacific Electric Ry. Co.*, 25 Cal.2d 287, 298, 153 P.2d 705. Whether the defendant was negligent in the performance of that duty was a question of fact for the jury.

[10, 11] The trial court herein denied defendant's motion for a nonsuit and a directed verdict and then granted the motion for judgment notwithstanding the verdict. As was said in *Card v. Boms*, 210 Cal. 200, 202, 291 P. 190, 191:

"The right of the trial court to set aside a verdict and enter a contrary judgment is absolutely the same as its right to grant a nonsuit. Section 629, Code Civ.Proc.; In re Estate of Caspar, 172 Cal. 147, 155 P. 631; *Perera v. Panama-Pacific International Exposition Co.*, 179 Cal. 63, 175 P. 454; *Hunt v. United Bank & Trust Co. of California*, [210 Cal. 108] 291 P. 184. The court should therefore grant such a motion when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the

result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff. In re Estate of Caspar, supra; *Perera v. Panama-Pacific International Exposition Co.*, supra."

See also *Palmquist v. Mercer*, 43 Cal.2d 92, 95, 272 P.2d 26, 28, where the court said:

"A motion for nonsuit may properly be granted '* * * when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff.' *Card v. Boms*, 210 Cal. 200, 202, 291 P. 190, 191; see also, *Blumberg v. M. & T. Inc.*, 34 Cal.2d 226, 229, 209 P.2d 1; *Golceff v. Sugarman*, 36 Cal.2d 152, 153, 222 P.2d 665. 'Unless it can be said as a matter of law that * * * no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury.' In re Estate of Lances, 216 Cal. 397, 400, 14 P.2d 768, 769; see also, *Raber v. Tumin*, 36 Cal.2d 654, 656, 226 P.2d 574."

[12] We are of the opinion that under the circumstances shown by the record the trial court was in error in determining that there was no evidence which gave substantial support to the verdict reached by the jury.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

134 Cal.App.2d 702

**Ona C. KEIPER, as Administratrix of the
Estate of Ralph J. Keiper, Deceased,
Plaintiff and Respondent,**
v.

**NORTHWESTERN PACIFIC RAILROAD
COMPANY, a corporation,
Defendant and Appellant.**

Civ. 8560.

District Court of Appeal, Third District,
California.

Aug. 1, 1955.

Hearing Denied Sept. 21, 1955.

Dissenting Opinion Filed Sept. 22, 1955.

See 288 P.2d 262.

Action by widow to recover damages on account of death of her husband who was struck during nighttime and after working hours by train at a point near "outfit" car in which husband was living while on a certain job for railroad. From adverse judgment of the Superior Court, Mendocino County, Lilburn Gibson, J., entered upon verdict in favor of administratrix, the railroad appealed. The District Court of Appeal, Finley, J. pro tem., held that evidence was insufficient to support jury's implied finding of negligence on the part of the railroad.

Judgment reversed with directions.

1. Courts ☞97(5)

All questions of substance presented in action under the Federal Employers' Liability Act are federal questions upon which decisions of federal courts are conclusive and binding upon all state courts. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

2. Master and Servant ☞278(1)

In action by administratrix for damages on account of death of her husband, who was employed by railroad and who was struck by train during nighttime and after working hours at a point near "outfit" car in which husband was living while working on a certain job, evidence was insufficient to support jury's implied finding of negligence on the part of railroad.

3. Master and Servant ☞265(2, 3)

In action by widow to recover damages on account of death of her husband who was killed during nighttime and after work-

ing hours by train at a point near "outfit" car in which husband was living while on a certain job for railroad, presumption that husband was exercising due care for his own safety did not lead to the conclusion, presumption, or inference that railroad was negligent or that such negligence was the proximate cause of husband's death.

Burke & Rawles, by Wayne P. Burke Ukiah, for plaintiffs and respondents.

Mannon & Brazier, Ukiah, Dunne, Dunne & Phelps, San Francisco, for defendant and appellant.

FINLEY, Justice pro tem.

This appeal is from a judgment entered upon the verdict of a jury in favor of plaintiff as administratrix, awarding damages on account of the death of her husband.

In the early morning of October 28, 1949, the severed body of Ralph J. Keiper, a welder employed by appellant Northwestern Pacific Railroad Company, was found lying just outside of the westerly rail of the company's main line track at a siding south of Ukiah known as Echo. Near that point a narrow raised roadway of dirt or gravel crossed the track at approximate right angles, and also the siding track lying just to the west of it. There was a gate on each side of the tracks where this road intersected the right of way fences.

The upper part of the severed body was found lying just on the southerly edge of this dirt or gravel roadway, while the lower part lay to the north and on the other side of the roadway about 20 feet from the upper part. On the siding which parallels the main track on the westerly side there had been spotted two so-called "outfit cars", the south end of the most southerly car being from 16 to 20 feet north of this raised dirt roadway. The lower part of the body lay nearly opposite the said south end of this car which had been allocated to the deceased as living quarters while working at Echo. In the middle portion of this car, on either side, there was a door below which had been permanently attached two steps leading to the ground, and along one side of each doorway was a metal handle or

"grabiron" to assist one in using the steps. A short distance to the west of the car on the opposite side thereof from the main track, there had been placed a privy for the use of the deceased, and a path leading to it had been cut through the grass growing between it and the car.

There is no material conflict in the evidence. Plaintiff offered no direct proof of how the tragedy occurred. The factual situation was developed almost entirely by the defense. According to the testimony of his immediate superior, called as a defense witness, the deceased, a lead welder in the employ of appellant, had been sent to Echo to build rail jetties where an adjacent creek had washed out a portion of the right of way. He had moved into the outfit car assigned to him "the day before." He was the only one who used it. It was not necessary for him to live there. He could have lived at home and driven back and forth had he chosen to do so. Outside of an emergency his assigned hours of work were from 7 to 11 a. m. if on daylight saving time, or 8 a. m. to 12 noon, and from 12:30 to 4:30 p. m. if on standard time. These assigned hours are not changed, but the welding gangs have no specified hours due to the heat. If it was exceptionally hot they worked early. The work deceased was assigned to do was not of an emergency nature.

This same witness also testified that deceased would take an occasional drink; that he had never seen him intoxicated; and that deceased was a careful man around trains. He further testified that there was blood on the west rail of the main track approximately 90 feet south of the outfit car occupied by deceased; that there was what looked like a footprint near the entrance to this car between the two main line rails, and that about opposite the south end of this car there was also a scraping such as might have been made by the side of a foot. There was blood on the rails nearly opposite.

According to this same witness, from four to six trains passed over this area between 6:30 on the evening of October 27, 1949, and daylight the next morning.

In addition to this witness, defendant also called Harvey O. Peters, a special agent; Roy J. Connors, the locomotive engineer on the train that passed Echo about 10 o'clock on the night of October 27, 1949; and also W. J. Egan, the roundhouse foreman at Santa Rosa. The fireman who served with engineer Connors on the night in question had died before the date of trial.

Connors testified that his train consisted of 47 freight cars, 41 loaded and six empty. As he approached the outfit cars at Echo the speed of the train was about 18 miles per hour or less. The headlight was on high beam and illuminated the track 20 car lengths away; the track could be seen clearly for approximately 15 car lengths, but beyond that it would not appear distinctly. The locomotive whistle was sounded at the mile board, one mile from Echo and also as he came around the turn when he observed the outfit cars on the siding. He sounded the whistle a second time as he approached them. The locomotive bell was ringing. As he approached the outfit cars he saw nothing on the tracks and the fireman gave him no warning of any sort. He, Connors, had a full view of the entire width of the main track and was carefully observing conditions within the range of his headlights. He did not strike anyone, and when he was informed the next morning that a man had been killed at Echo, he looked the locomotive over but found no blood on it, and no one pointed out any blood to him. He would not be able to say whether there was any there.

W. J. Egan, the roundhouse foreman, testified that about 9 a. m. on October 28, 1949, he inspected this locomotive and found no blood on the pilot but did find eight or ten drops of blood on the No. 3 driver wheel which would be back approximately 25 feet from the front of the locomotive on the right side. He did not know whether it was human blood.

On rebuttal plaintiff recalled plaintiff's witness Reno Bartolomei who was a deputy sheriff and deputy coroner of Mendocino County at the time of the accident, but who at the time of trial was an investigator for

the district attorney and an automobile salesman. He testified from a memorandum contained in the sheriff's file and made by him of a telephone conversation allegedly held by him with a Henry P. Dohring who, at the time of the accident was in charge of defendant's station at Ukiah. He asked Dohring to check the engines. Dohring later called him back and said that engine 2625 was checked and that blood was found on the right side of the cow-catcher, on the pilot and on the front wheel on the right side. Dohring, also called by plaintiff as a rebuttal witness, could not recall this conversation or incident.

This in substance is all of the relevant testimony appearing in the record of any probative value to indicate what happened. No one saw the accident, nor was there any evidence to explain what the deceased was doing on or about the track. His body was found apparently run over and severed by a train, and that is all.

So far as we are concerned here, the only question to be answered is whether the verdict of the jury in the sum of \$37,500 in favor of plaintiff can be sustained by this evidence under the provisions of the Federal Employers' Liability Act. The appeal is from the judgment entered upon this verdict and from the order denying defendant's motion for judgment notwithstanding the verdict.

The Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., so far as relevant here, provides in substance that a common carrier engaged in interstate commerce shall be liable to those designated in the act or injury to or death of any employee "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." The act also provides that contributory negligence of an employee who meets death or is injured shall not bar recovery, but that damages suffered shall be diminished in proportion to the amount of negligence attributable to the employee, provided how-

ever that such diminution shall not apply nor shall any doctrine of the assumption of risk apply in any case where there has been a violation by such common carrier of any statute enacted for the safety of employees and where this violation contributed to the occurrence of injury to or death of an employee.

[1] All questions of substance presented in actions under this statute are federal questions upon which the decisions of the federal courts are conclusive and binding upon all state courts. *Atlantic Coast Line R. Co. v. Dixon*, 5 Cir., 207 F.2d 899, 903; *Dice v. Akron C. & Y. R. Co.*, 342 U.S. 359, 361, 72 S.Ct. 312, 96 L.Ed. 398; *Bailey v. Central Vermont Railway*, 319 U.S. 350, 352, 63 S.Ct. 1062, 87 L.Ed. 1444; *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244, 63 S.Ct. 246, 87 L.Ed. 239. This being so it is quite obvious that as an intermediate appellate state court our function here is not to attempt any interpretation of the act itself but to ascertain if possible the applicable rule from the existing federal decisions. We cannot resolve conflicts, and we speak with but little authority in attempting to select from among the federal decisions an applicable rule. Thus without authority, but speaking with little fear of contradiction, we concur with the trial judge in his observation that "the propositions of law applicable hereto are in such a state of confusion in the decisions of the higher courts, including the highest court of the land, that it [the trial court] is unable to determine just what the law applicable to the case is."

[2] Counsel have filed excellent briefs and have discussed the cases at some length. In the light of our inability to establish precedent or resolve conflicts or to announce a rule with any perceptible authority, we see but little virtue in discussing here in any detail the maze of cases referred to in the briefs. About all we can do is weigh the evidence appearing in the record and announce our opinion as to whether giving to it all the weight to which it is entitled the evidence is legally sufficient to support the jury's implied finding of negligence on the part of defendant. In making such a determination we are satis-

fied that we must rely more upon what, in our opinion, would in the light of common, everyday contemplation and experience appear to amount to ordinary care, rather than upon any attempt to fit the facts before us into an indeterminate mold fashioned by the federal decisions.

First it may be said that there is not even a scintilla of evidence to indicate or support a finding that the decedent was engaged in any act connected with his employment at the time he met his death. In respondent's brief there appears this statement: "The evidence indicates that the deceased was on the railroad track at 10 o'clock P.M. on October 27, 1949, between the rails of the main line track, opposite to the entrance to his bunk car. This is indicated by the following: A. A foot print was found at this point, 18 inches inside the west line, of the same size as the shoe worn by Mr. Keiper at the time of his death. It was deeper on one side than the other, and was headed in an easterly direction."

There is no evidence to the contrary. This appears then as an admission that the death apparently did not occur before 10 p. m. It was not even suggested by anything in the evidence or otherwise that it did, or that the deceased was welding or otherwise working at that time of the night, or that he was engaged in any activity of any nature on the tracks at that hour which could be considered as being even remotely connected with his employment. The record is absolutely silent, and no plausible theory has been suggested, as to why he was there or what he was doing.

Respondent urges the following circumstances as constituting evidence of negligence under the act on the part of appellant:

"I. The bunk car furnished to deceased as living quarters had an entrance on the side next to the main line track, less than five feet from passing cars.

"II. The bunk cars were dark red, making them difficult to observe at night.

"III. No warnings were given by signs or otherwise to warn trainmen on the main line track of the fact that there were workmen living in these cars.

"IV. No precautions were taken by the defendant to protect workmen, living in bunk cars, against passing trains."

Taking these specifications in order, the only evidence in the record is that the "bunk" or "outfit" car furnished to deceased had a similar entrance on both sides, and that when the body of deceased was discovered the doors to both these entrances were locked. There is no evidence that the deceased was, at the time, using the east entrance with the car spotted as it was on the siding west of the main track, or that the entrance on the west side was out of order or that there was any condition whatsoever that made it any less usable than the entrance on the east side. This leads us to the rule that if a choice of two equally usable doorways lay open to the decedent and he, of his own choice and volition, chose the dangerous way, particularly in light of his familiarity with bunk cars, tracks, trains and railroad practices in general (which must be logically assumed after, as the evidence shows, at least three years of railroad employment), it cannot be other than logically considered that he assumed any additional risk in using the more dangerous way. We do not see how appellant, as his employer, could be held liable unless it were in some manner responsible for his making a choice of using the more dangerous of the two doors. The reason for two doors is obvious, for it is a matter of common knowledge that sidings occur on both sides of railroad main tracks, and the obvious purpose of having a door on each side is so that whether a car is spotted on one side or the other those having occasion to enter or leave such a car may do so on the side away from the main track.

Next respondent states that the cars were red and hence were difficult to see at night. We fail to see how this fact has any bearing on the situation. None of the cars

were struck by the train. There is no evidence that the cars were not seen by all train crews as they approached and passed the cars, or that the conduct of any train crew would in the exercise of ordinary care have been any different had the cars been luminous or painted any other color. Also it is a matter of common knowledge that red is, and for many years has been, a color quite generally used on box cars, and it would be hardly logical to say that all of a sudden and for no especial reason, the spotting of bunk cars so painted should amount to negligence. Connors, the engineer of the locomotive on which the blood was found, testified that he knew the cars were there; that he sounded the whistle at the mile board one mile from Echo; that the headlight was on high beam and that the track could be seen clearly for approximately 15 car lengths ahead; that the whistle was sounded again as he came around the turn and observed the outfit cars on the siding, and a second time as he approached them; that also the locomotive bell was ringing. As appellant has pointed out, even though this testimony be entirely discounted and disbelieved, still there is no evidence in the record to support any inference or even a speculation that the color of the cars had any causal connection whatever with the death of deceased.

The above reasoning can in general be applied to respondent's third specification of negligence. There is no evidence that respondent violated any common or generally recognized custom or practice among railroads or acted in any manner without ordinary care and prudence in not posting special signs or otherwise to warn trainmen on the main track that there were workmen living in these cars. There is no evidence in the record to indicate that the absence of any warning "signs or otherwise" had any causal connection with the death. As pointed out above, Connors, the locomotive engineer, stated that he observed the cars and blew the whistle; that he had blown it twice before, once at the mile board and once as he rounded the bend which was estimated by plaintiff's witness Bartolomei to be about a mile north of the bunk car. Connors also testified

that the bell was ringing; that it had been turned on approximately 10 car lengths from where it was supposed to be heard, and that it rang automatically. He also testified that the speed of the train was 18 miles per hour or less.

There is nothing in the record to indicate that the operation of the train would have been any different had warning been "given by signs or otherwise to warn trainmen on the main line tracks of the fact that there were workmen living in these cars." Even if all defense testimony be disbelieved entirely, there is no evidence of any negligent operation of the train, unless it is to be inferred or presumed from the fact alone that because deceased was found dead and his body severed that the operation of the train was negligent.

[3] The record contains no evidence at all to indicate any departure by appellant or any of its agents, servants or employees, from common and established practices in railroading, or the violation of any statute or any departure from what common experience would dictate as a standard of ordinary care. This tragedy happened at night. There was no evidence of any light in or about the bunk car or anything at all to indicate that deceased was, or had any occasion to be, on or perilously near the main line track. Had he been in the bunk car provided for him there is nothing to indicate that he would not have been perfectly safe. Why he was on or about the main line track at or about 10 o'clock at night no one knows. There is no evidence from which even an inference may be logically drawn that he was there for any purpose in connection with his employment. There is no evidence that he had any tools or equipment with him or even a light of any kind. There is no evidence that there was anything connected with his employment or personal needs to draw him at that time of night to any point at all on or east of the main track or indeed to any point east of the easterly wall of his bunk car. His privy was on the west side, away from the main track, and his bed presumably in the car. There is no evidence of any town, store, building, place of habitation, person or

thing that might have drawn him across the track at that hour. Indeed there is not even evidence that he met his death by being run over by a train. There was testimony by plaintiff's witness Bartolomei that when he found the body the door on the east side of the bunk car was locked. There was other testimony that the doors on both sides were locked. It seems strange that a man, at least one experienced around railroads, in possession of his faculties and under normal circumstances, would at that time of night be, for no fathomable reason, where deceased must have been for his body to have been run over and severed by the train. Any hypothesis must of necessity be based upon pure speculation. It is true that respondent is entitled to the presumption that deceased was exercising due care for his own safety, but as a corollary it does not follow that indulgence in this presumption leads to the conclusion or presumption, or even inference, that appellant was negligent or that this negligence was the proximate cause of death. *Looney v. Metropolitan R. Co.*, 200 U.S. 480, 488, 26 S.Ct. 303, 50 L.Ed. 564, 569. If we are to speculate, it might as well be said that deceased fell on the rails as the result of a heart attack or some other organic or functional failure, or that someone killed him and placed his body on the track to lend the appearance of accident. In answer to this it might be said that even so the locomotive engineer or fireman, if they were maintaining a proper lookout, should have seen the body on the track. We do not feel that the law or reason binds appellant to any such degree of care under the appellation of ordinary care. Had the engineer or fireman known, or if in the exercise of ordinary care they should have known, or even if they had had any reason to anticipate anyone on the track at that point at that time of night, it might in reason be said that they should have been vigilant in maintaining a most careful scrutiny of every foot of track. But here we can think of nothing which, under the circumstances, might in reason have caused them to anticipate the presence of anyone on the track, or dangerously close to it, at that point, at that time of night, even

though they were chargeable with knowledge that workmen were quartered in the bunk cars. We do not think that in order to comply with the standard "ordinary care" an engineer or fireman of a locomotive can be charged with the duty of carefully watching every foot of a track from point of departure to destination excepting those points where they know, or in the exercise of ordinary care, should have reason to know or anticipate that the passage of the train might create a hazard to persons or property. A right of way is owned and maintained by a railroad for the passage of its rolling stock, and excepting at known intersections or where the presence of children might be anticipated, or at known points of possible danger, or at points where it could, in the exercise of ordinary care, be reasonably anticipated, it seems that the train crews should be conceded some time for attention to their gauges and instruments and the management of their controls, and should not, under penalty of being found guilty of negligent conduct, be bound at all times to keep their eyes focused upon the track ahead.

We hold that under the circumstances here there was, at the time and place involved and in the exercise of ordinary care and prudence, no reason for the engineer or fireman to maintain a constant and intense vigil over each and every foot of the track ahead, for even though if charged with knowledge of the presence of workmen in the bunk cars, there appears no fathomable reason to expect the presence of any one of them on or perilously near the main track at that time of night.

In view of the salient points of similarity involved and persuaded by the reasoning and conclusions reached in *Lenz v. Union Pac. R. Co.*, 128 Neb. 99, 258 N.W. 33; *Lammers v. Pacific Electric Ry. Co.*, 186 Cal. 379, 199 P. 523; and *Greene v. Atchinson, etc., Ry. Co.*, 120 Cal.App.2d 135, 260 P.2d 834; and guided by the rules announced in *Moore v. Chesapeake & O. Ry. Co.*, 340 U.S. 573, 71 S.Ct. 428, 95 L.Ed. 547; *Chesapeake & O. Ry. Co. v. Thomas*, 4 Cir., 198 F.2d 783, 788; *Kansas City So. Ry. Co. v. Jones*, 276 U.S. 303, 48 S.Ct. 308, 72 L.Ed. 583; *Looney v. Metropolitan R.*

Co., 200 U.S. 480, 488, 26 S.Ct. 303, 50 L. Ed. 564, 569; and Davis v. Alabama Great So. Ry. Co., 324 U.S. 846, 65 S.Ct. 676, 89 L.Ed. 1407, we hold that as a matter of law the record is totally devoid of evidence to support a finding of negligence on the part of defendant, and that the trial court should have granted appellant's motion for judgment notwithstanding the verdict.

The judgment is reversed with directions to the trial court to enter judgment for appellant notwithstanding the verdict.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

Hearing denied; GIBSON, C. J., and CARTER, J., dissenting.



134 Cal.App.2d 686

Hazel HURST, also known as Hazel Hurst Coloursis, Plaintiff, Cross-Defendant and Respondent,
v.

HAZEL HURST FOUNDATION FOR THE BLIND, Inc., a corporation, Defendant, Cross-Complainant and Appellant.
Civ. 20280 and 20577.

District Court of Appeal, Second District,
Division 1, California.

Aug. 1, 1955.

Action upon promissory note. Defendant counterclaimed. The Superior Court, Los Angeles County, Clarence M. Hanson, J., rendered judgment for plaintiff and denied defendant's motions to vacate judgment, and defendant appealed from the judgment and the orders. The District Court of Appeal, Drapeau, J., held that evidence supported findings for plaintiff.

Judgment affirmed.

1. Bills and Notes ⇨516

In action against corporation to collect on promissory note, evidence supported findings for plaintiff.

2. Appeal and Error ⇨1011(1)

It was province of trial judge to resolve conflicts in evidence, and reviewing court could not weigh evidence, or set aside judgment on conflicting evidence.

3. Appeal and Error ⇨173(2)

Where defendant in action upon note tried case upon theory that note had been cancelled and another note substituted therefor, it could not, on appeal, contend that it had not originally been liable on note.

4. Appeal and Error ⇨171(1)

Parties are not permitted to adopt new and different theories of a case for first time upon appeal.

5. Appeal and Error ⇨931(1)

It was presumed that trial court had given judicial consideration to evidence before it.

6. Appeal and Error ⇨439

Where defendant had perfected an appeal, all further proceedings in Superior Court were stayed, and Superior Court did not have jurisdiction either to hear motion under statute granting relief from a judgment taken by mistake, etc., or to hear motion to vacate judgment for extrinsic fraud. West's Ann.Code Civ.Proc. §§ 473, 946.

Edward Raiden, Los Angeles, for appellant.

Dalton, Dalton & Cardon, Norwalk, for respondent.

DRAPEAU, Justice.

For many years Hazel Hurst was president and a member of the Board of Directors of Hazel Hurst Foundation for the Blind, Inc., a California charitable corporation. The foundation trained seeing-eye dogs and blind persons for whom the dogs were obtained. The idea behind the foundation was Hazel Hurst's. She organized the corporation. She was active in promoting and advertising its work, and in securing donations for its purposes. The affairs of the corporation were administered by its Board of Directors.

On May 22, 1951, Hazel Hurst terminated her relations with the foundation. There had been dissension between her and the Board of Directors, culminating in her retirement. Before that for a time she was not active in the management because of disagreement with the Board. When that Board retired from management her husband (whom she later divorced) then became president and a member of the Board. When he retired from the presidency Hazel Hurst again took over until her final retirement.

The complaint in this case was by Hazel Hurst to collect a promissory note for \$10,500, alleged to have been made, executed, and delivered by the foundation to her. Defendant foundation denied any liability under the note, and cross-complained for an accounting, and for several items of indebtedness claimed due it by plaintiff.

The trial court found against defendant on the cross-complaint, and for the plaintiff, on the note. Judgment for plaintiff followed for the amount of the note, together with interest and attorneys fees. Defendant appeals from the judgment.

After filing the notice of appeal defendant moved in the Superior Court to vacate and set aside the judgment for the reasons specified in Section 473 of the Code of Civil Procedure, and also for alleged extrinsic fraud.

These motions were denied for the reason, as stated by the court, that under the provisions of Section 946 of the Code of Civil Procedure it lacked jurisdiction to entertain them. Defendant appeals from each of these orders.

[1] So far as the promissory note is concerned, the solution of this problem is easy. The record discloses positive evidence for the plaintiff that supports the findings and the judgment. The directors authorized the note. It was formally delivered to plaintiff. And she testified it was for moneys previously advanced by her to defendant.

Defendant's brief goes with particular detail into the proceedings of the Board of Directors, and the relationship of plaintiff to the corporation. Assuming that it could

have been inferred from the evidence that there was no consideration for the note, that there was fraud or misconduct on the part of plaintiff in securing it, that the note was invalid for irregularity in the proceedings of the directors, or was beyond their powers, or the powers of the corporation, still the record contains substantial evidence to support the findings and the judgment.

[2] It was the province of the trial judge to resolve all conflicts in the evidence. And under familiar principles of appellate practice, in the circumstances in this case this Court may not weigh the evidence, or set aside the judgment of the trial court. *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 45 P.2d 183; *In re Estate of Teel*, 25 Cal.2d 520, 154 P.2d 384.

[3, 4] Moreover, many points now urged for the first time on appeal were not brought to the attention of the trial court. The case was tried upon the theory that the note was cancelled and another note for \$5,000 substituted in its place. Parties are not permitted to adopt new and different theories of a case for the first time upon appeal. *Ernst v. Searle*, 218 Cal. 233, 22 P.2d 715.

[5] Defendant's contention that the trial court failed to review and consider all of the relevant evidence is without merit. The minutes of the corporation were before the court, and it is to be presumed that they were given judicial consideration. *Deary v. Shields*, 54 Cal.App. 2d 795, 129 P.2d 935.

Defendant concedes that the trial court was right in denying the motion under Section 473 of the Code of Civil Procedure. But defendant contends that the motion to set aside the judgment for extrinsic fraud should have been heard on its merits.

[6] This Court is unable to see any difference in the application of the rule set forth in Section 946 of the Code of Civil Procedure as to either motion. Under that section all further proceedings in the Superior Court were stayed, except for certain collateral proceedings, when the appeal was perfected. In effect the appeal removed from the jurisdiction of the Su-

perior Court the subject-matter of the judgment. *Sacks v. Superior Court*, 31 Cal.2d 537, 190 P.2d 602; *Agnew v. Superior Court*, 118 Cal.App.2d 230, 257 P.2d 661. A motion to vacate for extrinsic fraud is embraced within the subject-matter of a judgment appealed from.

The judgment and the orders are, and each of them is, affirmed.

WHITE, P. J., and DORAN, J., concur.



Victor DESNY, Plaintiff and Appellant,

v.

Billy WILDER, Paramount Pictures Corporation, a corporation, and Paramount Film Distributing Corporation, a corporation, Defendants and Respondents.

Civ. 20705.

District Court of Appeal, Second District,
Division 3, California.

July 15, 1955.

Rehearing Denied Aug. 10, 1955.

Hearing Granted Sept. 8, 1955. *

Action against motion picture producer and others upon alleged contract implied in fact to pay for use of story. Defendants had summary judgment in the Superior Court, Los Angeles County, Stanley Mosk, J., and from the judgment and from order denying motion to set aside the judgment, an appeal was taken. The District Court of Appeal, Ashburn, J. pro tem., held that although contents of the manuscript were within the public domain and anyone had a right to use all or any facts or incidents therein set forth, use of the manuscript owner's compilation or treatment, with knowledge of his expectation of payment therefor gave rise to liability.

Judgment reversed with instructions to limit trial to issues raised by first count of amended complaint and to permit amend-
* Opinion vacated 299 P.2d 257.

ment as proposed; appeal from order dismissed as being from nonappealable order.

1. Literary Property Ⓒ2

Under 1947 amendment to statute pertaining to character of ownership of author of any product of the mind, protection is afforded only in the representation or expression of a composition, and rule of protectibility of an idea has been abrogated by acceptance of traditional theory of protectible property under the common law copyright. West's Ann.Civ.Code, § 980.

2. Literary Property Ⓒ2

Under 1947 amendment to statute pertaining to character of ownership of author of any product of the mind, ideas and historic events are unprotectible property. West's Ann.Civ.Code, § 980.

3. Literary Property Ⓒ7

Contract implied in law cannot arise from submission to another of material from the public domain, but submission of such matter under express contract or one implied in fact may form basis for cause of action. West's Ann.Civ.Code, § 980.

4. Contracts Ⓒ4

Only distinction between "contract implied in fact" and an express contract is that, in the former, promise is not expressed in words but is implied from the promisor's conduct. West's Ann.Civ.Code, §§ 1619-1621.

See publication Words and Phrases, for other judicial constructions and definitions of "Contract Implied in Fact".

5. Contracts Ⓒ28(1)

Under theory of contract implied in fact, required proof is essentially same as under a count upon express contract, with exception that conduct from which promise may be implied must be proved.

6. Principal and Agent Ⓒ178(1)

Where duties of secretary included answering telephone and keeping record of persons who called, such duties encompassed receiving messages and delivering them to her principal, and information received by her would be imputed to her principal in action by telephone caller against principal for value of use of story in motion picture,

synopsis of which story had been read over telephone to the secretary.

7. Judgment ⇨185.1(4)

Extent of authority of an agent involves pure conclusion, and such conclusion in affidavit will not sustain motion for summary judgment. West's Ann.Code Civ. Proc. § 437c.

8. Judgment ⇨185.1(4)

Motion for summary judgment cannot be sustained by an affiant's conclusions. West's Ann.Code Civ.Proc. § 437c.

9 Judgment ⇨185.2(7)

Facts stated in affidavits opposing motion for summary judgment are to be taken as true. West's Ann.Code Civ.Proc. § 437c.

10. Judgment ⇨186

On motion for summary judgment, court's sole function is to ascertain whether triable issue of fact exists, and court must not try to solve the issue.

11. Judgment ⇨185(6)

A triable issue, such as will preclude granting of summary judgment, exists when there is conflict in evidence or divergent inferences deducible from uncontradicted evidence.

12. Judgment ⇨185.3(8)

In action for value of use of plaintiff's story in motion picture by defendants, court could properly grant motion for summary judgment in favor of defendants only if plaintiff's evidence and supporting circumstances were legally insufficient to warrant finding of a contract implied in fact. West's Ann.Civ.Code, § 980.

13. Literary Property ⇨2

Both an idea, and its concrete expression, even though wanting in protectible quality, may be subject of sale to anyone who is willing to buy. West's Ann. Civ.Code, § 980.

14. Work and Labor ⇨4(2)

In absence of an express contract originally, where one performs for another, with the other's knowledge, useful service of character usually charged for, and latter

expresses no dissent, or avails himself of the service, a promise to pay reasonable value is implied.

15. Literary Property ⇨7

Oral recitation of synopsis of story over the telephone could be construed as a submission, so as to be the basis, if circumstances otherwise warranted, of contract implied in fact to pay value of use of the story. West's Ann.Civ.Code, §§ 980, 1622.

16. Literary Property ⇨7

There may be contract to pay for use of unprotectible material just as there may be one to pay for disclosure. West's Ann. Civ.Code, § 980.

17. Literary Property ⇨2

Treatments of news events and other compilations of known facts are protected in same manner as original compositions. West's Ann.Civ.Code, § 980.

18. Literary Property ⇨5

In field of protectible literary or musical or like property, a limited or qualified publication does not destroy the private ownership, and same rule applies to a manuscript which, though not original and protectible, may become subject of protecting contract. West's Ann.Civ.Code, § 980.

19. Literary Property ⇨8

Though contents of manuscript were within public domain and anyone had right to use all or any facts or incidents therein set forth, use of manuscript owner's compilation or treatment with knowledge of his expectation to payment therefor gave rise to liability. West's Ann.Civ.Code, § 980.

20. Judgment ⇨185(2)

Moving party has burden of making clear showing that he is entitled to judgment without a trial.

21. Judgment ⇨185.3(8)

Record on motion for summary judgment, and motion picture as viewed by court on the motion, in action against picture producer and others on implied contract to pay for use of story based on events in public domain, raised triable issues of fact precluding summary judgment.

22. Appeal and Error ⇨113(1)

Order denying motion to set aside judgment and permit plaintiff to amend amended complaint was not appealable.

23. Judgment ⇨186

A sound discretion ordinarily demands that a party be permitted to amend when, upon motion for summary judgment, it appears that his pleading is defective, but initiative must be taken by counsel and if he does not move, the court is not required to act. West's Ann.Code Civ.Proc. §§ 469, 470.

24. Pleading ⇨229

Great liberality is indulged in the matter of amendment to pleadings to the end that lawsuits may be determined upon their merits. West's Ann.Code Civ.Proc. §§ 469, 470.

25. Limitation of Actions ⇨127(11)

In determining whether new "cause of action" has been inserted by amendment after running of statute of limitation, court must apply to specific facts a correct concept of what constitutes a "cause of action," and a "cause of action" is the right to secure redress for violation of an obligation owing to the claimant. West's Ann.Code Civ.Proc. §§ 469-471.

See publication Words and Phrases, for other judicial constructions and definitions of "Cause of Action".

26. Pleading ⇨248(2)

For purpose of determining whether amendment is possible, the "cause of action" referred to as furnishing the test means only the legal obligation which it is sought to enforce against defendant, and power to permit amendment is denied only if change is made in the liability sought to be enforced. West's Ann.Code Civ.Proc. §§ 469-471.

27. Pleading ⇨248(3)

In action against motion picture producer and others upon implied contract to pay for use of story, amendment of complaint which charged that manuscript had been submitted, so as to show that synopsis instead was submitted, would not introduce new cause of action and amendment should have been permitted. West's Ann.Civ.

Code, § 980; West's Ann.Code Civ.Proc. §§ 469-471.

28. Judgment ⇨181(1)

Objection of variance between complaint and proof is not a matter available to moving party in proceeding for summary judgment. West's Ann.Code Civ.Proc. §§ 437c, 469-471.

Milo V. Olson and Frank De Marco, Jr., Los Angeles, for appellant.

O'Melveny & Myers, W. B. Carman, William W. Alsup, Everett B. Clary, Los Angeles, for respondents.

ASHBURN, Justice pro tem.

This cause has narrowed on appeal into an action in quasi plagiarism—one for recovery of the price of a story drawn from the public domain of news and history and furnished to defendants upon an implied promise to pay the reasonable value in case of use by them in a motion picture. The appeal is taken from a summary judgment in favor of defendants. Plaintiff's amended complaint is in three counts, two of which sound in plagiarism and the other (count I) in quasi-contract. Under the impact of *Weitzenkorn v. Lesser*, 40 Cal.2d 778, 256 P.2d 947; *Kurlan v. Columbia Broadcasting System*, 40 Cal.2d 799, 256 P.2d 962; and *Burtis v. Universal Pictures Co., Inc.*, 40 Cal.2d 823, 256 P.2d 933, present counsel for plaintiff rely upon that first cause of action only and urge error in granting a summary judgment with respect thereto.

[1-5] The *Weitzenkorn*, *Kurlan* and *Burtis* decisions establish these principles as California law: Whereas, prior to the amendment of Civil Code § 980 in 1947, protection was afforded to the author of any product of the mind with respect to the "idea" as well as the form and manner of its expression, *Weitzenkorn v. Lesser*, supra, 40 Cal.2d 778, 256 P.2d 947, 956, that amendment " * * * has eliminated the protection formerly given to 'any product of the mind.'" And "The statute as it now exists * * * provides protection only 'in the representation or ex-

pression' of a composition. The Legislature has abrogated the rule of protectibility of an idea and California now accepts the traditional theory of protectible property under common law copyright", namely, that "ideas 'are free as air.'" Id., 40 Cal. 2d at page 789, 256 P.2d at page 955. This is equally true of historic events. *Echevarria v. Warner Bros. Pictures, D.C.*, 12 F. Supp. 632, 638; *Fendler v. Morosco*, 253 N.Y. 281, 171 N.E. 56, 59. A contract implied in law cannot arise from submission to another of material from the public domain, unprotectible matter, for the same considerations apply to that situation as to a claim of plagiarism. *Weitzenkorn v. Lesser*, supra, 40 Cal.2d 778, 794-795, 256 P.2d 947. But the submission of such matter under an express contract or one implied in fact may form the basis for a cause of action. Id., 40 Cal.2d at pages 791-794, 256 P.2d at pages 957-959. "The only distinction between an implied-in-fact contract and an express contract is that, in the former, the promise is not expressed in words but is implied from the promisor's conduct. *Silva v. Providence Hospital of Oakland*, 14 Cal.2d 762, 773, 97 P.2d 798; *Smith v. Moynihan*, 44 Cal. 53, 62; *Grant v. Long*, 33 Cal.App.2d 725, 736-737, 92 P. 2d 940; Civ.Code, §§ 1619-1621. Under the theory of a contract implied in fact, the required proof is essentially the same as under the * * * count upon express contract, with the exception that conduct from which the promise may be implied must be proved. *Cole v. Phillips H. Lord, Inc.*, supra [262 App.Div. 116, 28 N.Y.S. 2d 404]." *Weitzenkorn v. Lesser*, supra, 40 Cal.2d 778, 794, 256 P.2d 947. Appellant now disclaims plagiarism and stands upon an asserted contract implied in fact through words and conduct.

The first count of the amended complaint alleges: "Prior to November 17, 1949, Plaintiff conceived, originated and completed a certain untitled literary and dramatic composition (hereinafter called 'Plaintiff's Property') based upon the life of Floyd Collins. Plaintiff has, at all times prior to and since November 17, 1949, been, and now is, the sole and exclusive owner of Plaintiff's Property, and has at all times

retained all common law rights of ownership and authorship therein." Attached as an exhibit is a copy of the story which is 57 pages in the original pleading. The complaint further avers that "Within two years last past and on or about November 17, 1949, Plaintiff submitted Plaintiff's Property to the Defendants Billy Wilder and Paramount Pictures Corporation. In making said submission, Plaintiff stated to said Defendants Billy Wilder and Paramount Pictures Corporation that it was made for the purpose of sale of Plaintiff's Property to Defendants to be used by Defendants only if Defendants paid to Plaintiff the reasonable value thereof. Defendants accepted submission of Plaintiff's Property, and became fully familiar with the contents thereof, thereby indicating their consent to pay Plaintiff the reasonable value of said material if used by them." It is also alleged that defendants made, distributed and exhibited a motion picture entitled "Ace in the Hole" or "The Big Carnival"; that they used and copied "Plaintiff's Property" in and in connection with said motion picture, knowing that he expected to be paid for such use. He seeks recovery of \$150,000 as the reasonable value of his said "property". Defendants' answer admitted the production and distribution of said photoplay and denied most of the other material allegations.

Shortly after a pretrial hearing defendants gave notice of a motion for summary judgment, to be based upon the records and files, the deposition of plaintiff taken by defendants, affidavits of Jacob H. Karp, Billy Wilder and Marian Elliott, the notice of motion and an attached memorandum of points and authorities. It had developed upon plaintiff's deposition that he never did submit to defendants the story attached to the complaint as Exhibit 1, but, at the request of Wilder's secretary, had submitted a synopsis of same. And defendants in their supporting memorandum said that "* * *" because plaintiff testified in his deposition taken on October 22, 1953 that what he claims to have submitted to defendants and to have been appropriated by defendants is not Exhibit 1 to the amended complaint, as alleged in said complaint, but,

rather, an outline or summary of said Exhibit 1, we believe that the case now can, and should be, decided for defendants on the issues of law involved. For purposes of this motion we are assuming that plaintiff *did make a submission to defendants* in accordance with his testimony in his deposition. At a trial of the action the purported fact of such submission would be contested, but to simplify the issues *it is not contested in the making of this motion.*" (Emphasis added.) The memorandum quotes the entire outline or synopsis. Plaintiff's deposition has been treated by counsel for both sides as an opposing affidavit of plaintiff and we so consider it. Before testing its sufficiency to show the existence of a cause of action it is well to bring it into focus through a quotation from appellant's opening brief. "It is conceded for purposes of argument that the synopsis submitted by plaintiff to defendants was not sufficiently unique or original to be the basis for recovery under the law of plagiarism or infringement. It is conceded that the plaintiff first obtained the central idea or theme of his story, which involves the entrapment of a man in an underground cave and the national interest promoted by the attempt to rescue him, from the Floyd Collins incident which occurred in the 1920's."

Plaintiff's deposition told of two telephone conversations with defendant Wilder's secretary. Wilder was employed by Paramount "* * * either as a writer, producer or director, or a combination of the three" at various times. The secretary was also a company employee. When plaintiff first called to make an appointment with Wilder she insisted on knowing his business. "I told her about this fantastic, unusual story. * * * I described to her the story in a few words. * * * I told her that it was the life story of Floyd Collins who was trapped and made sensational news for two weeks, headlines, front page right-hand corner, all over the country, and I told her the plot. * * * I described the entrapment. I told her that it was not only the governor but even the White House and President Coolidge was involved in it, and that it was national news

which kept the people in suspense for two weeks. I described to her the entrapment and the death, in ten minutes, probably. * * * That is right. I described the central idea. The main emphasis was the central idea, which was the entrapment, this boy who was trapped in a cave eighty-some feet deep. I also told her the picture had never been made with a cave background before. * * * I told her that the story starts from the time that he was a boy, until he dies at the end of the story, when he dies, and I described to her—not very accurately, but I described to her the main features of the story." Plaintiff wanted to send her a copy of his story; after "I explained to her in brief the plot and the sensational interest in this country twenty-five years ago she seemed to be interested" and asked how many pages; when told it was sixty pages she said Wilder would not read it and it must go to the script department there to be condensed into three or four pages for submission to producers and directors if considered "fantastic and wonderful"; plaintiff said he preferred to make his own synopsis and send it to her; she acquiesced; he made a condensation or outline of three or four pages, called the secretary two days later and told her of the synopsis; she said she would take it down in shorthand and show it to Wilder and let plaintiff know. Plaintiff read his outline to her over the telephone. She took his telephone number but never communicated with him.

Plaintiff did not recall mentioning in the first conversation anything about selling the Floyd Collins story to defendants. Concerning the second one he testified: "Q. By Mr. Alsup: Mr. Desny, did you make any statement at all to this secretary of Billy Wilder, in that second telephone call which you say occurred in November, 1949, to the effect that you were reading her this outline or telling her about your synopsis for the purpose of selling it to Billy Wilder and Paramount Pictures, and that they could use it only if they paid you the reasonable value of it? A. Yes, definitely. I made it clear to her that I wrote the story and that I wanted to sell it. Q. What did you say in that connection, as best you can

recall the exact language? and if you can't recall it, give us the substance of it. * * *

"The Witness: I naturally mentioned again that this story was my story which has taken me so much effort and research and time, and therefore if anybody used it they will have to pay for it, because I made it clear to her that I didn't write the story for pleasure.

"Q. By Mr. Alsup: What did she say? A. She said that if Billy Wilder of Paramount uses the story, 'naturally we will pay you for it.'"

"Q. Anything else? A. No. That was the extent of it." This was in November, 1949; the picture was released in 1951; in July, 1950 plaintiff called the secretary to protest the alleged use of plaintiff's material in defendants' photoplay,—“Well, I just protested very angrily.”

[6] Though conceding that plaintiff did submit the story to defendants as testified in his deposition, defendants undertook to offset this by a showing that neither Wilder nor his secretary had authority to make or negotiate a contract. This is the burden of the Karp and Wilder affidavits.¹ It is somewhat beside the point upon this appeal because appellant's counsel insists only upon a contract implied in fact,—not an express one. And that implied contract arose, so he says, from use of plaintiff's material with knowledge that he expected to be paid for its use. Wilder's affidavit discloses that the secretary's duties included answering the telephone, keeping him informed of engagements, and keeping some record of persons who called him on the telephone. Plainly this would encompass receiving and delivering messages to him. Information received by her in so doing would be imputed to her principal, 2 Cal.Jur.2d § 160, p. 855, because it was her duty to report the information to him. This would warrant the inference that she transcribed and delivered the synopsis to him. And the motion picture, which we have viewed, states that it was written by Wilder and two others, and that Wilder produced and directed it.

[7, 8] Parenthetically it should be said that lack of authority to negotiate or contract, if important, could not be established by any such generalities as those contained in the affidavits, one of them being this: "At no time has my secretary had any authority to make a contract in my behalf or to negotiate for a contract in my behalf for the purchase of a motion picture story or script, or otherwise." Wilder affidavit. The extent of authority of an agent involves a pure conclusion, 2 Am.Jur. § 447, p. 353; *Waniorok v. United Railroads*, 17 Cal.App. 121, 132, 118 P. 947, and a motion for summary judgment cannot be sustained by an affiant's conclusions. *Weichman v. Vetri*, 100 Cal. App.2d 177, 179, 223 P.2d 288; *Krupp v. Mullen*, 120 Cal.App.2d 53, 57, 260 P.2d 629. This is for the reason, among others, that section 437c, Code of Civil Procedure, provides that "The affidavit or affidavits in support of the motion must *contain facts* sufficient to entitle plaintiff or defendant to a judgment in the action, and the facts stated therein shall be within the personal knowledge of the affiant, and *shall be set forth with particularity*, and each affidavit shall show affirmatively that affiant, if sworn as a witness, can testify competently thereto." (Emphasis added.)

[9-12] The facts stated in the affidavits opposing the motion are to be taken as true, *Weichman v. Vetri*, supra, 100 Cal.App.2d 177, 179-180, 223 P.2d 288; *Raden v. Laurie*, 120 Cal.App.2d 778, 782, 262 P.2d 61; *D. E. Sanford Co. v. Cory Glass, etc., Co.*, 85 Cal.App.2d 724, 731, 194 P.2d 127. And the court's sole function is to ascertain whether a triable issue of fact exists; there it must stop, without trying to solve the issue. *Eagle Oil & Refining Co. v. Prentice*, 19 Cal.2d 553, 555, 122 P.2d 264. A triable issue exists when there is a conflict in the evidence or divergent inferences deducible from uncontradicted evidence. This principle finds everyday application upon motions for nonsuit, directed verdict, judgment non obstante, and determination on appeal of sufficiency of evidence to sustain a finding. Applied to the instant case this

1. The Marian Elliott affidavit merely authenticates copies of certain documents, which are conceded to be correct.

means that the court properly could grant the motion only if plaintiff's evidence and supporting circumstances were legally insufficient to warrant a finding of an implied contract, one implied in fact.

[13] In plaintiff's conversations with Wilder's secretary he revealed to her his idea of a motion picture based upon the life and death of Floyd Collins and also his treatment of the facts, which he had drawn from sources such as the New York Times and American Mercury Magazine. Both the idea and its concrete expression (even though wanting in protectible quality) may be the subject of sale to anyone who is willing to buy. In *Weitzenkorn v. Lesser*, supra, 40 Cal.2d 778, 791, 256 P.2d 947, 957, Mr. Justice Edmonds' opinion says: "The question of protectibility need not be considered in determining the sufficiency of the allegations of the first count of the complaint, based upon express contract." In the *Kurlan* case, Mr. Justice Traynor says, concerning the express contract count, 40 Cal.2d at page 815, 256 P.2d at page 973: "Although that idea is not property, it may be protected by an express or an implied-in-fact contract." In the second telephone call plaintiff specifically told Wilder's secretary he expected to be paid the reasonable value if his material was used by defendants. If used after this submission an implied contract to pay would be fairly, if not inevitably, inferable.

[14] And the first conversation would support such an inference although plaintiff is unable to recall that he said anything about expecting payment. A request for submission of the material is not of the essence. It is a settled principle that "* * * in the absence of an express contract originally, where one performs for another, with the other's knowledge, a useful service of a character usually charged for, and the latter expresses no dissent, or avails himself of the service, a promise to pay the reasonable value is implied." 12 Cal.Jur.2d § 5, p. 188. "And even though no request is made for the performance of work or service, if it is known that it is being rendered with the expectation of pay, the person benefited

is liable. It is a question of fact if services are accepted whether a reasonable man in the position of the parties would understand that they are offered in return for a fair compensation, or would rather suppose either that they are offered gratuitously, or if not, that the recipient might think so. It is customary to lay down presumptions, as that 'with respect to strangers a contract for compensation will be implied unless a contrary situation is exhibited,' whereas as between relatives 'a contract alleged to exist must be affirmatively shown.' But it is undesirable to lay too much stress on such presumptions. They are mere inferences of fact. Intimate friends sometimes render services gratuitously, and how close must relationship be to make one presumption or another applicable? The question is purely one of fact, varying in every case, but with the burden always on the party, who alleges a contract and seeks to enforce it, to prove its existence." *Williston on Contracts* (Rev.Ed), Vol. 1, § 36, pp. 94, 95, 96. The motion picture companies have been subjected to this type of suit innumerable times over the years. They have become, or should have become, sensitive to the fact that anyone like plaintiff who submits a manuscript or story is in search of large rewards. On the other hand there is no basis in common sense to suppose that plaintiff, a stranger to defendant, should offer it anything as a basis for its making money without expecting to be paid for it. The circumstances of the original conversation and its partial disclosure suggest the inference that both sides would expect payment of a consideration in event of use by defendant. "Implicit in this submission was the belief that if the program were used he would be compensated therefor." *Stanley v. Columbia Broadcasting System*, 35 Cal.2d 653, 663, 221 P.2d 73, 79, 23 A.L.R.2d 216. It is to be remembered that our present task is merely to determine whether inferences of sufficient substantiality arose to make a triable issue of fact. So far as the second conversation is concerned, it does not affirmatively appear that the mention of payment followed the disclosure. The deposition was taken under section 2055, Code of

Civil Procedure, and the order of eliciting facts was determined by the cross examiner.

[15] If express, such a contract could rest in parol, Civ.Code, § 1622; *Kurlan v. Columbia Broadcasting System*, supra, 40 Cal.2d 799, 810, 256 P.2d 962; *Johnston v. Twentieth Century-Fox Film Corporation*, 82 Cal.App.2d 796, 820, 187 P.2d 474, and of course necessity of a writing is negated by the very concept of a contract implied in fact. We do not agree with the assertion that "An oral recitation of a synopsis over the telephone cannot be construed to be submission of a written manuscript",—not unless the word "manuscript" be taken as referring to the sixty page story rather than the synopsis.

[16] Counsel for respondents make the point that there could be no contract here because plaintiff's unprotectible material was not property and the essence of a contract respecting same is the disclosure for an agreed consideration; that, in this instance, the disclosure was made before any mention of an expectation of compensation and therefore there could be no contract implied in fact.² There appears to be no reason why a contract to pay for use could not be made as well as one to pay for disclosure; the former would be much more sensible and realistic. It is a question of fact as to what men's minds actually meet upon.

This contention must be examined with the *Weitzenkorn* and *Kurlan* rulings in mind. They hold that there can be an express or an implied-in-fact contract covering ideas or other material drawn from the public domain. Respondents' cited cases of *Bristol v. Equitable Life Assurance Society*, 132 N.Y. 264, 30 N.E. 506, 507 and *Rodriguez v. Western Union Telegraph Co.*, 259 App.Div. 224, 18 N.Y.S.2d 759, do support the proposition that advance disclosure is fatal to a claim of a contract to pay for use of an idea. But they represent only one viewpoint in a field which discloses a split in the authorities. And those New York

cases, unless confined to mere ideas, deny the California rule that there can be a contract implied in fact with respect to unprotectible literary material.

Brunner v. Stix, Baer & Fuller Co., 352 Mo. 1225, 181 S.W.2d 643 upholds an agreement to pay for a disclosed idea, saying at page 646: "The utterance of his idea by a creator or the expiration of his copyright or patent operates merely to destroy his monopolistic right in the copyrighted work or patented invention; but the creative value of the idea imparted by the literary work or by the invention is not destroyed. The case does not pivot on an unauthorized use of an asserted property right, common law or statutory, in a disclosed idea, but on a contract to pay for the authorized use of a disclosed idea. Plaintiff was under no legal obligation to make his plan known to defendant. He disclosed it in consideration of a promise given and received as the equivalent in value for its disclosure. Defendant's cases recognize, we think, the disclosure of a new and useful idea, or one thought to be useful, may be protected by contract." This case is followed in *Schonwald v. F. Burkhart Mfg. Co.*, 356 Mo. 435, 202 S.W.2d 7.

[17] It well may be true with respect to a mere idea that "A duty not to use an idea already known cannot be created by virtue of the fact that one makes a confidential disclosure of that idea." *Smoley v. New Jersey Zinc Co.*, D.C., 24 F.Supp. 294, 300. That rule would apply to plaintiff's disclosure of his idea of making a motion picture based upon the harrowing experience of *Floyd Collins*. But we apprehend that it does not extend to disclosure, for the express purpose of sale, of a written treatment of that idea even though it be merely plaintiff's individual method of telling the story of an historical event drawn from newspapers and magazines. Treatments of news events furnish an analogy, though not a complete one. They are protectible, see 34 Am.Jur. § 17, p. 412. Other compilations of known facts are also protected in

2. Interesting discussions of this problem appear in 27 Southern California Law Review 290 and 42 California Law Re-

view 28. See also 104 A.L.R. 1357; 23 A.L.R.2d 245; 170 A.L.R. 459.

the same manner as original compositions. Section 12, at page 409 of 34 American Jurisprudence says: "Creation, in its technical sense, is not essential to vest one with ownership of rights in intellectual property. Thus, a compiler who merely gathers and arranges, in some concrete form, materials which are open and accessible to all who have the mind to work with like diligence is as much the owner of the result of his labors as if his work were a creation rather than a construction. Also, one who, by his own investigation and labor, annotates or makes a commentary upon the literary product of another is considered the owner of his notes and comments, and he is treated, in law, accordingly."

In his first telephone conversation plaintiff disclosed his idea and told briefly the Collins story, but he did not then furnish the text of his sixty page treatment and had not yet prepared the synopsis. So he did not then lose any rights inhering in or growing out of his own written story of the Collins tragedy. In the next conversation he revealed the entire synopsis, his own treatment of the event, giving explicit notice that he expected payment in the event of its use by defendants. That this constituted sufficient basis for a contract implied in fact is suggested by the ruling in *Yadkoe v. Fields*, 66 Cal.App.2d 150, 151 P.2d 906, 908, where recovery upon implied contract was upheld. Without request plaintiff, a total stranger, submitted to defendant W. C. Fields a certain radio script; Fields acknowledged same and said "if you would like to submit a couple of scripts gratis and I am able to use them, who knows, both parties being willing, we might enter into a contract." Plaintiff complied. Defendant used some of his material and defended the action upon the ground, among others, that it was not protectible. Plaintiff's recovery was upheld, reference being made, as supporting authority, to *Liggett & Meyers Tobacco Co. v. Meyer*, 101 Ind.App. 420, 194 N.E. 206; *How J. Ryan & Associates v. Century Brewing Ass'n*, 185 Wash. 600, 55 P.2d 1053, 104 A.L.R. 1353; and *Cole v. Phillips H. Lord, Inc.*, 262 App.Div. 116, 28 N.Y.S.2d 404. The opinion does not specifically pass upon the question of whether

the material used was within the protectible class, but it remarks on page 159 of 66 Cal. App.2d on page 911 of 151 P.2d and its reliance upon the *Liggett*, *How J. Ryan* and *Cole* cases seem to indicate the view that it was dealing with protectible matter. The law has progressed since *Yadkoe* to the point where it is now recognized that an implied contract may arise from material which is otherwise *publici juris*,—one implied in fact. A true quasi-contract cannot spring from its use, for there is no unjust enrichment,—the same considerations applying here as in a true plagiarism case. The implied contract with respect to public domain material is like any other which is implied in fact. "Under the theory of a contract implied in fact, the required proof is essentially the same as * * * upon express contract, with the exception that conduct from which the promise may be implied must be proved." *Weitzenkorn v. Lesser*, supra, 40 Cal.2d 778, 794, 256 P.2d 947, 959. If plaintiff *Desny's* manuscript story of a well-known event were protectible *per se* the *Yadkoe* case would be directly in point; but counsel for appellant concedes it was not in that category. However, counsel does not concede that the synopsis could not be made the subject of an implied contract to pay in case of use. Plaintiff's deposition shows a submission upon express declaration of a right to compensation in case of use by defendants. If it were held that use under these circumstances could not give rise to a contract implied in fact that phase of the *Weitzenkorn* decision would have been ignored and the distinction between contracts implied in law and those implied in fact would have been obliterated. The essential difference between the two types of quasi-contract is that the former relates to protectible (original) material and the latter pertains to facts, stories, plays, etc. drawn from the public domain. Unless the present factual situation gives rise to an implied contract it is difficult to conceive of a situation that would do so.

[18, 19] In the field of protectible literary or musical or like property a limited or qualified publication does not destroy the private ownership. *Stanley v. Columbia*

Broadcasting System, 35 Cal.2d 653, 666, 221 P.2d 73, 23 A.L.R.2d 216; see also cases discussed in dissent of Mr. Justice Carter in *Kurlan v. Columbia Broadcasting System*, supra, 40 Cal.2d 799, 816-819, 256 P.2d 962. There seems to be no good reason why the same rule should not apply to a manuscript which, though not original and protectible, may become the subject of a protecting contract. "A limited publication of literary property is really not a publication, in the ordinary sense of the word, but a privileged disclosure. It is the communication of knowledge of the contents of literary property under conditions expressly or impliedly precluding its dedication to the public." 34 Am.Jur. § 61, p. 445. "If it were held otherwise, the mere offer to sell would destroy the thing offered", says the Washington court in *How J. Ryan & Associates v. Century Brewing Ass'n.*, 185 Wash. 600, 55 P.2d 1053, 1054, 104 A.L.R. 1353. And *Moore v. Ford Motor Co.*, 2 Cir., 43 F.2d 685, 687 recognizes that limited submission may be made of nonprotectible material without destroying the subject of the offer. So does *Elfenbein v. Luckenbach Terminals*, 111 N.J.L. 67, 166 A. 91. While the contents of plaintiff's synopsis were within the public domain and defendants free to use all or any of the facts or incidents there set forth they had to go to original sources for their said facts and they could not, in the face of plaintiff's notice of an expectation of pay, take a short-cut by using his compilation, not without incurring liability to him for such use.

Counsel for respondents also argue that there can be no consideration for an implied promise to pay for unprotectible material which has been disclosed. The *Rodriguez* and *Bristol* cases, supra, stand for this proposition. They deal with mere ideas. If disclosure of a treatment of an idea constitutes adequate consideration for a contract, the use of the same after disclosure would afford no less support for a promise to pay.

[20] We apprehend that defendants' motion should have prevailed in the face of a showing of the alleged implied contract if they had succeeded in establishing with-

out conflict that there was no use of plaintiff's synopsis in making the motion picture. In this event the other triable issues would not be determinative ones. Of course the moving party has the burden of making a clear showing that he is entitled to judgment without a trial. *Travelers Indemnity Co. v. McIntosh*, 112 Cal.App.2d 177, 182, 245 P.2d 1065; *Werner v. Sargeant*, 121 Cal.App.2d 833, 837, 264 P.2d 217. Defendants' affidavits make no mention of whether plaintiff's treatment was actually used in the making of the photoplay. And their argument in this court stresses the fact that they had the right to use any and all material relating to *Floyd Collins* rather than a claim that they did not promote their own convenience by adapting to their photoplay the readily available compilation of facts. They are thus left in position where it must appear as a matter of law that there was no substantial similarity, so that on that basis it may be further said that no use was made of plaintiff's material. The document filed by plaintiff's counsel at time of argument, entitled "Appellant's Opening Argument" makes a comparison of plaintiff's synopsis and the scenario of defendants' photoplay and we have witnessed a showing of the motion picture, with the result that this court cannot say, as matter of law, that there was no use by defendants of plaintiff's outline.

[21] The record discloses triable issues of fact.

[22] Plaintiff also appeals from an order of January 27, 1954 denying a motion to set aside the judgment and permit plaintiff to amend the amended complaint. The proposed amendment substituted an allegation of submission of the synopsis in the manner and on the terms set forth in plaintiff's deposition, in the place of paragraph VI of the amended complaint which averred submission of his full treatment, Exhibit 1. The order is not appealable. *Bank of America, etc., v. Oil Well Supply Co.*, 12 Cal.App.2d 265, 271, 55 P.2d 885; *Werner v. Sargeant*, supra, 121 Cal.App.2d 833, 834-835, 264 P.2d 217. But the arguments presented by respondents in connection with that attempted appeal are pertinent to the

propriety of the summary judgment. They say that there was a fatal variance between *allegata* and *probata* in that the complaint alleged submission of the entire story, Exhibit 1, and the proof showed that the only thing submitted was the synopsis.

[23] A sound discretion ordinarily demands that a party be permitted to amend when, upon motion for summary judgment, it appears that his pleading is defective, but the initiative must be taken by counsel; if he does not so move the court is not required to act. *Gardenswartz v. Equitable, etc., Society*, 23 Cal.App.Supp.2d 745, 753, 68 P.2d 322; *Krupp v. Mullen*, 120 Cal.App.2d 53, 57, 260 P.2d 629. In this case no such motion was made until after judgment entered. But if perchance there was a fatal departure, rather than a variance, the court properly rendered judgment for defendants.

Section 469, Code of Civil Procedure, says: "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the Court may order the pleading to be amended, upon such terms as may be just." Section 470: "Where the variance is not material, as provided in the last section, the Court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs." Section 471: "Where, however, the allegation of the claim or defense to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, within the last two sections, but a failure of proof." Respondents' point is that there was a complete failure of proof because the reliance upon the synopsis was an attempt to introduce an entirely new cause of action after the statute of limitation had run. This contention cannot be upheld.

[24-26] Great liberality is indulged in the matter of amendment to the end that lawsuits may be determined upon their

merits. *Klopstock v. Superior Court*, 17 Cal.2d 13, 19, 108 P.2d 906, 135 A.L.R. 318; *Frost v. Witter*, 132 Cal. 421, 424, 64 P. 705; *Barr v. Carroll*, 128 Cal.App.2d 23, 26, 274 P.2d 717; *Hanna v. Hirschhorn*, 112 Cal.App. 438, 440-442, 296 P. 891. But the solution of every problem of whether a new cause of action has been inserted by amendment after the running of the statute of limitation must be solved by applying to the specific facts a correct conception of what constitutes a cause of action. A cause of action is the right to secure redress for violation of an obligation owing to the claimant. Though phrased in varying ways this is the result of the authorities. In *Frost v. Witter*, *supra*, 132 Cal. 421, 426, 64 P. 705, 707, the court said: "The action therefore springs from the obligation, and hence the 'cause of action' is simply the obligation." Again: "The 'cause of action' is therefore to be distinguished also from the 'remedy,' which is simply the means by which the obligation or the corresponding action is effectuated; and also from the 'relief' sought. Pom. Pl. & Prac. § 453." In *Klopstock v. Superior Court*, *supra*, 17 Cal.2d 13, at page 20, 108 P.2d 906, at page 910: "In determining whether a wholly different cause of action is introduced by the amendment technical considerations or ancient formulae are not controlling; nothing more is meant than that the defendant not be required to answer a wholly different legal liability or obligation from that originally stated. As the court says in the *Frost* case, *supra*, 132 Cal. at page 426, 64 P. at page 707, for the purpose of determining whether amendment is possible, the 'cause of action' referred to as furnishing the test means only the legal obligation which it is sought to enforce against the defendant. Other courts have used almost identical language; the test is not whether under technical rules of pleading a new cause of action is introduced, but rather, the test is whether an attempt is made to state facts which give rise to a wholly distinct and different legal obligation against the defendant. The power to permit amendment is denied only if a change is made in the liability sought

to be enforced against the defendant. See *Harriss v. Tams*, 258 N.Y. 229, 242, 179 N.E. 476." *Day v. Western Loan & Building Co.*, 42 Cal.App.2d 226, 231, 108 P.2d 702, 704: "It is well settled that, where the original complaint has been filed within the statutory period, an amended complaint may be filed after the statute has run as long as it does not state a new or different cause of action from that appearing in the original complaint. Stated another way, if the original complaint defectively states a cause of action, it may be amended after the running of the statute as long as the cause of action stated in the amended pleading can trace its descent from the original pleading."

[27, 28] Certainly the proposed amended pleading "can trace its descent from the original pleading" for it relies upon an abstract of the story initially alleged to have been submitted. And respondents can not claim to have been misled, for they adopted for the purpose of their motion the synopsis and agreed it had been submitted to them. There was no shifting to a new cause of action here, at best a variance and that is not a matter available to the moving party in a proceeding for summary judgment. This is a case in which the court may find the fact according to the evidence. And the case appears to be a proper one in which to direct the allowance of the proposed amendment, 4 Cal.Jur.2d § 668, p. 556, and, because of appellant's concession that no cause of action exists upon the second or third count, to limit the trial to the issues raised by the amended first cause of action and answer thereto. 4 Cal.Jur.2d § 668, p. 555.

The appeal from the order of January 27, 1954 denying motion to set aside judgment etc., is dismissed. The judgment is reversed with instructions to limit the trial to issues raised by first count of amended complaint and answer thereto, and to permit plaintiff to amend paragraph VI of the amended complaint in the manner heretofore proposed by him, and to make such other and further amendments to said complaint as the court may deem appropriate.

SHINN, P. J., and VALLÉE, J., concur.

134 Cal.App.2d 562

Henry M. SMITH and Josephine L. Smith,
Plaintiffs and Respondents,
and

Henry M. Smith, Cross-Defendant,
v.

Fortune Jules PELLISSIER, Defendant,
and

Fortune Jules Pellissier and Edith Pellissier,
Cross-Complainants and Appellants.

Civ. 16363.

District Court of Appeal, First District,
Division 2, California.

July 26, 1955.

Rehearing Denied Aug. 25, 1955.

Hearing Denied Sept. 21, 1955.

Reciprocal negligence actions of two married couples injured when their automobiles collided. The Superior Court, Marin County, Thomas F. Keating, J., entered judgment for couple whose automobile had been proceeding on through highway, and driver of automobile which had approached from side road appealed. The District Court of Appeal, Nourse, P. J., held that instruction with regard to which automobile had right of way at intersection involved, was not error requiring reversal, where record did not show who proposed instructions or whether any of them were given at court's own motion.

Judgment affirmed.

1. Appeal and Error ⇐991

Question whether approaching vehicle constitutes immediate hazard is ordinarily one of fact concerning which jury's conclusion is binding on appeal.

2. Automobiles ⇐245(14)

Whether driver acts with due care or negligently in proceeding across through highway must as general rule be left to determination of jury in view of all circumstances.

3. Appeal and Error ⇐699(4)

In reciprocal negligence actions of two married couples injured when their automobiles collided, instruction with regard to which automobile had right of way at intersection involved, was not error requiring reversal, where record did not show who proposed instructions or whether any of

them were given at court's own motion. Vehicle Code, §§ 81, 82.5, 86, 471, 552, 577.

4. Appeal and Error ⇨928(1)

When record fails to show who requested instructions, it will be presumed by appellate court that they were requested by appellant who claims them to be erroneous.

5. Appeal and Error ⇨882(12)

Under doctrine of invited error, party cannot complain on appeal of giving of instruction which he requested, which is substantially the same as one he requested, or giving of which was invited by one he requested.

6. Appeal and Error ⇨757(3)

Where appellant claims that some particular issue of fact is not sustained by evidence, he is required to set forth in his brief all material evidence on point, and if such is not done, error assigned is deemed waived.

7. Appeal and Error ⇨757(3)

On appeal from judgment in automobile accident case, action of appellant in failing to include evidence with respect to injury of respondents, constituted waiver of claimed excessiveness of amount of damages.

Fred Leve, Myers & Meehan, San Anselmo, for appellants.

Bagshaw, Schaal & Martinelli, San Rafael, for respondents.

NOURSE, Presiding Justice.

These are reciprocal negligence actions of two married couples injured when their cars collided. In each car the husband was the driver and each couple sued the driver of the other car. The verdicts were for the Smiths, who were driving on a sign-posted through highway; the Pellissiers, who drove their car from a side road into the highway in front of the Smith car, appeal. Appellant in singular will hereinafter indicate Mr. Pellissier, respondent Mr. Smith.

The through highway is Tiburon Boulevard which connects Tiburon in Marin County with highway 101. The side road is Cove Road which connects Belvedere in Marin County with Tiburon Boulevard, at

which it ends. The parties considered Tiburon Boulevard at the intersection as running easterly and westerly; the directional arrow on the surveyor's plat used in the case shows that such is not correct, but as the absolute directions are without importance herein we shall follow this terminology of the parties. Cove Road then enters Tiburon Boulevard from the southeast, forming a "Y" intersection. At the intersection Cove Road widens very strongly so that cars can more easily turn from it into Tiburon Boulevard both in easterly and westerly direction. The stop sign which protects the boulevard is placed where Cove Road begins to widen. Appellant Mr. Pellissier testified that from the stop sign to the southern travel lane of the boulevard he had measured the distance to be 90 feet.

The accident happened on April 26, 1953 at about 11:00 P.M. It was raining and the pavement was very wet. The Smiths in their Ford were going east on Tiburon Boulevard back to their home at Tiburon. The Pellissiers in their Buick were coming from Belvedere, where they had had dinner at the house of Mr. Mantegani, and were going home to San Francisco. Mr. Mantegani in his car was bringing away another guest in the same direction and the Pellissiers, who were not certain of the way back, were to follow him. To go to San Francisco over highway 101 the cars had to turn left (west) into Tiburon Boulevard. When Mr. Mantegani came to the stop sign, he stopped there and seeing a car only far away to the west, probably not nearer than 800 feet, he proceeded to cross. He crossed the middle line of the boulevard at a speed of 20 miles per hour and increased it thereafter. He met the car coming from the west (the Smith car) after he himself had been going west on the boulevard for a distance of which the estimates vary between 100 and more than 200 feet. He estimated the speed of the Smith car at 40 to 45 miles an hour, which was more than his own speed.

Appellant testified that he had stopped behind the Mantegani car at the stop sign, that when Mr. Mantegani started up he followed immediately to the stop sign and made a full stop there, that he then saw a

car coming from the west just at the other side of the railway tracks which cross the highway and which he measured later to be 175 yards (525 feet) from the place of the accident. He made no estimate of the speed of the oncoming car, but knew that Tiburon was a main traveled boulevard, and he thought that there was there a maximum speed zone of 35 miles an hour. He then started and drove on in low gear at a constant speed of 5 miles an hour into the boulevard. He continued to observe the oncoming car and when the front of his own car was at the southern travel lane of the boulevard he saw the other car about the length of the courtroom away (it was subsequently fixed at 51 feet). It was coming pretty fast. The right front wheel of the Pellissier car was over the middle line, the left front wheel just before it when the Smith car hit it just in front of the driver's seat. However, the witness Thruston, a Highway Patrolman, testified that when after the accident he asked appellant how far the other vehicle was when he noticed it when pulling away from the stop, his answer was "I first saw him when he was six or eight feet from me."

Respondent testified that he was familiar with the intersection and the stop sign. He was driving thirty to thirty-five miles an hour before he came to the railway tracks, and diminished to approximately 25 when coming to the tracks. From there he could see more clearly lights moving in Cove Road in the direction of the boulevard. He saw the lights of two cars of which he thought the lead car was stopped at the stop sign the second car 12 or 15 feet behind it. When he had passed the railway tracks he increased speed to approximately thirty miles. Just then he saw the lead car start. He took his foot from the accelerator. The lead car passed 170 feet (or less) in front of him and it actually passed him on the highway fifty or sixty feet from the place of the later impact. When the first car had crossed in front of him he saw the second car moving up very slowly. Possibly up to 12 feet back from the imaginary south border line of the highway it stopped a second. Respondent was then in the highway about 50 feet from the place of impact and he con-

cluded that appellant was giving him the right of way. Respondent continued his course but at that distance of 50 feet the other car suddenly started in front of him. He threw on his brakes, but he started sliding. He tried to turn to the right but did not succeed and the cars collided. When he saw the lead car start when he was approximately 500 feet from the point of impact he could easily have stopped. On cross-examination of respondent there was some conflict with the above, but statement of these conflicts and of other details of testimony seem unnecessary for this appeal.

Appellants' first contention is that respondent was guilty of negligence as a matter of law because he violated Section 552 of the Vehicle Code by not yielding the right of way. The contention is without merit. Section 552 reads:

"(a) The driver of any vehicle shall stop as required by Section 577 of this code at the entrance to a through highway and shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard.

"(b) Said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on the through highway shall yield the right of way to the vehicle so about to enter or cross the through highway."

[1] It is evident that only then we could hold as a matter of law that respondent violated Section 552, if we could say as a matter of law that he was not approaching so closely on the through highway as to constitute an immediate hazard. "The question whether an approaching vehicle constitutes an immediate hazard is ordinarily one of fact concerning which the jury's conclusion is binding on appeal." *Zwerin v. Riverside Cement Co.*, 52 Cal.App.2d 715, 719, 126 P.2d 920, 922. This rule must certainly apply in this case where the decision in question is complicated by conflicts in the evidence and by the fact that the stop of the appellant was made at a considerable distance from the point of actual danger, to

wit where the paths of the two cars would actually cross. In *Cedzo v. Bergen*, 53 Cal. App.2d 667, 677-678, 128 P.2d 683, 689, it is said: "The very fact that the stop sign and the stop line were placed at such a considerable distance back from the curb line (extended) of Redondo Boulevard obviously placed on the driver of the car [which stopped there] the responsibility of recognizing that a car approaching from the west on Redondo Boulevard, even though a considerable distance away from the actual intersection, might constitute an immediate hazard to a car attempting to cross such intersection from a start on Florence Avenue at either the stop sign or the stop line." In this case appellant testified that he drove the 90 feet from the place where he stopped to the actual intersection at a speed of only five miles an hour. According to the generally accepted approximation that a speed of a number of miles per hour equals a speed of one and a half times that number of feet per second, appellant at a speed of $7\frac{1}{2}$ feet per second needed approximately 12 seconds to reach the place of actual danger. At the moderate speed of 35 miles an hour (a speed considered by appellant) respondent's car would in 12 seconds have gone approximately 630 feet, which is more than the distance at which appellant sighted it.

[2] Moreover, even if appellant had had the right of way and if therefore respondent had been in violation of Section 552, such would not conclusively have proved negligence, but the presumption to that effect could have been overcome by evidence showing that respondent's conduct was excusable, justifiable or such as might have been expected from a person of ordinary prudence under all the circumstances of the case, which matter normally presents a question of fact for the jury. *Satterlee v. Orange Glenn School Dist.*, 29 Cal.2d 581, 590, 177 P.2d 279. The jury was so instructed and could believe respondent's testimony that appellant made a second stop when he was near the actual intersection at a time when respondent was not more than fifty feet away, and the jury could hold that under these circumstances respondent could reasonably believe that appellant yielded the

right of way to him, so that he was justified in continuing in his course. It could then also hold that appellant was negligent in starting up and moving into respondent's path. "Whether a driver acts with due care or negligently in proceeding across a through highway must as a general rule be left to the determination of the jury in view of all the circumstances." *Wilkinson v. Marcellus*, 51 Cal.App.2d 630, 633, 125 P.2d 584, 586; *Grasso v. Cunial*, 106 Cal.App.2d 294, 300, 235 P.2d 32.

Appellants next complain of the following part of the instructions given:

"But in a situation where a driver about to enter a through highway may properly stop at a point some distance away from the boundary of the through highway, the duty of that driver to yield the right of way to vehicles approaching on the through highway, so closely as to constitute an immediate hazard, continues up to the time the entering driver reaches the entrance to the through highway."

According to appellants this instruction imposes on appellant a too long continued duty to yield the right of way, to wit until he reached the traveled portion of the through highway.

The paragraph complained of forms part of twenty-five pages of instruction without division into numbered sections or indication as to whether any part was proposed by appellants or respondents or was given on the court's own motion. With respect to the specific question of stopping and right of way at an intersection with a through highway, the instructions contain over and above the part complained of the text or the applicable part of the text of sections 81, 82.5, 471, 577, 86, and 552 of the Vehicle Code and the following paragraphs, which we number consecutively for reference, indicating where paragraphs have been omitted:

* * * * *

(1) "The location at which the State Department of Public Works may have erected a stop sign at an intersection to a through highway, does not necessarily indicate the entrance to the

through highway, nor the beginning of the intersection of the through highway. Sec. 471 of the Vehicle Code provides:

"Every stop sign shall be located at or near the entrance to the highway or intersection where a stop is required."

* * * * *

(2) "For the purpose of this case an intersection is the area within which vehicles traveling upon different highways joining at an angle such as the angle involved here may come in conflict."

* * * * *

(3) "If you believe from the evidence in this case that Pellissier stopped at the stop sign before entering the intersection, and at the time he entered the intersection the Smith automobile was not at that time an immediate hazard, then I instruct you that under such circumstances it was the duty of Smith to yield the right of way to Pellissier, and if he did not do so under such circumstances, then he violated the provisions of Section 552 of the Vehicle Code of this State."

(4) "But if Mr. Smith was exercising ordinary care, and was approaching so closely to Cove Road as to constitute an immediate hazard to the entry onto Tiburon Boulevard of the Pellissier car, at the time the Pellissier car was stopped at the entrance to the intersection, then Mr. Smith had a right to assume that the Pellissier car would yield the right-of-way to him."

(5) "You may ask yourselves the question: When has a vehicle on a through highway approached so close to an intersection as to constitute an immediate hazard? The answer is that the approaching vehicle is that close whenever, if a reasonably prudent person were in the position of the driver who has stopped his automobile at the entrance to the through highway, he would apprehend the probability of colliding with the approaching vehicle were he then to enter the highway."

* * * * *

(6) "A driver on a through highway is not absolved from the duty of maintaining a proper lookout and keeping his car under control, and where another car enters the highway at a time when the car on the through highway is not 'approaching so closely as to constitute an immediate hazard', the driver of the vehicle on the through highway is under a duty to yield the right of way to the car engaged in crossing it."

(7) "It is the duty of every person using a public highway, whether a pedestrian or the driver or operator of any kind of vehicle, to exercise ordinary care at all times to avoid placing himself or others in danger and to avoid a collision."

* * * * *

(8) "A motorist who attempts to enter a through highway from a side road does not do so at his peril. He has certain established rights which must be respected by motorists on the through highway. If you find in this case that Pellissier stopped at or near the stop sign and then proceeded to cross the intersection at a time when Smith's car did not constitute an immediate hazard, then I instruct you under such circumstances that Pellissier had the right of way and it was the duty of Smith to yield the right of way to him."

(9) "One entering a through highway is required by law to stop but once and that at the entrance to a through highway. I hereby instruct you that for the purposes of this case the stop sign located on Cove Road is at the entrance to the intersection of Cove Road with Tiburon Highway, even though you may feel that it is some distance from any boundary line of the intersection."

Immediately thereafter follows the paragraph complained of, and the charge then continues with:

(10) "If you find that Tiburon Boulevard was a through highway and that the plaintiff, Henry Smith, was exercising ordinary care in driving upon said highway immediately preceding

the accident, then the said plaintiff Henry Smith had a right to assume that all other drivers, including the defendant Pellissier, would obey the law and would bring their automobiles to a stop before entering Tiburon Boulevard and would yield the right of way to the said plaintiff Smith if the automobile of the said plaintiff Smith was then approaching so closely to said intersection as to constitute an immediate hazard."

There can be little doubt that this charge is repetitious, complex and uncertain in its terminology. The meaning and the relation of the expressions, "entrance to through highway, beginning of intersection, entering the intersection, entry into Tiburon Boulevard, enter the highway, engaged in crossing it, proceed to cross the intersection, boundary line of the intersection" would be sufficiently clear if they related to a normal crossing of two roads where cars made their stop near to the travel lanes to be crossed or turned into, but are uncertain in this case where the stop is made far from the crossing lanes of traffic. For instance it can hardly be said that a car which proceeds after having stopped at the stop sign at that moment enters the through highway or even the intersection, as at that place no cars "traveling upon different highways" (See instruction 2) "may come in conflict." Such can only happen where the traveled portions of both highways meet or less than a car length outside of said area. Moreover there seems to be some conflict in the rules stated in the different instructions as to the right of way, considering that appellant stopped at a distant stop sign. Some of them seem to decide the question of right of way according to conditions existing at the moment that appellant's car was stopped at the stop sign or starting from there (instructions 3 and 4 and more ambiguously 5, 8 and 10). Such may well be in accord with the language of Section 552, Vehicle Code if construed to mean that the car about to enter the through highway yields the right of way at the place where it makes its stop, and proceeds only from there when it is entitled to the right of way.

Language in *Cedzo v. Bergen*, supra, 53 Cal.App.2d 667, 678, 128 P.2d 683, 690 ("at the time the latter made its stop") seems to point in that direction. However, in instruction 6 the decisive moment seems to be that on which the car coming from the lesser road enters or crosses the through highway. This may well be a more practical approach. See *Elmore v. County of Lassen*, 10 Cal.App.2d 229, 232, 51 P.2d 481. Under it the driver of the car about to enter a through highway must stop in accordance with Section 577, Vehicle Code to observe traffic conditions, but if the point where he stopped is distant from the actual crossing of the travel lanes he may move up to that point carefully if he can do so without danger and decide there whether he can enter or cross the through highway without any car then moving on the through highway causing an immediate danger. The parties discuss the instruction complained of as if it provided for the latter manner of deciding the right of way. However, it does not do so, or at least less clearly than instruction 6, which is not attacked. It says that the duty of the entering driver to yield the right of way continues up to the time he "reaches the entrance to the through highway." Immediately preceding this instruction instruction 9 had told the jury "that for the purpose of this case the stop sign located on Cove Road is at the entrance to the intersection of Cove Road with Tiburon Highway." Earlier in instruction 1 it had been said that the stop sign did not necessarily indicate the entrance to the through highway or the beginning of the intersection of the through highway because the sign under Section 471, Vehicle Code could be placed *at or near* the intersection. In our case, however, it was stated to be *at* such entrance. (Instruction 9.) As the entrance and the stop sign accordingly are the same place the instruction attacked did not enlarge appellant's duty to yield the right of way.

[3-5] We cannot know with certainty how the jury understood this instruction, or the whole combination of instructions mentioned, but at any rate, no defect in the instruction complained of, separately or in

connection with related instructions, can entitle appellants to a reversal. As mentioned before, the record does not show who proposed any of these instructions or whether any of them were given at the court's own motion. When the record fails to show who requested the instructions, it will be presumed by the appellate court that they were requested by the appellant who claims them to be erroneous (4 Cal.Jur.2d 441-442). Under the doctrine of invited error, a party cannot complain on appeal of the giving of an instruction which he requested, which is substantially the same as one he requested or the giving of which was invited by one he requested (4 Cal.Jur.2d 423). This matter is treated at length in *Lynch v. Birdwell*, 44 Cal.2d 839, 285 P.2d 919, just decided by our Supreme Court.

[6, 7] Finally appellants assert that the sum of \$31,500 awarded respondents is excessive and not justified by the evidence, without making any statement with respect to the injury suffered or the evidence regarding it except that "Mrs. Smith sustained serious injuries." After respondents in their brief have set out at length the grievous character of Mrs. Smith's injuries and Mr. Smith's medical costs, loss of consortium, and minor own injury, with references to the transcript, more than sufficient to justify the award, appellants in their closing brief do not make any further statement as to this point. "Where an appellant claims that some particular issue of fact is not sustained by the evidence, he is required to set forth in his brief all of the material evidence on the point * * *. If this is not done, the error assigned is deemed waived." *Tesseyman v. Fisher*, 113 Cal. App.2d 404, 407, 248 P.2d 471, 473. Appellants' attitude as to this point obviously constitutes waiver.

Appellants also appeal from an order denying their motion for a judgment notwithstanding the verdict. As no separate grievances are presented in this respect, it does not require separate consideration.

Judgment and order affirmed.

DOOLING and KAUFMAN, JJ., concur.

134 Cal.App.2d 659

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**John E. HARTRIDGE, Defendant and
Appellant.**

Cr. 2584.

**District Court of Appeal, Third District,
California.**

July 29, 1955.

Defendant was convicted of receiving stolen property. The Superior Court, Sacramento County, Raymond T. Coughlin, J., sitting without jury, entered judgment of conviction and denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Finley, J. pro tem., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Criminal Law ⇨260(11)

District Court of Appeal could not be called upon to substitute its appraisal of witness and his testimony for appraisal made by trial judge.

2. Criminal Law ⇨511(1)

In criminal prosecution, other testimony in record was legally sufficient, if believed by trier of fact, to qualify as corroborating testimony for that of witness asserted by defendant to be an accomplice. Pen.Code, §§ 496, 1111.

3. Criminal Law ⇨1036(1)

Attempt to challenge, for first time on appeal and by material outside record, voluntariness of defendant's statements which police officer testified had been voluntarily made to him by defendant would not be permitted.

4. Criminal Law ⇨518(1)

Even if statements made by defendant to police officers could be considered as confessions, they would still be voluntary, even though officers had failed to advise defendant of his right to counsel or his right to remain silent and had failed to state that his statements might be used against him.

5. Criminal Law ⇨412(1)

In criminal prosecution, police officer was properly permitted to testify as to statements made to him by defendant, in absence of showing that such statements were not voluntary.

6. Criminal Law ⇨254

In prosecution for receiving stolen property, court's finding that it, after being fully advised, found that defendant was guilty of crime of receiving stolen property as charged in the information was sufficient.

7. Receiving Stolen Goods ⇨8(3)

Evidence was sufficient to sustain conviction for receiving stolen property.

8. Receiving Stolen Goods ⇨3

Guilty knowledge of the larceny is essential fact to be proven in prosecution for receiving stolen goods, but it is not essential that such knowledge be actual and positive, and it may be circumstantial and deductive.

9. Criminal Law ⇨1030(1), 1114(1)

Where defendant's contention was wholly unsupported by record and not raised in the trial court, contention could not be considered upon appeal.

10. Criminal Law ⇨1032(1)

Where defendant had failed to object to amendment of information to provide for incorporation of charge that defendant had been previously convicted of a felony or to request any continuance of matter by reason of filing of such amended information, and defendant had admitted the prior conviction, defendant could not raise such point for first time on appeal.

11. Criminal Law ⇨1035(3)

Defendant, who was represented at trial by counsel of his own choice, and who, during course of trial, did not make any protest to court concerning procedure adopted by his counsel nor in any way manifest to court any dissatisfaction with manner in which his case was handled, could not, upon appeal, attack competency of his counsel.

12. Criminal Law ⇨641(1)

Defendant is entitled to a fair, not a perfect, trial, and his counsel is not required to be infallible.

13. Criminal Law ⇨1035(3)

Habeas Corpus ⇨25(1)

Allegations of mistakes on part of trial counsel, such as that counsel failed to have defendant testify or offer testimony in his own behalf or that counsel failed to obtain available evidence or to ask for continuance, are not recognized as grounds for habeas corpus nor are they entitled to consideration in the District Court of Appeals if not raised in the trial court.

14. Criminal Law ⇨1119(1)

Where, in a criminal prosecution, record does not disclose incompetence of counsel which would make trial judge's failure to intervene on behalf of defendant during trial an abuse of discretion, claims and specifications dehors the record can not be considered for first time on appeal.

John Hartridge, in pro. per.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

FINLEY, Justice pro tem.

Defendant has taken this appeal from a judgment of conviction by the trial court sitting without a jury, and from the order denying his motion for a new trial.

During the afternoon of June 21, 1954, one Alfred McNally burglarized a residence in Sacramento and stole therefrom certain distinctive articles of jewelry worth several thousand dollars. Later that same afternoon defendant, who had become acquainted with McNally while they were both inmates of Soledad Prison, took certain pieces thereof to a jewelry store in Sacramento, told the jeweler that he had been sent over by "Tony", a bartender at the Clayton Club, and asked if the articles were worth \$200. The jeweler told defendant that "if somebody only wanted \$200.00 for this jewelry, then it must be hot. If I was him, I would go tell Tony that, not to touch it with a ten foot pole, but because it is too good for too little." The jeweler also telephoned to Tony who was a friend of his and relayed the same information to him.

Still later that afternoon or evening defendant approached one Lennie Russell, an

entertainer and master of ceremonies at the Clayton Club, and asked the loan of \$200 to go to Reno. Russell refused and defendant left, returning a few minutes later with the same or some of the same articles of jewelry shown to the jeweler and asked Russell to lend him \$150 thereon, stating that he would repay Russell the following Monday. Russell loaned the \$150 and took the jewelry which he retained in his possession until the following Sunday when officers inquired about it and he turned it over to them. At the trial he testified that when he loaned the money he knew nothing about the jewelry having been stolen or presented to the jeweler, or of the jeweler's conversations with defendant or Tony.

Defendant was arrested by the officers on June 26, 1954. It is undisputed that in a voluntary conversation with them subsequent to his arrest, he denied possession of the jewelry in question at any time. In a later conversation with the officers he stated that McNally came to his room with the jewelry and wanted defendant to help him get rid of it. He took McNally to the Clayton Club where McNally remained outside while defendant entered and offered to sell the jewelry to Tony, the bartender. The bartender sent defendant to the jewelry store to have the articles appraised. While the appraisal was being made McNally remained outside on the sidewalk. Defendant then returned to the Clayton Club and told the bartender what the jeweler had said. Defendant identified the jewelry to the officers and stated that he gave it back to McNally, and that he was suspicious of how McNally had obtained it. In a still later conversation with the officers defendant stated that he gave McNally the money obtained on the jewelry from Russell and that he kept none of it. At the trial defendant did not testify or produce any evidence on his own behalf.

Under the heading of "Assignments of Error", defendant lists the following contentions in his opening brief:

"A—The trial court erred in admitting the testimony of Mr. Russell.

"B—The trial court erred in admitting portions of the testimony of Mr. Parker Smith

"C—The verdict of the court was insufficient under existing laws

"D—The evidence is insufficient to sustain a verdict of guilty of receiving stolen property

"E—The District Attorney was guilty of prejudicial misconduct before the court

"F—The trial court erred in denying a defense motion to dismiss the information

"G—Prejudicial misconduct on the part of the defense attorney"

[1] In support of his first specification of error appellant calls attention to several alleged discrepancies in Russell's testimony. His position is that because of these alleged discrepancies the trial court should not have believed Russell's testimony. This argument merely goes to the question of the credibility of the witness, and an appellate court cannot be called upon to substitute its appraisal of the witness and his testimony for that of the trial judge.

Appellant's next argument in connection with Russell's testimony is that the evidence clearly indicates that Russell was an accomplice, and that under the rule laid down in *People v. Lima*, 25 Cal.2d 573, 154 P.2d 698, the uncorroborated testimony of an accomplice is inadmissible. Appellant claims that the test by which it is to be determined whether one is an accomplice or not is to ascertain whether or not he could be indicted for the offense for which the accused is on trial. He argues that since Russell took the jewelry in question and had possession of it under suspicious circumstances, and that these incidents, when linked together, constitute a violation of section 496 of the Penal Code thus establishing that Russell was an accomplice. Respondent's reply to this contention is that under the common law the uncorroborated testimony of an accomplice is sufficient to sustain a conviction, and that the only change in the common law brought about through the enactment of section 1111 of the Penal Code is that although

corroboration is now required, this corroboration need only be slight and may even be circumstantial if it tends to connect the accused with the commission of the offense. *People v. Santo*, 43 Cal.2d 319, 273 P.2d 249; *People v. Griffin*, 98 Cal.App.2d 1, 219 P.2d 519; *People v. Simpson*, 43 Cal.2d 553, 275 P.2d 31. Respondent also contends that in this case the question as to whether Russell was an accomplice was a question for the trier of fact; that impliedly the trier of fact, the trial judge here, found Russell not to be an accomplice, but that even if the finding had been to the contrary, the facts adduced disclose that the testimony of Russell was sufficiently corroborated by the testimony that defendant displayed the stolen jewelry to a jeweler for his appraisal and was advised that it was "hot" and that he shouldn't touch it; that thereafter defendant used this jewelry on which to borrow money; and also by appellant's own statement, allegedly made to the officers and apparently believed by the court, that McNally's possession of the jewelry was suspicious; that he, defendant, was warned by the jeweler not to touch it; and also by defendant's failure to deny the transaction with Russell as well as the conflicting stories told to the officers by defendant. Respondent contends that all this evidence corroborates the testimony of Russell, even assuming that he be regarded as an accomplice. *People v. Gallardo*, 41 Cal.2d 57, 257 P.2d 29; *People v. Henderson*, 34 Cal.2d 340, 209 P.2d 785; *People v. Hooker*, 126 Cal.App.2d 394, 272 P.2d 839; *People v. Griffin*, 98 Cal.App.2d 1, 219 P.2d 519; *People v. Gould*, 111 Cal.App.2d 1, 243 P.2d 809.

[2] We are convinced that respondent's position is well taken. We are satisfied that under the law the testimony in the record in support of Russell's testimony, if believed by the trier of fact, is legally sufficient to qualify as corroborating testimony. See *People v. Bycel*, 133 Cal.App.2d 596, 284 P.2d 927; *People v. Lima*, supra; *People v. McKinney*, 71 Cal.App.2d 5, 161 P.2d 957; *In re Morton* 179 Cal. 510, 177 P. 453.

[3-5] Appellant challenges the admissibility of the testimony of Deputy Sheriff

Smith as to admissions appellant made in conversation with the officers subsequent to his arrest on the ground that such statements were not made voluntarily. However there is no evidence in the record to substantiate this contention. An examination of the record discloses that in each instance the officer testified that the statements made by appellant were made voluntarily and without any force, threats or promises being made to him. The record contains no evidence to the contrary; hence any attempt by appellant to challenge the voluntariness of these statements for the first time on appeal by material outside of the record is unavailing. *People v. Collins*, 117 Cal.App.2d 175, 255 P.2d 59. Even if it be assumed that the statements made by appellant to the officers could be considered as confessions, they would nonetheless be voluntary even though the officers had failed to advise appellant of his right to counsel, his right to remain silent, or that his statements might be used against him. *People v. Landry*, 106 Cal.App.2d 8, 234 P.2d 736. Appellant did not take the stand in his own behalf, and there is no evidence in the record that the statements made by appellant to the officers were other than voluntary. We therefore hold that the testimony of Officer Smith was properly admitted by the trial court.

[6] Appellant's next contention is that the verdict of the court was insufficient under existing laws, and he cites the case of *People v. Tilley*, 135 Cal. 61, 67 P. 42. The finding of the court in the instant case, as disclosed by the clerk's minutes, was that " * * * the court being fully advised finds that the defendant John Hartridge [is] Guilty of the crime of Receiving Stolen Property as charged in the information." We find no impropriety in this finding by the trial court, and *People v. Tilley*, supra, is not authority to the contrary. In that case the verdict of a jury was involved and not the finding of a trial judge. However the finding made by the court here would have been sufficient, even had it been contained in a jury verdict as will appear from the case of *People v. Foogert*, 85 Cal.App. 2d 290, at pages 298-299, 193 P.2d 14, where the court held that *People v. Tilley*, supra, preceded section 4½ of article VI of the

Constitution, and such being the case injury was presumed from error. The holding in the Tilley case is further questioned in *People v. Chavez*, 11 Cal.App.2d 388, 53 P.2d 1020, and in *People v. McKinney*, supra. We hold that appellant suffered no prejudice by reason of the trial court's choice of words in its finding.

[7, 8] As the next point in order appellant urges that the evidence is insufficient to sustain a verdict of guilty of receiving stolen property. At the close of the prosecution's case, counsel for appellant moved to dismiss the information on the ground that there had been insufficient evidence to show that the appellant had guilty knowledge that the jewelry was stolen. From the discussion appearing above it is obvious that there was more than sufficient evidence from which it could be inferred that the appellant had knowledge of that fact. "While guilty knowledge of the larceny is an essential fact to be proved in a prosecution for receiving stolen goods, it is not essential that such knowledge be actual and positive; it may be circumstantial and deductive. *People v. Marcado*, 59 Cal.App. 69, 72, 209 P. 1035. Among the elements the courts have found persuasive as giving rise to an inference of guilty knowledge is a disproportionately low price paid, *People v. Gould*, 111 Cal.App.2d 1, 7, 243 P.2d 809, or that the accused denied possession of the goods if such denial is shown to be false. *People v. Levison*, 16 Cal. 98, 99 [76 Am.Dec. 505]." *People v. Bycel*, 133 Cal.App.2d 596, 599, 284 P.2d 927, 930. We hold that there was ample legally sufficient evidence to sustain the trial court's finding, and beyond that we are not required to go. Appellant's motion to dismiss the information was properly denied.

[9] It is next contended by appellant that the district attorney was guilty of prejudicial misconduct before the court. In support of this contention, he argues that the district attorney entered into a conspiracy with the witness Russell, and that he permitted and solicited Russell to make false and perjured testimony. This contention is wholly unsupported by the record, nor was the point raised in the trial court. Therefore it cannot be considered on ap-

peal. *People v. Collins*, 117 Cal.App.2d 175, 255 P.2d 59; *People v. Ruiz*, 103 Cal. App.2d 146, 229 P.2d 73.

[10] The further argument is made that the district attorney amended the information and that appellant was not served with a copy thereof as amended until the trial date. The record shows that the only amendment made to the information was the incorporation of the charge that defendant had been previously convicted of a felony. Appellant admitted the prior conviction; therefore, no issue was presented for determination that had not been raised by the original information and appellant's plea of not guilty. The record fails to disclose that appellant or his counsel made any objection at the time or requested any continuance of this matter by reason of the filing of the amended information. Hence the point may not be raised for the first time on appeal. *People v. Simpson*, 43 Cal. 2d 553, 275 P.2d 31.

[11-14] Appellant's final claim of error is that there was prejudicial misconduct on the part of the defense attorney. As will appear from the record, appellant was represented at the trial by counsel of his own choice. At no point during the course of the trial did he make any protest to the court concerning the procedure adopted by his counsel, nor did he in any way manifest to the court any dissatisfaction with the manner in which his case was being handled. In no proceeding subsequent to the trial was this point raised in the trial court. Therefore appellant may not now attack the competency of his counsel. As stated in the case of *In re Ward*, 28 Cal.2d 583, at page 586, 170 P.2d 665, at page 666, "The evidence and findings reveal that upon his trial petitioner was represented by a person of his own choosing and he must, therefore, abide the results of his selection of a representative." As was indicated in *United States ex rel. Feeley v. Ragen*, 7 Cir., 166 F.2d 976, a defendant is entitled to a fair trial not a perfect one, and his counsel is not required to be infallible. The record discloses that appellant was granted the fair trial to which he was entitled under our Constitution and laws, and we cannot say from the record or from

the fact that appellant was found guilty that he was deprived of any right guaranteed to him. The fact that appellant was convicted is no evidence that his counsel was incompetent. Allegations of mistakes on the part of trial counsel such as that he failed to have a defendant testify or offer testimony on his own behalf, or that he failed to obtain available evidence or to ask for a continuance are not recognized as grounds for habeas corpus, nor are they entitled to consideration here if such points were not raised in the trial court. *Morton v. Welch*, 4 Cir., 162 F.2d 840; *Ex parte Haumesch*, 9 Cir., 82 F.2d 558; *Farrell v. Lanagan*, 1 Cir., 166 F.2d 845. There is nothing in the record that discloses any lack of professional skill, ability or loyalty on the part of defense counsel, and where a record does not disclose such incompetence that it must be considered an abuse of discretion on the part of the trial judge not to intervene on behalf of a defendant during a trial, claims and specifications dehors the record may not be considered for the first time on appeal.

The judgment is affirmed.

VAN DYKE, P. J., concurs.



134 Cal.App.2d 668

D & W FOOD CORPORATION, a corporation, and **Salinas Drive-In Corporation**, a corporation, **Plaintiffs and Appellants**,

v.

Melburn E. GRAHAM, Defendant and Respondent.

Civ. 16446.

District Court of Appeal, First District,
Division 1, California.

Aug. 1, 1955.

Rehearing Denied Aug. 31, 1955.

Hearing Denied Sept. 21, 1955.

Action to enjoin defendant from using his own abbreviated given name in connection with his business. The Superior Court, County of Santa Clara, Leonard R. Avilla, J., refused relief and the plaintiffs appealed.

The District Court of Appeal, Peters, P. J., held that the rule that ordinarily, in absence of fraud or unfair practices, every person has a legal right to use his or her name even though it is the same as that of another, is applicable to given names and to "nicknames" or abbreviations of given names as well as to family names, and that it is the right to use the name by which one is generally known which is entitled to protection.

Affirmed.

1. Trade-Marks and Trade-Names and Unfair Competition §73(1)

Statute providing that any person who has first adopted and used trade name, whether within or beyond limits of the State, is its original owner, is merely an affirmation of common-law rule and subject to common-law limitations. *West's Ann. Bus. & Prof.Code*, §§ 14242, 14400.

2. Trade-Marks and Trade-Names and Unfair Competition §73(1)

In absence of fraud or unfair practices, every person has legal right to use his or her name even though it is the same as that of another, and ordinarily, personal names may not become trade-marks. *West's Ann. Bus. & Prof.Code*, §§ 14242, 14400; *West's Ann.Civ.Code*, § 3369.

3. Trade-Marks and Trade-Names and Unfair Competition §73(1)

Rule that ordinarily, in absence of fraud or unfair practices, every person has legal right to use his or her name even though it is the same as that of another, is applicable to given names and to "nicknames" or abbreviations of given names as well as to family names, and it is right to use the name by which one is generally known which is entitled to protection. *West's Ann.Bus. & Prof.Code*, §§ 14242, 14400; *West's Ann.Civ.Code*, § 3369.

4. Trade-Marks and Trade-Names and Unfair Competition §93(3)

In action to enjoin use of trade-name in connection with defendant's drive-in restaurant, evidence sustained trial court's finding that name "Mel's" had not been used so widely as to acquire, in the mind

of the public, a secondary meaning. West's Ann.Bus. & Prof.Code, §§ 14242, 14400; West's Ann.Civ.Code, § 3369.

5. Trade-Marks and Trade-Names and Unfair Competition ⇨73(1)

Although one may legally use his own name in his business, he must do so honestly and not as means of pirating good will and reputation of business rival, and if use of one's own name is calculated to cause confusion or to deceive the public, such use constitutes unfair competition and may be enjoined. West's Ann.Bus. & Prof.Code, §§ 14242, 14400; West's Ann.Civ.Code, § 3369.

6. Trade-Marks and Trade-Names and Unfair Competition ⇨97

Under statute, as it now reads, authorizing injunction against unfair competition, injunctive relief against unfair competition in use of trade-mark will be granted if defendant is guilty of unfair or fraudulent business practices or if natural consequences of defendant's conduct are such as to cause deception. West's Ann.Civ.Code, § 3369.

7. Trade-Marks and Trade-Names and Unfair Competition ⇨73(1)

In cases involving the use of one's own name, injunctions are ordinarily granted only where there is a showing of actual fraud, i. e., the resorting by defendant to artifice in the use of his name with actual intent to deceive, but in other situations defendant may be enjoined even in absence of actual fraud if natural consequence of his conduct is to cause deception. West's Ann.Bus. & Prof.Code, §§ 14242, 14400; West's Ann.Civ.Code, § 3369.

8. Trade-Marks and Trade-Names and Unfair Competition ⇨93(3)

In action to enjoin defendant's use of his own abbreviated given name in his business, evidence sustained trial court's finding that there was no fraud, deceit or artifice. West's Ann.Civ.Code, § 3369; West's Ann.Bus. & Prof.Code, §§ 14242, 14400.

9. Trade-Marks and Trade-Names and Unfair Competition ⇨73(1)

Though fact that plaintiffs and defendant were not in same geographic area was

not conclusive, where customers of both parties were ambulatory, wide separation of competing establishments was evidence to be considered in determining whether public was deceived or was likely to be deceived by similarity of names. West's Ann.Civ.Code, § 3369.

10. Trade-Marks and Trade-Names and Unfair Competition ⇨100

In action to enjoin defendant's use of his own abbreviated given name in connection with his business, question whether public was deceived or was likely to be deceived by similarity of names was factual one for trial court, and where trial court decided it adversely to the plaintiffs, reviewing court could not interfere. West's Ann.Bus. & Prof.Code, §§ 14242, 14400; West's Ann.Civ.Code, § 3369.

Herbert Bartholomew, San Francisco, Naylor & Lassange, Jas. M. Naylor, San Francisco, for appellants.

Peter J. Mancuso, San Jose, for respondent.

PETERS, Presiding Justice.

The trial court refused plaintiffs' application to enjoin the defendant from using in connection with his business the name "Mel's," "Mel's Drive-In" or "Mel's Drive-In and Restaurant." Plaintiffs appeal.

The plaintiffs are the D & W Food Corporation and the Salinas Drive-In Corporation. They own two of a chain of six drive-in restaurants that all operate under unified management and control. All six restaurants use the name "Mel's," "Mel's Drive-In" or "Mel's Drive-In and Restaurant." The first of these six restaurants was opened by the D & W Food Corporation on South Van Ness Avenue in San Francisco in December of 1947. It had filed a certificate of doing business under the name of "Mel's" as a drive-in restaurant in August of 1947. The stock of D & W is owned equally by Harold S. Dobbs and D. M. Weiss, known as Mel Weiss.

In February of 1951 Dobbs and Weiss organized the San Francisco Drive-In Food Corporation, which opened a drive-in

on Mission Street in San Francisco in July of 1951. D & W gave its formal consent to this new corporation to use the name "Mel's," "Mel's Drive-In" or "Mel's Drive-In and Restaurant." The San Francisco corporation is not a party to this action.

In August of 1951 Dobbs and Weiss incorporated the Salinas Drive-In Corporation, which is one of the plaintiffs. On October 15, 1951, it commenced construction of a drive-in in Salinas and put up a sign on the premises "Another Mel's Drive-In Restaurant from San Francisco." It opened for business on April 21, 1952.

The defendant Melburn E. Graham, about the first of April of 1952, opened a drive-in restaurant in the town of Morgan Hill under the name "Mel's Drive-In." Morgan Hill is located on the highway between San Francisco and Salinas, being 70 miles south of San Francisco and 36 miles north of Salinas. It will be noted that defendant opened his drive-in after plaintiff D & W had opened its establishment on South Van Ness Avenue in San Francisco, and after the non-plaintiff San Francisco Drive-In Food Corporation had opened its restaurant on Mission Street in San Francisco, and after the other plaintiff had erected a sign on their Salinas property and started construction of the establishment.

To make the story complete, after defendant had opened his drive-in located in Morgan Hill in April of 1952, Dobbs and Weiss incorporated three more corporations to conduct the drive-in restaurant business—one in San Jose, one in Berkeley, and another one in San Francisco. These three new businesses were given formal permission by D & W to use the name "Mel's," "Mel's Drive-In" or "Mel's Drive-In and Restaurant." Dobbs and Weiss also incorporated a company by the name of "Mel's, Inc.," to act as the central buying agency for the chain of six restaurants. None of the corporations mentioned in this paragraph is a party to this action.

All of the restaurants in the chain have been constructed according to a uniform architectural plan and are operated pursu-

ant to a uniform pattern. They use the same menu containing pictures of all six restaurants, prepare the food served according to the same recipes, and serve it in similar ways. There is one general manager for the chain. The chain advertises by means of radio broadcasts from stations in Monterey, Salinas, San Jose and Berkeley. It also utilizes advertising in newspapers, theaters and school papers throughout the area.

As already pointed out, defendant opened his Morgan Hill establishment after two of the chain of Mel's drive-ins had been opened in San Francisco, and while a third was being constructed in Salinas. The defendant's business is wholly owned and operated by Melburn C. Graham, customarily called "Mel." On his establishment defendant, in block script, displays the word "Mel's," and beneath that name the word "Drive-In." The word "Mel's" on plaintiffs' establishments is also in script. Defendant testified that prior to opening his restaurant he had seen the sign of plaintiffs' on their South Van Ness Avenue establishment, and had tried to make his sign different, or as he said "opposite." The defendant was not a newcomer in the restaurant field. He had worked in the San Jose area in the drive-in restaurant business for about 20 years, and during all this period had been known as "Mel." He had managed the "Five-Spot Drive-In" near San Jose and owned the "Easy Restaurant" in the same area. His lease at this last named spot required him to operate under the name of the "Easy Restaurant."

When defendant first opened in Morgan Hill he ran several advertisements in the San Jose papers, and continued for a while his predecessor's radio advertising from a Watsonville station. At the time of trial, in November of 1953, his only advertising was in the Morgan Hill newspaper. In this advertising he added his full name.

When plaintiffs notified him of their objections to his use of the challenged name, defendant added to his menus and matchbook covers "Mel Graham, Proprietor" to show, as he put it, that he "didn't belong to any chain." Defendant has never claimed any connection with plaintiff's chain,

and, on the few occasions when he has been asked whether he is affiliated with plaintiffs, he denied any such association. It is admitted that, because Morgan Hill is on the main highway between San Francisco and Salinas, defendant caters to appreciable numbers of motorists from those two areas.

The trial judge in directing judgment for the defendant filed the following memorandum decision:

"In this matter it seems to be clear that a person may not be enjoined from using his own name in his business, provided he is not guilty of fraud, deceit, or artifice in so doing which causes injury or damage to another. No authorities have been presented which make any distinction on principle between the use of one's full name and the use of only a part of his name.

"In this case the Court finds no fraud, deceit or artifice on the part of defendant in the use he has made or is making of his own name in his business."

From a judgment denying the application for the injunction, plaintiffs appeal, contending that under the facts their property rights have been unlawfully invaded by defendant, and that defendant has been guilty of unfair competition.

There are many cases in the books discussing the problems involved when two persons or corporations do business under identical or similar names, and one seeks to enjoin the other. There are really two basic problems involved. One is whether the first in the field has established an exclusive property interest in the name as a trade-mark that warrants an injunction, and the other is whether the second in the field has been guilty of unfair competition so as to warrant an injunction. The two problems frequently overlap, and the cases do not always recognize the distinctions between them. Some of the cases, however, have recognized the distinction. See *Dunston v. Los Angeles Van, etc., Co.*, 165 Cal. 89, 94, 131 P. 115; *Yellow Cab Co. of San Diego v. Sachs*, 191 Cal. 238, 242, 216 P. 33, 28 A.L.R. 105; *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 387, 78 P. 879; *Tomsky v. Clark*, 73 Cal.App. 412, 417, 238 P.

950; see also § 14400 of the Bus. & Prof. Code as compared with § 3369 of the Civ. Code.

[1,2] In the instant case it is quite clear that, as against defendant, plaintiffs do not possess a property right in the use of the name "Me's" that is entitled to the protection of an injunction. Plaintiffs assert such a right under the provisions of section 14400 of the Business and Professions Code. That section provides that "Any person who has first adopted and used a trade name, whether within or beyond the limits of this State, is its original owner." In spite of the broad language of this statute it is well settled that it is merely an affirmation of the common law rule and subject to common law limitations. *Weatherford v. Eytchison*, 90 Cal.App.2d 379, 382, 202 P.2d 1040. It certainly is the law that ordinarily personal names may not generally become trade-marks for the simple reason that, in the absence of fraud or unfair practices every person has the legal right to use his or her name even though it is the same as that of another. Section 14242 of the Business and Professions Code recognizes this by providing that a trademark cannot consist of "Merely the name of any person not written, printed, * * * in some particular or distinctive manner * * *". See *Dunston v. Los Angeles Van, etc., Co.*, 165 Cal. 89, 131 P. 115; *Italian Swiss Colony v. Italian Vineyard Co.*, 158 Cal. 252, 110 P. 913, 32 L.R.A.,N.S., 439.

The general rule was stated as follows in *Ida May Co., Inc., v. Ensign*, 20 Cal.App. 2d 339, 343, 66 P.2d 727, 729:

"It is well settled that while a person may confer rights by consent upon another to use his personal name as a trade-mark, ordinarily personal names may not become trade-marks because, as between persons of the same or similar names, each has an equal right to use his own name in his own business."

The court applied this rule to a situation where the plaintiff *Ida May Co., Inc.*, had registered that name and then attempted to enjoin *Ida May Ensign* from the use of

the names of Ida May in a competing business. The trial court found no fraud or unfair practices by defendant. The court denied the injunction, and, in doing so, quoted with approval the rules set forth in *Tomsky v. Clark*, 73 Cal.App. 412, 238 P. 950. In that case, 73 Cal.App. at page 418, 238 P. at page 952, the court stated:

"* * * The right to do business under one's own name is one of the sacred rights known to the law; and a family name is incapable of exclusive appropriation, and cannot be thus monopolized. Nims on Unfair Competition and Trade Marks (2d Ed.) § 67.

"Every man has the absolute right to use his own name in his own business, even though he may interfere with and injure the business of another bearing the same name, provided he does not resort to any artifice or do any act calculated to mislead the public as to the identity of the establishments or to produce injury to the other beyond that which results from the similarity of names. [Citing many cases.] As just stated, equity will not allow a person to resort to artifice or contrivance in the use of his name as a result of which the public is deceived as to his business or products. But in such case it is not the use of a man's own name that is condemned; it is the dishonesty practiced in the use of it. [Citations.] Where it appears, however, as it does here, that the party sought to be enjoined has a right to use his own name, and he does so reasonably and honestly, he is not obliged to abandon the use thereof or to unreasonably restrict it, whether used in a firm or corporation, merely because some confusion may have arisen from similarity of names."

Similar statements appear in many cases. In *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 P. 879, after stating the general rule the court drew a well recognized distinction between a defendant using his own name that is similar to another's and the use by a corporation of a name already used by another. In this connection the court stated, 145 Cal. at page 388, 78 P. at page 882: "* * * a person comes natu-

rally by his name from his parents, and it is a thing personal to himself, which in truth and in justice he has the right to use * * * while the name given to a corporation is an artificial and impersonal thing, selected arbitrarily by the incorporators themselves, and which can be selected from an entire vocabulary of names." See also *American Distilling Co. v. Bellows & Co.*, 102 Cal.App.2d 8, 226 P.2d 751, for an excellent summary of many of the cases on this subject.

[3] Plaintiffs do not seriously challenge this rule, but they contend that "Mel" is not defendant's name. His name, it is urged, is Melburn or Mel Graham. They contend that the rule has no application to the given name of an individual, and certainly not to an abbreviation of a given name. While most of the cases involve the family name of an individual rather than his given name, see annotation and collection of cases 47 A.L.R. 1189, 1190, there are cases holding that given names are within the protection of the rule. The *Ida May* case referred to, supra, 20 Cal. App.2d 339, 66 P.2d 727, involved the protection of the first and second names of *Ida May Ensign*. In *Elize Costume Co. v. Mme. Elize, Inc.*, 206 App.Div. 503, 201 N.Y.S. 545, the New York Supreme Court permitted a woman whose first name was "Elize" to leave appellant's shop and open her own shop under the name of "Mme. Elize." We have found no case holding that the rule under discussion is limited to family names, and no logical reason for so limiting it has occurred to us or been suggested by plaintiffs. Nor is there any logical reason why the general rule should not apply to generally used "nicknames" or abbreviations of given names. It is the right to use the names by which one is generally known that is entitled to protection. Certainly, most persons with names susceptible to abbreviation—Ray for Raymond, Ed for Edward, Al for Albert, etc., and Mel for Melburn—are more usually known by the abbreviation than by the full given name, and the testimony shows that this was true in the instant case.

[4] It cannot be successfully contended that plaintiffs have used the name "Mel's" so widely that, in the mind of the public, it has come to have a secondary meaning. The trial court found "That it is not true that the trade name 'Mel's Drive-In' and 'Mel's Drive-In Restaurant' and 'Mel's' has become and are associated in the public mind with each and all of the restaurants organized, incorporated, conducted and operated by Harold S. Dobbs and David Melvin Weiss.

"That 'Mel's' has not become and is not synonymous in the public mind with the trade names 'Mel's Drive-In' and 'Mel's Drive-In Restaurant.'"

These findings are amply supported by substantial evidence, and by reasonable inferences from that evidence.

[5] This brings us to the second phase of the problem—unfair competition. Although one may legally use his own name, he must do so honestly and not as a means of pirating the good will and reputation of a business rival. If the use of one's own name is calculated to cause confusion or to deceive the public such use constitutes unfair competition, and may be enjoined. *MacSweeney Enterprises v. Tarantino*, 106 Cal. App.2d 504, 235 P.2d 266; *Hoyt Heater Co. v. Hoyt*, 68 Cal.App.2d 523, 157 P.2d 657; *Jackman v. Mau*, 78 Cal.App.2d 234, 177 P.2d 599.

[6,7] Under section 3369 of the Civil Code as it now reads, injunctive relief against an act of unfair competition in the use of a trademark will be granted if the defendant is guilty of unfair or fraudulent business practices, or if the natural consequences of defendant's conduct are such as to cause deception. *Schwartz v. Slen-derella Systems of California*, 43 Cal.2d 107, 271 P.2d 857; *Wood v. Pepper*, 55 Cal. App.2d 116, 130 P.2d 220. However, in the cases involving the use of one's own name injunctions have been usually granted only where there was a showing of actual fraud, that is, the defendant resorting to artifice in the use of his name with actual intent to deceive. *Winfield v. Charles*, 77 Cal.App.2d 64, 175 P.2d 69; *Benioff v. Benioff*, 64 Cal.App. 745, 222 P. 835; *Hoyt*

Heater Co. v. Hoyt, 68 Cal.App.2d 523, 157 P.2d 657; *Morton v. Morton*, 148 Cal. 142, 82 P. 664, 1 L.R.A.,N.S., 660; *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 P. 879; *Jackman v. Mau*, 78 Cal.App.2d 234, 177 P.2d 599; *Nolan Bros. Shoe Co. v. Nolan*, 131 Cal. 271, 63 P. 480, 53 L.R.A. 384; *MacSweeney Enterprises v. Tarantino*, 106 Cal.App.2d 504, 235 P.2d 266. But in other than the personal name situation the defendant may be enjoined even in the absence of actual fraud if the natural consequence of his conduct is to cause deception. *Wood v. Pepper*, 55 Cal. App.2d 116, 130 P.2d 220; *Karsh v. Haiden*, 120 Cal.App.2d 75, 260 P.2d 633. In *Hoover Co. v. Groger*, 12 Cal.App.2d 417, at page 419, 55 P.2d 529, at page 530 (not involving a name situation), the court stated the rule as follows: "It is the policy of the law to protect the business of the first person to enter the field doing business under a given name to the extent necessary to prevent fraud upon his business and upon the public. [Citations.] A second to enter the field may be enjoined from the improper use of the name established by the first to enter the field. [Citation.] It is not necessary for the plaintiff to prove fraudulent intent. The defendants may be enjoined if the natural consequence of their conduct is such as to cause deception."

[8] In all the personal name cases we have found where injunctions were granted there was some artifice used with the intent to deceive the public. In the instant case no such acts were committed by the defendant. The trial court first found "That defendant * * * does not pretend or represent to be connected or associated in, or affiliated with, or a branch or any part of any other 'Drive-In' or 'Drive-In Restaurant'"; and then found that "Defendant has committed no fraud, deceit or used any artifice in the use he has made or is making of his own name, 'Mel' in his own business, and has committed no injury or damage to plaintiffs because of using his own name." These findings are amply supported by the evidence.

[9,10] But even if the broader rule were applicable to name cases, so that innocent deception of the public alone

would be sufficient to warrant an injunction, such innocent deception does not here appear, certainly not as a matter of law. When defendant opened his establishment in Morgan Hill the only other drive-ins then using the name of "Mel's" were two in San Francisco, 70 miles away, and one under construction in Salinas, 36 miles away. While the fact that plaintiffs and defendant are not in the same geographic area may not be conclusive, Academy of Motion Picture, etc., v. Benson, 15 Cal.2d 685, 104 P.2d 650; Schwartz v. Slenderella Systems of California, 43 Cal. 2d 107, 271 P.2d 857; Benioff v. Benioff, 64 Cal.App. 745, 222 P. 835, since the customers of both parties are ambulatory, the wide separation of the competing establishments was a factor that the trial court could properly consider in determining whether the public was deceived or was likely to be deceived by the similarity of names. The problem is a factual one, and the trial court has decided it adversely to the plaintiffs. We cannot interfere.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



George G. EICHELBERGER, Elsie Haggerty and Lewis Wescott, Plaintiffs and Appellants,

v.

CITY OF BERKELEY, a municipal corporation, Fire Pension Board, Laurence L. Cross, John D. Phillips, Pauline Young, William Melnhelt, John Holstrom, Mrs. Ruth Cunningham, and Weldon L. Richards, Defendants and Respondents.

Civ. 16338.

District Court of Appeal, First District,
Division 2, California.

July 26, 1955.

Hearing Granted Sept. 21, 1955. *

Proceeding to recover retirement pensions. Plaintiffs appealed from a judgment
* Opinion vacated 293 P.2d 1.

by the Superior Court, County of Alameda, Cecil Mosbacher, J., denying their claims that they were entitled to higher pensions or death benefits than paid to them by city. The District Court of Appeal, Nourse, P. J., held that amendment of ordinance which increased basis of pension rights did not operate retrospectively.

Affirmed.

1. Constitutional Law ☞102(2)

Pensions ☞2

Pension rights become finally determined upon happening of contingency on which right to pension depends on basis of pension law then in effect, although amount of benefits may remain fluctuating in accordance with provision of pension law to that effect, and until happening of contingency employee does not have vested right to any fixed or definite benefits, but only to substantial or reasonable pension, and after happening of contingency pension provisions may not by subsequent amendment be changed to detriment of pensioner.

2. Pensions ☞1

States ☞119

A subsequent amendment increasing existing pension rights or death benefits is not invalid as a gift of public money, but it will not be applied retroactively to a person entitled to benefits prior to the enactment unless the intention to make it so applicable clearly appears from the terms of the enactment.

3. Municipal Corporations ☞220(9)

Where ordinance dealing with pension rights was amended to authorize increase in pension on basis of salary increase there was no indication that form of amendment was chosen with the intention to reach the result of a retrospective application and the amendment could only be applied prospectively and could not be applied to give pensioners whose rights had matured before amendment increase of pensions on basis of salaries as increased since effective date of amendment.

4. Statutes ☞261

A "retroactive application" of statute is one which gives to a previous transaction

or event a different legal effect from that which it had under the law when it occurred.

See publication Words and Phrases, for other judicial constructions and definitions of "Retroactive Application".

5. Constitutional Law ☞211

Application, prospectively only, of amendment increasing basis of pension rights did not deprive prior pensioners of their constitutional rights to equal protection of the laws.

6. Constitutional Law ☞211

The equal protection clauses do not prevent reasonable classification, according to difference in time.

Cornish & Cornish, Francis T. Cornish, Howard W. Wayne, Berkeley, for appellants.

Fred C. Hutchinson, City Atty., Robert T. Anderson, Asst. City Atty., Berkeley, for respondents.

NOURSE, Presiding Justice.

Three plaintiffs appeal from a judgment in cases consolidated in first instance insofar as it denies their claims that they were entitled to higher pensions or death benefits than paid to them by the City of Berkeley. Other plaintiffs, among whom is the plaintiff Brennan, who were successful in the first instance, are not parties to this appeal. The facts have been stipulated to in the trial court.

On April 28, 1938, Ordinance No. 2188-N.S. of the City of Berkeley, regulating pensions and death benefits of firemen, became effective. It provided for pensions and benefits of one-half or one-third of "the average salary attached to the rank or ranks held during the three years immediately preceding the date of retirement." (Sections 7, 8, 9, 10, 11, and 13) and further contained Section 24 which read in part: "The pensions granted under the terms of this ordinance shall not increase nor decrease with any changes in salary subsequent to the date of the granting of the pension for the rank or ranks upon which the pension was based * * *."

On April 20, 1939 Ordinance No. 2254-N.S., amending the above Ordinance No. 2188-N.S., became effective. Section 12 of the new ordinance amended Section 24, supra, so as to read in part: "The pensions granted under the terms of this ordinance shall not decrease with any changes in salary subsequent to the date of the granting of the pension for the rank or ranks upon which the pension was based * * *."

Plaintiffs Eichelberger and Wescott retired after long service entitling them to pensions, on February 25, 1939 and July 1, 1938 respectively. Plaintiff Elsie Haggerty is entitled to a pension as widow of George Haggerty, who died as a result of the performance of his duty as a member of the Fire Department on August 18, 1938. The court below held that in the calculation of their pensions the City of Berkeley correctly did not consider increases in salary subsequent to the dates of the granting of the pensions for the rank or ranks upon which the pensions were based, in accordance with the provision of Section 24, supra, as it read at the time of the granting of the pensions, whereas it was the position of appellants, urged also on appeal, that they were entitled to increase of pension on the basis of salaries as increased, at least since the effective date of the above amendment (April 20, 1939).

Appellants' first contention is, that they were so entitled even under the 1938 ordinance provisions, because Section 24 allegedly conflicted with the earlier sections, the language of which in *Terry v. City of Berkeley*, 41 Cal.2d 698, 263 P.2d 833, was held to grant a pension fluctuating with changes in the basal salaries, and because in the conflict the earlier sections must prevail as specific provisions against a general one and as more favorable to the pensioners. The contention is so obviously without merit that we ignore the question whether the argument was offered for the first time on appeal to reject it on the merits. Evidently the sections were intended to be and must be construed together. In *Terry v. City of Berkeley*, supra, 41 Cal.2d at pages 701, 702, 263 P.2d 833, it was said that the provisions of the ordinance there under consideration similar to those in the earlier sections here in-

volved, might be susceptible to more than one interpretation and that then a liberal construction in favor of the applicant should be followed. Here the ambiguity has been resolved by the express language of Section 24, which is conclusive.

[1-3] It is next urged that even if the 1938 ordinance provided for fixed pensions, the amendment of 1939 would entitle appellants from its effective date to a pension open to increase. It is contended that such construction was intended and desirable and that it would not be a retroactive application of the amendment. The contention runs counter to the rules of the California cases. They hold that in general the pension rights become finally determined upon the happening of the contingency on which the right to the pension depends on the basis of the pension law then in effect, *Holmberg v. City of Oakland*, 55 Cal.App. 270, 203 P. 167; Compare *Aetna Cas. & Surety Co. v. Industrial Acc. Comm.*, 30 Cal.2d 388, 392, 182 P.2d 159, although the amount of the benefits may remain fluctuating in accordance with a provision of the pension law to that effect. *Casserly v. City of Oakland*, 6 Cal. 2d 64, 56 P.2d 237. Until the happening of the contingency the employee does not have a vested right to any fixed or definite benefits, but only to a substantial or reasonable pension. *Wallace v. City of Fresno*, 42 Cal. 2d 180, 183, 265 P.2d 884. After the happening of the contingency the pension provisions may not by subsequent amendment be changed to the detriment of the pensioner. *Terry v. City of Berkeley*, supra, 41 Cal.2d 698, 703, 263 P.2d 833. A subsequent amendment increasing existing benefits is not invalid as a gift of public money, *Home v. Souden*, 199 Cal. 508, 512, 250 P. 162; *Brummund v. City of Oakland*, 111 Cal.App. 2d 114, 119, 244 P.2d 441, but it will not be applied retroactively to a person entitled to benefits prior to the enactment unless the intention to make it so applicable clearly appears from the terms of the enactment. *Holmberg v. City of Oakland*, supra, 55 Cal. App. 270, 203 P. 167. In *Brophy v. Employees Retirement System*, 71 Cal.App.2d 455, 460, 162 P.2d 939, 942, it is said: "The

contention that the 1945 amendment should be given retroactive effect is unsound. It is elementary law that all statutes are interpreted to operate prospectively unless their language clearly compels an interpretation that they were intended to operate retroactively. * * * In *Holmberg v. City of Oakland*, 55 Cal.App. 270, 271, 203 P. 167, a charter provision that a police officer injured in the performance of his duty 'shall be entitled to receive * * * such medical * * * treatment * * * as may be required during the continuance of his disability * * *' was held not retroactive and therefore not applicable to an officer disabled by injuries sustained prior to the effective date of the charter provision." See similar expressions in *O'Dea v. Cook*, 176 Cal. 659, 662, 169 P. 366; *Jordan v. Retirement Board*, 35 Cal.App.2d 653, 657, 96 P.2d 973; *Chaney v. Los Angeles County Peace Officers' Retirement Bd.*, 59 Cal.App. 2d 413, 415, 138 P.2d 735. The amendment of the ordinance does not contain any language clearly showing that it was intended to operate retroactively. Appellants rely in this respect on the expression "The pensions granted under the terms of this ordinance" in Section 24, of Ordinance No. 2188-N.S., as amended in 1939, and urge that this must mean all pensions granted under Ordinance No. 2188-N.S. both in its original form and as amended. It can, however, also be construed as meaning granted under the ordinance as amended and there is no indication that this form of amendment was chosen with the intention to reach the result of a retrospective application. The above rule against retroactive construction requires us then to apply the amendment prospectively only.

[4] Appellants' further contention that an application of the provision for pensions on an increased basis to payments to appellants subsequent to the effective date of the amendment is not a retroactive application is without merit. A retroactive application is one which gives to a previous transaction or event a different legal effect from that which it had under the law when it occurred. *Holt v. Morgan*, 128 Cal.App.2d 113, 117,

274 P.2d 915. The facts on which the right to pension are predicated are the service and the retirement or death, which here took place prior to the amendment of 1939, which altered said right. Compare *Aetna Cas. & Surety Co. v. Industrial Acc. Comm.*, supra, 30 Cal.2d 388, 392, 393, 182 P.2d 159, 161, where it is said: "The authorities support the conclusion that a statute changing the measure or method of computing compensation for disability or death is given retrospective effect when applied to disability or death resulting from an injury sustained before the effective date of the statute." Appellants rely on *People ex rel. Albright v. Board of Trustees of Firemen's Pension Fund*, 103 Colo. 1, 82 P.2d 765, 118 A.L.R. 984, but that case which takes a view opposite to the above is not the law in California.

[5,6] The contention that the application of the amendment prospectively only deprives plaintiffs of their constitutional right to equal protection of the laws is also without merit. The equal protection clauses do not prevent reasonable classification, according to difference in time, *C. Dudley De Velbiss Co. v. Kraintz*, 101 Cal.App.2d 612, 617, 225 P.2d 969, and a similar classification has been upheld as to amendment of pensions. *Allstot v. City of Long Beach*, 104 Cal.App.2d 441, 445, 231 P.2d 498. No case has been cited to us or found by us declaring a favorable amendment of pension rights for future pensioners only to be violative of the equal rights of employees previously pensioned. Cases cited herein before show that this is the normal procedure and that those whose rights have been fixed according to the law in effect at the time of their prior pensioning have no right to complain that those pensioned at a later time obtain higher benefits under a later enactment. See especially *Jordan v. Retirement Board*, supra, 35 Cal.App.2d 653, 658, 96 P.2d 973.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

The PEOPLE of the State of California,
Plaintiff and Appellant,

v.

Robert John VILLARINO, Defendant and Respondent.

Civ. 196365.

Appellate Department, Superior Court,
San Diego County, California,

June 30, 1955.

Prosecution for violation of city ordinance which prohibits addiction to use of narcotics. The defendant made motion to dismiss the charge. The Municipal Court, San Diego Judicial District, San Diego County, James C. Toothaker, J., granted the motion, and the State appealed. The Superior Court, Appellate Department, held that where city ordinance in effect duplicated state law which provides that no person shall unlawfully use or be addicted to unlawful use of narcotics, the ordinance was in conflict with state law within meaning of constitution which provides that city may make and enforce within its limits all local regulations which are not in conflict with general laws, and therefore ordinance was unconstitutional to extent of duplication.

Judgment of dismissal affirmed.

Municipal Corporations §592(2)

Where city ordinance in effect duplicated state law which provides that no person shall unlawfully use or be addicted to unlawful use of narcotics, the ordinance was in conflict with state law within meaning of constitution which provides that city may make and enforce within its limits all local regulations which are not in conflict with general laws, and therefore ordinance was unconstitutional to extent of duplication. Health and Safety Code, §§ 11001, 11009, 11721; West's Ann.Const. art. 11, § 11.

J. F. DuPaul, City Atty., San Diego, by John S. Rhoades, Deputy City Atty., San Diego, for appellant.

Edgar G. Langford, San Diego, for respondent.

PER CURIAM.

The defendant was charged with a violation of the City of San Diego Ordinance, Section 52.65, and upon motion therefor it was ordered dismissed by the Municipal Court wherein it was pending.

Judge James C. Toothaker, Judge of the Municipal Court, prepared a written opinion which we think fully and fairly states the facts in the case and correctly disposes of the points of law involved. We therefore adopt his opinion as our own. It is as follows:

"Defendant moves to dismiss the complaint against him on the ground that the city ordinance involved is in conflict with Health and Safety Code Section 11721, and therefore unconstitutional under Article XI, Section 11 of the California Constitution. A previous motion to dismiss was denied on the ground that the complaint stated a public offense under the Health and Safety Code, and that the prosecution was accordingly entitled to proceed regardless of any invalidity of the city ordinance. A subsequent motion of defendant to compel the prosecution to elect as to whether it was going to proceed under the provisions of Health and Safety Code, Section 11721, or under City ordinance, Section 52.65, was granted, pursuant to stipulation by the prosecution. The prosecution has elected to proceed under the city ordinance and has specifically stated that it does not desire to proceed under the state law, thus raising directly the question of the validity of the city ordinance.

"The pertinent Sections of the law involved are as follows: Article XI, Section 11 of the California Constitution:

"Police Power of Counties, Cities and Townships

"Sec. 11. Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

"Sec. 11721 of the California Health and Safety Code:

"Punishment of addicts.

"No person shall unlawfully use or be addicted to the unlawful use of narcotics. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be placed on probation for not more than five years and the court shall sentence the person convicted to not less than 90 days nor more than one year in the county jail as a condition of probation."

"Section 52.65 of the San Diego City Ordinance:

"Use of or Addiction to Narcotics—Prohibited.

"No person within the City of San Diego shall be addicted to the use of narcotics, or shall use narcotics, or shall be under the influence of narcotics except when narcotics are or have been administered by or under the direction of a person licensed by the State of California to prescribe and administer narcotics.

"The term 'narcotics' as used in this section shall be defined in accordance with the definition contained in Section 11001 of the California Health and Safety Code."

"No issue is raised in this case concerning the portion of the city ordinance dealing with being under the influence of narcotics. The complaint charges that the defendant 'was a person unlawfully addicted to the use of narcotics and used narcotics.'

"The case of *In re Sic*, 1887, 73 Cal. 142 at page 146 [14 P. 405, at page 407], was the earliest expression of the California Supreme Court on this general problem. In holding invalid an ordinance of the City of Stockton pertaining to the smoking of opium, the Supreme Court stated:

"The section plainly covers the same ground as the Penal Code. It was probably intended to cover some supposed defects in the Penal Code; still it denounces as criminal precisely the same acts which are attempted to be prohibited by the Code. It is admitted that no ordinance is valid which

conflicts with the general laws of this state.'

"At page 148 [of 73 Cal., at page 408 of 14 P.], the court went on to say:

"It would seem that an ordinance must be conflicting with the general law which may operate to prevent a prosecution of the offense under the general law. The constitution provides that no one shall be twice put in jeopardy for the same offense. If tried and convicted or acquitted under the ordinance, he could not be again tried for the same offense under the general law. The contrary doctrine has been held in some states, but this conclusion seems more in consonance with reason and justice.'

"And in conclusion the court stated [73 Cal. at page 149, 14 P. at page 408]:

"Holding these views, we think the respondent must be discharged. It will be observed that we only hold that there is a conflict where the ordinance and the general law punish precisely the same acts. We do not wish to be understood as holding that the sections of the ordinance which make criminal other acts not punishable under the general law are void because the legislature has seen fit to legislate upon the same subject.'

"The same general result was reached in *In re Mingo*, 190 Cal. 769 [214 P. 850], where the court further held it was beyond the power of the legislature to authorize local legislation which was in conflict with the state law.'

"In *In re Portna[o]y*, 21 Cal.2d 237 at page 239 [131 P.2d 1, at page 2], a Riverside County ordinance pertaining to gambling was held to be in conflict with Penal Code Sec. 330a, and therefore unconstitutional. The court recognized that 'The control of gambling activities is a matter concerning which local governments possess power to enact and enforce local regulations not in conflict with general laws, for the purpose of supplementing those laws.' However, the court felt that there was a duplication of the general law in the city ordinance thus rendering the ordi-

nance unconstitutional. 'Insofar as the provisions of Ordinance No. 248 purport to prohibit acts which already are made criminal by the Penal Code, it is clear that they exceed the proper limits of supplementary regulation and must be held invalid because in conflict with the statutes which they duplicate. *Pipoly v. Benson*, supra, 20 Cal.2d [366] at page 370, 125 P.2d 482 [147 A.L.R. 515]; *In re Sic*, 73 Cal. 142, 14 P. 405; *In re Mingo*, 190 Cal. 769, 214 P. 850; *Ex parte Daniels*, 183 Cal. 636, 645, 192 P. 442, 21 A.L.R. 1172.' 21 Cal.2d at page 240, 131 P.2d at page 2. In rejecting a contention of the People that the difference in wording of a portion of the ordinance made it broader in scope than the state law and therefore valid, the court pointed out that in the chief essentials, the two laws were similar in nature. At p[age] 241 [of 21 Cal.2d, at page 3 of 131 P.2d] the court said:

"The ordinance, like the statute, contains as an integral part of the description of the prohibited acts the phrase "upon the result of action of which money or other valuable thing is staked or hazarded." The words "may be" appearing in the ordinance are used only in connection with the additional descriptive phrases dealing with the operation of the machines. Thus, the requirement is identical under both the statute and the ordinance with respect to an essential element of the crime, the hazarding of money. It follows that section 4 of the ordinance results in an unconstitutional duplication of section 330a of the Penal Code and is therefore invalid.'

"In *Pipoly v. Benson*, 20 Cal.2d 366 [125 P.2d 482, 147 A.L.R. 515], a case wherein the court held a Los Angeles city ordinance pertaining to traffic unconstitutional as being in conflict with the state law, the court reviewed generally the different types of situations where local ordinances may be invalid because in conflict with the state law. Although the case is not directly in point inasmuch as it pertains to a situation where the state law was deemed to cover the entire field, thus leaving no room for

local regulations of any sort, the court discussed all of the various situations where a local ordinance may be invalid because of being in conflict with the state law. The court, after quoting with approval from *In re Sic*, went on to say [20 Cal.2d at pages 370-371, 125 P.2d at page 485]:

"Paradoxical as it may seem, it is apparent that an ordinance and a statute may be identical under this rule and yet the ordinance is invalid because within the constitutional provision it is in conflict with the statute. *Ex parte Daniels*, supra, 183 Cal. page 645, 192 P. 442, 21 A.L.R. 1172. The invalidity arises, not from a conflict of language, but from the inevitable conflict of jurisdiction which would result from dual regulations covering the same ground. Only by such a broad definition of "conflict" is it possible to confine local legislation to its proper field of supplementary regulation.'

"It is true that in numerous California cases local ordinances have been upheld as not being in conflict with the state law where the ordinance in question provided for the punishment of a different offense than that covered in the state law. In *Ex parte Hong Shen*, 98 Cal. 681 [33 P. 799], an ordinance of San Francisco County prohibiting the sale of opium except on the written prescription of a physician was upheld, where the state law in question merely provided for certain registration requirements where opium was sold. The court said [98 Cal. at page 685, 33 P. at page 801]:

"The offenses being different, there is no violation of the constitutional inhibition against putting one twice in jeopardy for the same offense.'

"The court pointed out that the state had not legislated on the question of sales by physicians, saying [98 Cal. at page 685, 33 P. at page 801]:

"So, in the action at bar, the legislature has simply prohibited the sale of opium and certain other poisons unless a certain record is kept. It has not directly authorized the sale of

opium without the prescription of a physician; it has not legislated upon that subject at all, except in providing that, where a physician's prescription is presented, no other record need be kept. The city has gone further than the statute, and provided that no opium shall be sold without a prescription. While the regulation is different from that of the state, there is no conflict, and therefore it is not in violation of the provision of the constitution quoted above.'

"In *In re Iverson*, 199 Cal. 582 [250 P. 681], the Supreme Court upheld a city ordinance making it an offense to fill prescriptions for an alcoholic beverage exceeding eight ounces of alcoholic liquor. The state law restricted the filling of prescriptions where the alcoholic liquor exceeded sixteen ounces. The state law further specifically provided that nothing in the act should be construed as limiting the power of local governing bodies to enact additional provisions. The court held the ordinance not to be in conflict with the state law saying [199 Cal. at page 590, 250 P. at page 683]:

"As the offense legislated against by the ordinance is not the same as the offense proscribed by the state law, there is no conflict.'

"In *In re Hoffman*, 155 Cal. 114 [99 P. 517], wherein a city ordinance requiring a higher percentage of solids in milk than required by the state law was upheld, the court pointed out that inasmuch as the city had imposed additional regulations over and above the state law, the two laws were actually different and accordingly the local ordinance was not unconstitutional.

"In *Markus v. Justice's Court*, 117 Cal. App.2d 391 [255 P.2d 883, 886] the court had before it a Mendocino County ordinance relating to the keeping and control of dogs. Defendant's appeal was based, among other things, on the ground that the ordinance was unconstitutional since the state statute had completely occupied the field. The court held that proper supplementary legislation by the local governing body was permissible to the extent that there was no duplication of the state law.

The court, in recognizing that the county could not duplicate the state law on the subject, summarized the various cases by saying:

"An ordinance is void which prohibits the same acts which are forbidden by a State law to the extent of the duplication.' (Citing cases.)

"By way of dictum the court held a portion of the ordinance to be invalid wherein it covered the same violation set forth in the state law, but held the defendant was not affected by this portion of the ordinance. At page 397 [of 117 Cal. App.2d at page 887 of 255 P.2d] the court said:

"The power of the county therefore is limited only by the constitutional provision authorizing its legislative body to make and enforce within its boundaries such local regulations as would not be in conflict with the provisions of general law. Const. Art. XI, sec. 11. * * * However, there is a conflict between the statute and the ordinance to this extent, that the statute expressly and the ordinance generally prohibits dog owners from permitting their dogs to roam upon farms whereon are being kept livestock and domestic fowls; and as to offenses coming within the statutory inhibition the ordinance may not operate. In re Sic, supra; In re Mingo, supra.'

"From a consideration of the foregoing cases, it is apparent that a city ordinance which in effect duplicates the state law as to public offenses is, to the extent of the duplication, in conflict with the state law within the meaning of Art. XI, Sec. 11, of the California Constitution. As stated in the Pipoly case, supra, although it may seem paradoxical to say that two laws similar in nature are in conflict with each other, nevertheless such is the result of the California cases on this subject. To hold otherwise would result in a continuous conflict of jurisdiction between the state and the local governing body.

"The principal question in the present case, accordingly, is whether Sec. 52.65 of the San Diego city ordinances is essen-

tially a duplication of the provisions of Health and Safety Code section 11721, and therefore invalid. It is the court's conclusion that the portion of the city ordinance involved herein duplicates the offenses set forth in the Health and Safety Code and that accordingly the ordinance to that extent conflicts with the state law and is unconstitutional. No opinion is expressed concerning the portion of the ordinance dealing with a person 'under the influence of narcotics.'

"The state law provides:

"No person shall unlawfully use or be addicted to the unlawful use of narcotics.'

"The city ordinance provides:

"No person within the City of San Diego shall be addicted to the use of narcotics, or shall use narcotics * * * except * * *.'

"In essence, the state law says that no person within the State of California shall unlawfully use or be addicted to the unlawful use of narcotics, or to state it conversely, that no person within the State of California shall use or be addicted to the use of narcotics except in those instances where such use is lawful, that is to say, where the narcotic has been lawfully administered by or under the direction of a person authorized by the State of California to prescribe and administer narcotics. It would appear that the city ordinance in essence provides exactly the same thing in slightly different wording. The ordinance provides that no person within the City of San Diego shall be addicted to the use of narcotics or shall use narcotics except when the narcotics have been administered by or under the direction of a person authorized by the State of California to prescribe and administer narcotics, or to state the same thing in a different way, the ordinance provides that no person within the City of San Diego shall be addicted to the use of narcotics or shall use narcotics except where such addiction or use is lawful.

"It should be noted that the only actual difference in the two laws is the omission of the words 'unlawfully' and 'unlawful' in the city ordinance. Yet the ordinance in

effect includes those words by adding the exception as to the lawful use. It does not seem likely that the city ordinance was meant to punish a lawful use of narcotics. On the contrary, logic and reason both point to the conclusion that what is prohibited is the unlawful use or the unlawful addiction, which is precisely the same thing which is prohibited under the state law.

"The present case illustrates forcefully the situation mentioned in *Pipoly v. Benson*, where the court stated:

"The invalidity arises * * * from the inevitable conflict of jurisdiction which would result from dual regulations covering the same ground."

"If this ordinance were permitted to stand, it would appear likely that if the defendant Robert John Villarino, on the 19th day of January, 1955, actually used narcotics or was addicted to the use of narcotics, he could be prosecuted either through the District Attorney's office on a violation of the Health and Safety Code, or through the City Prosecutor's office on a violation of the city ordinance, depending on which filed the first complaint. The situation would be further complicated by the fact that different punishments are provided under the two laws. The state legislature has seen fit to provide for a mandatory minimum 90 day jail sentence to be imposed as a condition of probation. The City Council has made Sec. 52.65 a regular misdemeanor, the entire sentence for which could be suspended at the discretion of the court.

"No definition of the term 'addict' appears in the city ordinance. Sec. 11009 of the Health and Safety Code provides that an addict is one who 'unlawfully uses, or is addicted to the unlawful use of, narcotics.' Since no definition appears in the city ordinance it would appear that the definition in the Health and Safety Code would apply to the portion of the ordinance

pertaining to addiction, inasmuch as the legislature has seen fit to cover the subject. Applying this definition to the city ordinance would make it doubly clear that the acts prohibited by the city ordinance are the 'unlawful' use or addiction to the 'unlawful' use of narcotics. The prosecution argues that perhaps the City Council had in mind a different definition of the term 'addict.' It would seem that if the Council intended a different definition to apply, that it would have been a simple matter to have so stated. Moreover, even though the Council had desired to insert a different definition in the ordinance, inasmuch as the legislature has covered the subject as to what an 'addict' is, it would seem that to provide a different definition would have resulted in an express conflict in the two laws and the invalidity now existing would not have been eliminated.

"It should also be noted that complaints under the two laws would of necessity be worded in practically identical language. The present complaint charges that the defendant '* * * was a person unlawfully addicted to the use of narcotics and used narcotics.' Substantially similar wording would have been used if the complaint had been brought under the Health and Safety Code.

"Inasmuch as the city ordinance, insofar as it applies to the use of narcotics or addiction to narcotics is a duplication of the state law, it is unconstitutional and void. In view of the announced position of the prosecution that it does not desire to proceed under the Health and Safety Code, the motion to dismiss the complaint filed under the city ordinance is hereby granted. This ruling, of course, does not prohibit the People from filing a new complaint under the Health and Safety Code."

It is therefore ordered that the judgment of dismissal be and it is hereby affirmed.

TURRENTINE, P. J., and BURCH and GLEN, JJ., concur.

45 Cal.2d 50

In re ESTATE of Max L. SCHECHTMAN,
a/k/a M. L. Schechtman, a/k/a Manuel
Schechtman, Deceased.

Harold S. STONE, as executor of the estate
of Frances B. Schechtman, deceased,
Petitioner and Appellant,
v.

Dr. Abraham SCHECHTMAN and Leo
Schechtman, Contestant-Executors and
Contestant-Respondents.

L. A. 23018.

Supreme Court of California.

In Bank.

Aug. 2, 1955.

Proceeding by decedent's widow against executors of decedent's estate for discovery of property which allegedly should be inventoried and brought into estate. The Superior Court, Los Angeles, Samuel R. Blake, J., entered order refusing to compel co-executors to inventory certain alleged additional assets of estate, and widow purported to appeal. The Supreme Court, Shenk, J., held that order relating to discovery of property which should be inventoried and brought into decedent's estate was not directly appealable, although it was reviewable on appeal from final judgment entered in the proceedings.

Appeal dismissed.

Opinion, 273 P.2d 553, vacated.

1. Executors and Administrators ⚡85(1)

Proceeding under sections of Probate Code providing, on complaint of executor, administrator or other person interested in decedent's estate, for citation and examination of persons having knowledge of deed or other writing disclosing decedent's interest in real or personal property, is in nature of bill of discovery to aid executors and others interested in estate in locating and inventorying assets of estate. Probate Code, §§ 613-615.

2. Executors and Administrators ⚡85(6)

Power of court in proceeding for discovery of property which should be brought into decedent's estate ends with discovery

of the property and enforcement of statutory provisions for compelling disclosure, and jurisdiction to try questions of title is not invoked by petition for such discovery. Probate Code, §§ 613-615.

3. Courts ⚡200½, 472(4)

Court in exercise of its probate jurisdiction has power to try question of title only as between estate and certain persons interested in disposition of estate, and even then such jurisdiction is not necessarily exclusive.

4. Executors and Administrators ⚡85(8)

Proceeding on petition for discovery of property which should be inventoried and brought into decedent's estate could not be construed as proceeding for instructions to executors so as to render resultant order appealable. Probate Code, §§ 588, 613-615, 1240; West's Ann.Const. art. 6, § 4.

5. Executors and Administrators ⚡82

Amendment to section of Probate Code enumerating appealable orders to include for first time appeal from order instructing or directing executor or administrator, was enacted to accommodate orders made pursuant to section of Probate Code added at time of amendment making it possible for first time for executor to petition for instructions, and did not alter appealability of other orders. Probate Code, §§ 588, 1240; West's Ann.Const. art. 6, § 4.

6. Executors and Administrators ⚡85(8)

Appeal from order relating to discovery of property which should be inventoried and brought into decedent's estate could not be decided on its merits regardless of appealability. Probate Code, §§ 613-615; West's Ann.Const. art. 6, § 4.

7. Executors and Administrators ⚡85(8)

Order relating to discovery of property which should be inventoried and brought into decedent's estate was not directly appealable, although it was reviewable on appeal from final judgment entered in the proceedings. Probate Code, §§ 613-615, 1240; West's Ann.Code Civ.Proc. § 956; West's Ann.Const. art. 6, § 4.

Nathan L. Schoichet, Beverly Hills, for appellant.

Harry A. Franklin, Los Angeles, for respondents.

SHENK, Justice.

This is a purported appeal by the widow of Max L. Schechtman from an order refusing to compel the co-executors of his estate to inventory alleged additional assets of the estate.

Max L. Schechtman died in February, 1952, survived by his widow, Frances B. Schechtman, and three sons by his prior marriage, two of whom, Dr. Abraham Schechtman and Leo Schechtman, are co-executors of his estate. A will executed in 1948 provided for the transfer of certain items of personal property to the widow and recognized her one-half interest in all community property. It provided that the other half interest was to be transferred to Abraham Schechtman and Leo Schechtman. In October 1952, after the will and an inventory and appraisal of the assets of the estate had been filed by the executors, the widow filed a petition seeking to compel the executors to inventory additional items as assets of the estate. Her petition was filed pursuant to section 613 of the Probate Code, which provides in part: "Upon complaint made under oath by an executor, administrator, or other person interested in the estate of a decedent, that any person is suspected of having embezzled, concealed, smuggled or fraudulently disposed of any property of the decedent, or has in his possession or has knowledge of any deed, conveyance, bond, contract or other writing, which contains evidence of or tends to disclose the right, title, interest or claim of the decedent to any real or personal property, * * * the court or judge may cite the suspected person to appear before the court, and may examine him on oath upon the matter of such complaint. * * *" Section 614 provides means of enforcing rights established as provided in section 613, and section 615 permits a complainant to proceed in a similar manner against one with whom assets of an estate have been entrusted.

The widow alleged in her petition that in addition to the items inventoried the decedent owned interests in four other specific parcels of real property, then in the possession of the decedent's sons and their wives and the decedent's brother and his wife. She also asserted that the decedent owned interests in the proceeds derived from sales of nine other identified parcels of real property; that all of those transfers took place during her marriage to the decedent, and that the proceeds therefrom were presently in the hands of various members of the decedent's family and other persons known and unknown. Other items of property not identified were alleged to be in the possession of persons known and unknown and, within the knowledge of the executors, were alleged to be owned in part by the decedent. All of the foregoing interests of the decedent were claimed to be community property.

Pursuant to citations the executors and others appeared and a hearing was had on the petition. Based on findings of fact the court concluded that two bank accounts should be inventoried, but that there was insufficient evidence to show color of title in the decedent or his estate to warrant inclusion in the inventory of other properties as alleged in the petition. The order appealed from was accordingly entered.

[1-3] The determining question first to be considered relates to the appealability of the order. A proceeding under sections 613, 614 and 615 of the Probate Code is in the nature of a bill of discovery to aid executors and others interested in the estate in locating and inventorying assets of an estate. *Levy v. Superior Court*, 105 Cal. 600, 38 P. 965, 29 L.R.A. 811; *McCarthy v. Superior Court*, 64 Cal.App.2d 468, 471, 149 P.2d 55. The petition in the present case was entitled "Petition to Compel Executors to Inventory Additional Assets of Decedent's Estate." Counsel for the petitioner asserted upon inquiry by the court that the proceeding was commenced pursuant to section 613 et seq. of the Probate Code, and the matter was treated as such throughout the hearing. The court, in its findings of fact, referred to the matter as

"discovery proceedings". The power of the court in such a proceeding ends with the discovery of the property and the enforcement of the remedial provisions of the statute. *Koerber v. Superior Court*, 57 Cal.App. 31, 34, 206 P. 496. Jurisdiction to try a question of title is not invoked by a petition brought under section 613. The court in the exercise of its probate jurisdiction has the power to try a question of title only as between the estate and certain persons interested in the disposition of the estate, *Central Bank v. Superior Court*, Cal., 285 P.2d 906; *Ex parte Casey*, 71 Cal. 269, 12 P. 118; *In re Estate of Escolle*, 134 Cal.App. 473, 476, 25 P.2d 860, and even then such jurisdiction is not necessarily exclusive. *Schlyen v. Schlyen*, 43 Cal.2d 361, 374, 273 P.2d 897. In the present case the court recognized the limitations of its jurisdiction in probate, stating in its order for the inventory of the additional items of property that the inclusion thereof should be subject "to the rights of any person to set up and have adjudicated in a proper proceeding and in a Court of competent jurisdiction any claim of title thereto or for the possession thereof."

Appeals which may be taken from orders in probate proceedings are set forth in section 1240 of the Probate Code. The section does not expressly provide for an appeal from an order relating to the discovery of property to be inventoried. The courts have consistently held that appeals in probate matters are limited to those expressly provided by statute. In *In re Ohm's Estate*, 82 Cal. 160, at page 162, 22 P. 927, at page 928, the court stated that a matter then before it "certainly is a 'probate matter.' * * * The constitution provides that 'the supreme court shall have appellate jurisdiction * * * in all such probate matters as may be provided by law.' Article 6, § 4. The only provisions of law, as to appeals in probate matters, are contained in the third subdivision of section 963 of the Code of Civil Procedure [Now in substance, section 1240 of the Probate Code], in which is to be found no provision for an appeal from such an order as that appealed from in this case." To the same effect see *In re Estate of Brady*, 32 Cal.2d

478, 479, 196 P.2d 881; *In re Walkerly*, 94 Cal. 352, 353, 29 P. 719; *In re Estate of Wood*, 117 Cal.App.2d 132, 133, 254 P.2d 940; *In re Estate of Durham*, 108 Cal.App. 2d 148, 153, 238 P.2d 1057; *In re Estate of Thompson*, 61 Cal.App.2d 188, 142 P.2d 337; *In re Estate and Guardianship of Morro*, 36 Cal.App.2d 623, 627, 98 P.2d 552. More specifically it has been held that there is no right of appeal from an order made pursuant to the discovery provisions of the Probate Code. *In re Estate of Olmstead*, 216 Cal. 585, at page 587, 15 P.2d 495, at page 496 this court stated: "This proceeding is difficult to classify under any known method of procedure. * * * If it be classified as an attempt to discover assets of the estate pursuant to section 615 of the Probate Code, no appeal is allowed from an order made pursuant to that section, its object being to place the executor or administrator in possession of such facts as would authorize a suit on the civil side of the court to restore to the estate the property thereof held by another."

[4] The widow asserts that the proceeding in the present case may properly be construed as one for instructions to the executors. Section 588 of the Probate Code provides that "In all cases where no other or no different procedure is provided by statute, the court on petition of the executor or administrator may from time to time instruct and direct him as to the administration of the estate * * *." Section 1240 of the Probate Code provides for an appeal from an order "instructing or directing an executor or administrator", and it is argued that this constitutes authority for the appeal in the present case. This argument may not prevail for several reasons. As stated, at the hearing counsel for the petitioner, in response to an inquiry by the court as to the nature of the proceeding, stated that it had been commenced pursuant to section 613 of the Probate Code. The matter was treated throughout and regarded by the litigants and the trial court as a "discovery proceeding". It was not commenced "on petition of the executor" as required by section 588 but by the widow, a "person interested in the estate" as provided by section 613. The prayer of

the petition was for the examination of numerous individuals other than the co-executors and citations issued accordingly. To treat the matter now as a petition for instructions rather than for discovery would constitute a total disregard of the true nature of the proceeding involved. It is undoubtedly true that under many probate orders an executor or administrator necessarily will or is expected to take some action pursuant thereto. But that in itself does not constitute the order as one "instructing or directing an executor or administrator." Such an order is a part of a well recognized special proceeding in probate. It is the resulting order that is specially made appealable by section 1240.

[5] In this connection the appellant further contends that the decisions which have established the rule that orders pursuant to section 613 are not appealable, and in particular the decision in *In re Ohm's Estate*, 1889, supra, 82 Cal. 160, 22 P. 927, are no longer controlling in view of the amendment to section 1240 in 1935 to include for the first time an appeal from an order "instructing or directing an executor or administrator". Stats.1935, p. 1972. At the time of the decisions in those cases, section 1240 did not provide for an appeal from an order instructing an executor, and it is argued that if such an appeal had been available the courts would have construed the proceedings as for the instruction of executors. There is nothing in those cases to indicate that such a construction would have been approved by the courts. It appears that in the same year that section 1240 was amended to include appeals from orders instructing an executor, section 588 of the Probate Code was added, Stats.1935, p. 1973, making it possible for the first time for an executor to petition for instructions. It is clear that the change in section 1240 was enacted to accommodate orders made pursuant to section 588.

What the widow really seeks on her appeal is to have this court establish an exception to the general rule that the only appealable orders in probate are those provided for by statute. Such an exception,

she asserts, are orders in which a party litigant in a probate proceeding has an interest adversely affected by an order therein. There is in the cases no authoritative recognition of such an exception. Cases relied on are those in which the question presented was whether the appellant therein was the proper party to take an appeal from an order admittedly appealable. *In re Estate of Bradley*, 168 Cal. 655, 144 P. 136; *In re Estate of Leonis*, 138 Cal. 194, 71 P. 171; *In re Welch's Estate*, 106 Cal. 427, 39 P. 805; *In re Estate of Mesner*, 99 Cal.App.2d 319, 221 P.2d 740. No question was raised in those cases as to the appealability of the order, and the decisions must be so limited.

[6] The appellant contends that the appeal should be decided on its merits regardless of appealability, and cites as authority *In re Estate of Emerson*, 139 Cal. App. 571, 34 P.2d 800. In that case the court expressed approval of an objection that the order was not included in section 1240 and was not appealable but nevertheless considered the issues and concluded that the appeal was without merit. The court affirmed the order and the appellant took nothing regardless of the ground on which the court chose to place its decision. Such a result in the present case would be inconsistent with the appellant's demands, would permit her on this appeal to seek a reversal in contravention of the statute and decided cases, and would put the court in the position of usurping the function of the Legislature in providing for appeals in probate matters in accordance with the constitutional provision. § 4, art. VI.

[7] Although the order is reviewable on an appeal from a final judgment entered in the proceedings, § 956, Code Civ.Proc., it is concluded from the foregoing that it is not one from which an appeal may be directly taken.

The appeal is dismissed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

45 Cal.2d 66

**Katherine EILKE, as Executrix of the Will
of Herta Reinach, Deceased,
Plaintiff and Appellant,**

v.

**David RICE, Defendant and Respondent.
L. A. 23639.**

Supreme Court of California.
In Bank.
Aug. 5, 1955.

Action on notes by payee against maker. The Superior Court of Los Angeles County, James G. Whyte, J., entered judgment of dismissal and payee appealed. The Supreme Court, Shenk, J., held that payment of interest or principal just before four year statute of limitations is to run has the effect of extending statute of limitations four years from such date and statute may be tolled indefinitely as long as successive payments of either interest or principal are made within four years of each other.

Reversed.

Opinion, 277 P.2d 426, vacated.

1. Limitation of Actions §151(2)

The acknowledgment of a debt already barred by the statute of limitations gives rise to a new contract and a new cause of action dating from the acknowledgment.

2. Limitation of Actions §151(3)

Acknowledgment of a debt before statute of limitations has run, does not create a new obligation as of the time of the acknowledgment, but merely continues the original obligation through a new statutory period.

3. Limitation of Actions §163(6)

A payment of principal or interest on note continues original obligation through a new statutory period and as long as such payments are made within four years of each other statute of limitations will be tolled indefinitely. West's Ann.Code Civ. Proc. §§ 337, 360.

Moore, Trinkaus & Binns and Walter R. Trinkaus, Los Angeles, for appellant.

Morrison, Hohfeld, Foerster, Shuman & Clark, San Francisco, as amici curiae on behalf of appellant.

Vaughan & Brandlin, J. R. Vaughan, Richard I. Roemer and Warren J. Lane, Los Angeles, for respondent.

SHENK, Justice.

This is an appeal from a judgment of dismissal following an order sustaining a demurrer without leave to amend.

On August 1, 1944, the defendant Rice executed two promissory notes to one Herta Reinach, of whose estate the plaintiff is the executrix. Both notes were in the amount of \$3,000. The first was payable on or before six months; the second on or before one year. No payments were made on the principal on either note although some thirty payments on account of interest were made regularly through November 15, 1952. The complaint was filed on November 30, 1953. It alleged demand and failure of the defendant to pay the amount of \$3,000.00 due on each note and sought recovery of the principal, interest, attorneys' fees and costs.

The demurrer was sustained on the ground that the action was barred by the Code of Civil Procedure, section 337, which outlaws written contracts after four years. Unless tolled or extended by the payments of interest, the statute would have run on the first note on February 1, 1949 and on the second note on August 1, 1949.

The controversy centers upon the correct construction of the Code of Civil Procedure Section 360. That section as amended in 1947 (the amended portion in italics), provides: "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby, *provided, that any payment on account of principal or interest due on a promissory note made by the party to be charged shall be deemed a sufficient acknowledgment or*

promise of a continuing contract to take the case out of the operation of this title and the time within which an action may be brought upon a promissory note or upon any installment of principal or interest thereof shall not commence to run until the last payment of principal or interest made by the party to be charged prior to the time when the statute of limitations would otherwise have run on the principal sum or on the installment thereof last due."

The principal difficulty arises from the provision that time does not "commence to run until the last payment of principal or interest made by the party to be charged prior to the time when the statute of limitations would otherwise have run on the principal sum or on the installment thereof last due." This provision does not indicate the formula for determining when the statute would "otherwise have run." The defendant contends that it should be construed to indicate only an extension through the first four years from the original due dates of the notes. It is the position of the plaintiff that it should be read as including extensions resulting from payments of interest. The question is whether the entire section, including the amendment's time extension provision, is embraced within the computing formula for determining when the statute would "otherwise have run." There is room for legitimate argument that either view is possible under the language of the section as amended. There is therefore no merit in the defendant's contention that the section is clear and unambiguous and that this court has no power to construe it.

If the first construction were adopted, then, in the present case, the statute running originally on February 1, 1949 and August 1, 1949, the "last payments" would have been made on November 10, 1948 and May 9, 1949. The amendment would then bar the action four years after those dates; that is on November 10, 1952 and May 9, 1953. Since the action was commenced on November 30, 1953, the first suggested construction of the amendment would bar the action on both notes.

If the second suggested construction were adopted, the payments of November 10,

1948 and May 9, 1949 would have the effect of extending the period to November 10, 1952 and May 9, 1953, but this second period would again be extended for a third period beginning with the last payment made before the second period expired. The defendant's last payments of September 19, 1952 and November 15, 1952 would thus extend the periods to September 19, 1956 and November 15, 1956. Hence under the second suggested construction the action would not be barred.

The part payment problem has suffered a long and tortuous history both at common law and through the decisions in this state under section 360. An examination of this history is desirable in order to clarify the ambiguity found in the present language of the code.

Prior to the 1947 amendment section 360 provided simply that "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby." This language apparently had its origin in the Statute of Frauds Amendment Act, commonly known as Lord Tenterden's Act, [1828] 9 Geo. IV, Ch. 14, s. 1, which provided: "In actions of debt or upon the case grounded upon any simple contract no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation [of the statute of limitation] * * *, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby * * *." See *Fairbanks v. Dawson*, 9 Cal. 89.

The purpose of Lord Tenterden's Act was well stated by Chief Justice Tindal in *Haydon v. Williams*, [1830] 7 Bing. 163, at pages 166-167: "That statute did not intend, as it appears to us, to make any alteration in the legal construction to be put upon acknowledgments or promises made by defendants, but merely to require a different mode of proof; substituting the certain evidence of a writing signed by the party

chargeable, instead of the insecure and precarious testimony to be derived from the memory of witnesses." This reasoning was apparently considered inapplicable to the acknowledgment of a debt by part payment, for the first section of Lord Tenterden's Act provided that " * * * nothing herein contained shall alter or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever." (9 Geo. IV, Ch. 14, s. 1.) Despite this proviso, the statute was first construed to exclude parol evidence of part payment. (Willis v. Newham, [1830] 3 Younge & Jer. 518), but the proviso, saving part payment from the operation of the Act, was eventually recognized and Willis v. Newham, supra, was overruled. (Cleve v. Jones [1851] 6 Exch. 573.) This was also the state of the law in American jurisdictions when section 360 of the Code of Civil Procedure was adopted. See Williams v. Gridley, 9 Metc. 482, 50 Mass. 482; Read v. Hurd, 7 Wend.N.Y., 408; Sibley v. Lumbert, 30 Me. 253; Hapgood v. Southgate, 21 Vt. 584.

Because our legislature adopted Lord Tenterden's Act almost verbatim but failed to include the proviso saving part payment transactions, this court has consistently construed section 360 to include part payment. In Fairbanks v. Dawson, supra, 9 Cal. 89, at page 92, it was said: "From the fact that the proviso found in Lord Tenterden's act is left out of our statute, it would seem to be clear that the Legislature intended to put all acknowledgments and promises upon the same footing, to be governed by the same rule of evidence." See Clunin v. First Federal Trust Co., 189 Cal. 248, 252, 207 P. 1009; Minifie v. Rowley, 187 Cal. 481, 202 P. 673; Concannon v. Smith, 134 Cal. 14, 66 P. 40; Tuggle v. Minor, 76 Cal. 96, 18 P. 131; Biddel v. Brizzolara, 56 Cal. 374; Pena v. Vance, 21 Cal. 142; Barron v. Kennedy, 17 Cal. 574. These decisions adopted the earlier English rule found in Willis v. Newham, supra, [1830] 3 Younge & Jer. 518, overruled in Cleve v. Jones, supra, [1851] 6 Exch. 573. While the Federal Circuit Court for the District of California reached the opposite result in Palmer v. Andrews,

1859, Fed.Cas.No. 10,683, the rule in Fairbanks v. Dawson, supra, 9 Cal. 89 was followed in this state until section 360 was amended in 1947.

Having decided that section 360 applied to part payments, it then became necessary to determine whether the requirement of a writing went to the proof of the new promise or merely the act of part payment from which the promise to pay the whole debt could be inferred. This problem was first resolved in favor of limiting the effect of the section to require merely the written proof of the act of part payment. Written evidence of an express recognition or admission of the debt was not required. Minifie v. Rowley, supra, 187 Cal. 481, 202 P. 673; Concannon v. Smith, supra, 134 Cal. 14, 66 P. 40; Tuggle v. Minor, supra, 76 Cal. 96; Biddel v. Brizzolara, supra, 56 Cal. 374; Pena v. Vance, supra, 21 Cal. 142; Barron v. Kennedy, supra, 17 Cal. 574; Fairbanks v. Dawson, supra, 9 Cal. 89. When section 360 was reexamined eight months after the decision in Minifie v. Rowley, supra, 187 Cal. 481, 202 P. 673, the rule was extended to require that the writing prove either the new promise or a recognition or admission of the debt, not simply the act from which a promise could be inferred. In Clunin v. First Federal Trust Co., supra, 189 Cal. 248, 253, 207 P. 1009, 1011, this court said: " * * * no writing is sufficient as an acknowledgment under section 360, unless, it contains some reference to a debt, which, either of itself or with the aid of permissive evidence of extrinsic facts in explanation, amounts to an admission that there is a debt existing to the creditor to whom the writing is sent which the debtor is liable to pay and willing to pay. The checks introduced in evidence do not come up to this standard * * *." Butt v. Burkett, 18 Cal.App.2d 612, 64 P.2d 437; Armstrong v. Maupas, 97 Cal.App. 710, 276 P. 148; Ferguson v. Fonner, 87 Cal.App. 590, 262 P. 337.

Prior to the 1947 amendment therefore section 360 required not only a writing to prove the act of acknowledgment or part payment but also that the writing directly evidence the new promise or admit or refer

to the debt and the payment from which a new promise may be inferred. In these respects the California rule was totally at variance with the great majority of decisions in other jurisdictions where part payment transactions were excluded from the category of acknowledgments requiring a writing.¹

[1, 2] The language of the 1947 amendment of section 360 shows clearly that the Legislature intended to adopt the rule generally established in other jurisdictions. Within specified limits the amendment rejects the requirement of a writing to prove an acknowledgment by part payment. The first part of the amendment expressly excepts any part payment of principal or interest on a promissory note from the operation of the title. Part payment is deemed to be a sufficient acknowledgment of a "continuing contract" to take the case out of the statute of limitations. By express language the amendment is restricted to "continuing contracts"; that is, contracts against which the statute has not run at the time of the acknowledgment. Thus the amendment adopts the distinction between continuing and new contracts long recognized in this state. The acknowledgment of a debt already barred by the statute gives rise to a new contract and a new cause of action dating from the acknowledgment. *Sanford v. Bergin*, 156 Cal. 43, 103 P. 333; *Weinberger v. Weidman*, 134 Cal. 599, 66 P. 869; *Concannon v. Smith*, supra, 134 Cal. 14, 66 P. 40; *Rodgers v. Byers*, 127 Cal. 528, 60 P. 42. The acknowledgment of a debt before the statute has run, however, does not create

a new obligation as of the time of the acknowledgment; it merely continues the original obligation through a new statutory period. *Curtis v. Holee*, 184 Cal. 726, 195 P. 395, 18 A.L.R. 1024; *Concannon v. Smith*, supra, 134 Cal. 14, 66 P. 40; *Rodgers v. Byers*, supra, 127 Cal. 528, 60 P. 42; *Southern Pacific Co. v. Prosser*, 122 Cal. 413, 52 P. 836, 55 P. 145; *McCormick v. Brown*, 36 Cal. 180. The importance of the distinction between new and continuing contracts is seen in *Southern Pacific Co. v. Prosser*, supra, 122 Cal. 413, at page 417, 52 P. 836, 55 P. 145, at page 147, where it is said: "When a debtor makes a new promise before an action is barred upon the original contract, he does not make himself liable a second time for the same debt * * *; he merely continues his original liability for a longer term. In other words, he merely waives so much of the period of limitations as has run in his favor."

When read in the light of the foregoing background the legislative intention with reference to the language of the latter part of the amendment becomes clear. As stated, the latter part of the amendment provides: "* * * and the time within which an action may be brought * * * shall not commence to run until the last payment of principal or interest made by the party to be charged prior to the time when the statute of limitations would otherwise have run on the principal sum or on the installment thereof last due." This language elaborates and defines the distinction between continuing and new contracts above discussed. It defines the continuing con-

1. See *Anderson v. Nystrom*, 103 Minn. 168, 114 N.W. 742, 13 L.R.A.(N.S.), 1141; *Brudi v. Trentman*, 16 Ind.App. 512, 44 N.E. 932; *First National Bank of Utica v. Ballou*, 49 N.Y. 155; *Gaffney v. Mentele*, 23 S.D. 38, 119 N.W. 1030; *Gorrell v. Goff*, 148 Kan. 765, 84 P.2d 953, 124 A.L.R. 223; *Green v. Boothe*, 239 Mo.App. 73, 188 S.W.2d 84; *Hapgood v. Southgate*, supra, 21 Vt. 584; *Hogevoll v. Hogevoll*, 117 Mont. 528, 162 P.2d 218; *Horsfall v. Logan*, 72 Or. 150, 142 P. 760; *Joseph v. Carter*, 314 Ill.App. 630, 42 N.E.2d 321, reversed on other grounds, 382 Ill. 461, 47 N.E.2d 471; *King v. Mattingly*, 49 Idaho 618, 292 P. 220; *Lieske v. Swan*, 93 Colo. 396, 26

P.2d 807; *Lyle v. Esser*, 98 Wis. 234, 73 N.W. 1008; *McAbee v. Wiley*, 92 Ark. 245, 122 S.W. 623; *Miner v. Lorman*, 59 Mich. 480, 26 N.W. 678; *Pond v. French*, 97 Me. 403, 54 A. 920; *Romaine v. Corlies*, 47 N.J.L. 108; *Smith v. Davis*, 228 N.C. 172, 45 S.E.2d 51, 174 A.L.R. 643; *Stroud v. Payne*, 124 Neb. 612, 247 N.W. 595; *Wade v. Killen*, 200 Ala. 212, 75 So. 970; *Williams v. Gridley*, supra, 9 Metc. 482, 50 Mass. 482. Compare *Hootman v. Beatty*, 228 Iowa 591, 293 N.W. 32; *Murray v. Lightsey*, 58 Ga.App. 100, 197 S.E. 870; *Perry v. Ellis*, 62 Miss. 711; *Wilcox v. Williams*, 5 Nev. 206; *Woodham v. Hill*, 78 Fla. 517, 83 So. 717.

tract as one on which the statute has not run at the time of the last part payment. This is the most reasonable construction of the amendment as a whole. It is given additional support by the legislative decision to introduce the latter part of the amendment with the word "and", a word of extension and definition. To construe the language following "and" as language of definition leads to a construction which brings the latter part of the amendment into harmony with the entire section. To construe the language following "and" as language of limitation is to do violence to language and to produce unnecessarily burdensome restrictions such as the legislature sought to remove by the adoption of the amendment.

[3] Since the "continuing contract" is one where time is waived by part payment of principal or interest, *Southern Pacific Co. v. Prosser*, supra, 122 Cal. 413, 417, 52 P. 836, 55 P. 145, the construction thus placed on the amendment merely requires that subsequent payments be made before the statute has run on the "continuing contract." As so construed the amendment requires that part payments be made within four years of each other. See *Crawford's Admin. v. Ross*, 299 Ky. 664, 186 S.W.2d 797; *Duvall v. Parepoint*, 168 Ky. 11, 181 S.W. 653; *Windsor v. Hearn*, 35 Del. 184, 161 A. 288; *Hughes v. Werner's Estate*, D.C., 78 F.Supp. 762. Any payment made after the first four years have run without extension or after four years have passed since the last part extension by part payment will not have the effect of tolling the statute.

Had the Legislature intended to preclude from further extension the "continuing contract" once extended by part payment, either the language of limitation would have been used to introduce the qualification, or the "continuing contract" language would not have been used, or the latter part of the amendment would have specifically limited the extension to one statutory period based upon one and only one part payment. In the absence of such specific indication in any of these three possible instances, this court will follow the construction which

best harmonizes the entire provision; especially, as in this case, where the policy of the amendment is supported by authorities in other jurisdictions, as above noted, and favors the construction followed here.

The judgment is reversed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.



45 Cal.2d 75

PACIFIC COAST CHEESE, Inc., Plaintiff
and Appellant,

v.

SECURITY FIRST NATIONAL BANK OF
LOS ANGELES, a Banking Corporation,
Defendant and Respondent.

L. A. 23400.

Supreme Court of California.

In Bank.

Aug. 12, 1955.

Action by depositor against bank to recover amount paid from his account by bank on depositor's raised checks and for injury to depositor's credit when bank dishonored checks because of insufficient funds resulting from deductions from depositor's account for raised checks. The Superior Court, Los Angeles County, Harold B. Jeffery, J., directed a verdict for the bank and depositor appealed. The Supreme Court, Gibson, C. J., held that where bank made no effort to introduce in evidence any of the raised checks other than to serve a notice to produce on the depositor who had never seen checks, although there was evidence that District Attorney had two of such checks in his possession, evidence did not warrant a directed verdict for bank.

Reversed.

Opinion 273 P.2d 547, vacated.

1. Banks and Banking Ⓒ148(1)

A bank may not charge its depositor's account with payments made on altered or forged checks even where alteration or forgery was committed by employee of depositor, unless some conduct of depositor falling under principles of negligence or estoppel contributed to the loss and the bank itself was free from negligence.

2. Banks and Banking Ⓒ154(6)

Where a bank has made a payment on the basis of an altered or forged check the burden is on the bank to justify the charge by establishing as an affirmative defense both that it was free from negligence and that depositor was negligent or estopped to deny correctness of payments.

3. Banks and Banking Ⓒ154(9)

Whether bank which has paid on a altered or forged check has established as an affirmative defense both that it was free from negligence and that the depositor was negligent or estopped to deny correctness of payments, are ordinarily questions for the jury.

4. Banks and Banking Ⓒ148(1)

Where bank has made payment on basis of a forged or altered check the rule that the bank is responsible unless it can affirmatively show that the loss was not caused by its negligence is not rendered inapplicable by fact that depositor's bookkeeper may have destroyed some or all of the checks.

5. Banks and Banking Ⓒ154(9)

In depositor's action against bank to recover for amount paid out by bank on depositor's raised checks wherein bank gave evidence of its carefulness in examining checks presented for payment but did not make any effort to produce any of the checks except to serve an order to produce on depositor who had never seen checks, although evidence showed that District Attorney was in possession of two of the checks, evidence did not warrant a directed verdict for the bank.

6. Election of Remedies Ⓒ1

Election of remedies is based upon estoppel and when applicable, operates only if the party asserting it has been injured.

7. Election of Remedies Ⓒ3(4)

Where depositor brought civil action against his employee who had raised checks and recovered a judgment which was unsatisfied, and bank was not in any way injured or prejudiced by depositor's action against bookkeeper, doctrine of election of remedies did not prevent depositor from bringing civil action against bank for amount deducted from his account for payment of raised checks.

Jesse A. Hamilton, Lakewood, for appellant.

Iverson & Hogoboom and Paul E. Iverson, Los Angeles, for respondent.

GIBSON, Chief Justice.

Certain checks drawn against plaintiff's commercial account were altered so as to raise the amounts for which they had been written. Defendant bank honored the checks as altered, and the raised amounts were deducted from plaintiff's account. Subsequently the bank dishonored other checks of plaintiff on the ground that insufficient funds remained in the account after the deductions had been made. This action was brought to recover the amounts which plaintiff asserted had been wrongfully deducted from its account by reason of the bank's payment of the raised checks. Plaintiff also sought damages for asserted injury to credit resulting from the dishonoring of checks for lack of funds. The trial court directed a verdict for defendant, and plaintiff has appealed.

From January 25, 1952, through the month of February, plaintiff's bookkeeper drafted a series of checks for salaries and advances on salaries, filling in either by handwriting or by typewriter the date, the name of the payee, and the amount in figures, but leaving blank the space for the written amount. Plaintiff's manager signed the checks while they were in this condition and returned them to the bookkeeper, who put them through a protectograph machine, which is a device for perforating the amount in words on a check. The manager did not see what amounts were entered by use of the machine. There is evidence from

which it may be inferred that, except in one instance, the bookkeeper inserted the number "1" in front of the figures which were on the checks when they were signed and that he perforated corresponding sums on the checks when he put them through the protectograph, in effect raising each check by \$100. It also may be inferred that he raised one check for \$52.05 by altering the first "5" to an "8" and writing in the larger sum with the protectograph.

The first altered check was charged to plaintiff's account on January 25 and was indicated by an entry of \$130 on the January bank statement. Shortly after the statement arrived in the mail, the manager found it on his desk, placed it in his drawer and, upon examining it several days later, noticed that there was no canceled check or voucher for the \$130 deduction. He did not mention the missing item to anyone since he expected that it would arrive in the following month's statement, and he soon forgot about it.

On March 5, 1952, John Bell, an employee who occasionally made deposits for plaintiff, called at the bank and obtained the February statement, although the bank had not been authorized to deliver statements to him. Plaintiff's manager first suspected something was wrong when, on March 8, he learned that a check which was not one of the altered series had been dishonored for lack of sufficient funds. He discovered that plaintiff's account had been charged by the bank with amounts which did not correspond with plaintiff's records, and, although he made a search, he could not find the canceled checks representing the charges made by the bank. The altered checks were delivered to Bell with the February statement, and he gave them to the bookkeeper. The checks were not introduced in evidence, and the only showing as to what happened to them is the testimony of plaintiff's manager that two of the checks were probably in the district attorney's office. The manager said that he did not have any of them, and it does not appear that anyone connected with plaintiff other than the bookkeeper ever saw them. The bank served on plaintiff a notice to produce

all checks, but there is no evidence that the bank made any other effort to locate them.

The manager filed a criminal complaint against the bookkeeper and, as plaintiff's assignee, instituted a civil action, obtaining judgment against the bookkeeper for an amount which included the same items that plaintiff now asserts were improperly deducted from its account by the bank. The judgment has not been satisfied.

[1-3] The general rule is that a bank may not charge its depositor's account with payments made on altered or forged checks unless some conduct of the depositor falling under the principles of negligence or estoppel contributed to the loss and the bank was itself free from negligence. *Basch v. Bank of America*, 22 Cal.2d 316, 321, 139 P.2d 1; *Union Tool Co. v. Farmers', etc., Nat. Bank*, 192 Cal. 40, 46-48, 218 P. 424, 28 A.L.R. 1417; *Glassell Development Co. v. Citizens' Nat. Bank*, 191 Cal. 375, 379, 216 P. 1012, 28 A.L.R. 1427; cf. *Los Angeles Inv. Co. v. Home Sav. Bank*, 180 Cal. 601, 604, 182 P. 293, 5 A.L.R. 1193. This rule has been applied where, as here, the alteration or forgery was committed by an employee of the depositor. *Basch v. Bank of America*, 22 Cal.2d 316, 320, 321, 139 P.2d 1; *Union Tool Co. v. Farmers', etc., Nat. Bank*, 192 Cal. 40, 44, 46-48, 218 P. 424, 28 A.L.R. 1417. When it appears that a bank has made payment on the basis of an altered or forged check, the burden is on the bank to justify the charge by establishing, as an affirmative defense, both that it was free from negligence and that the depositor was negligent or was estopped to deny the correctness of the payments. *Basch v. Bank of America*, 22 Cal.2d 316, 321, 333, 139 P.2d 1 [forged signature]; *Sommer v. Bank of Italy, etc., Ass'n*, 109 Cal.App. 370, 376, 293 P. 98 [forged signature]. Ordinarily the questions presented by this defense are to be determined by the jury. *Basch v. Bank of America*, 22 Cal.2d 316, 323, 331, 139 P.2d 1; *Frankini v. Bank of America*, 31 Cal.App.2d 666, 674, 88 P.2d 790.

We shall first consider whether defendant bank has met its burden of showing that it was free from negligence. In considering this question we must keep in mind the rule

that a directed verdict may not be sustained on the basis of an affirmative defense unless it appears from the record that the defense was established as a matter of law. The only evidence offered by the bank to show that it exercised due care was the testimony of its manager that all checks over \$100 are customarily examined by two or three employees, including a senior teller who passes on them as to date, correctness of amount, signature, endorsement and possible discrepancies. Any irregularity is called to the attention of the bank manager, and according to his testimony, he was not informed of any irregularity during February or March 1952 concerning the checks involved here. He admitted that the bank occasionally does make errors.

[4] There is no testimony which, as a matter of law, eliminates the obvious possibility that an alteration may have been apparent on the face of one or more of the checks and that for this reason the bank may have been negligent in honoring them. For example, there may have been a suspicious crowding of the number "1" in front of the other figures on some of the checks or a difference in ink. Similarly, an erasure or other irregularity may have been visible on the check which was altered from \$52.05 to \$82.05, particularly if the check was one of those which had been type-written. While it is true that a lack of anything suspicious on the face of the altered checks would have been strong evidence that the bank was not negligent, the checks were not introduced in evidence, and defendant did not avail itself of this means of sustaining its burden of showing due care. Compare *Otis Elevator Co. v. First Nat. Bank*, 163 Cal. 31, 35, 40, 41, 124 P. 704, 41 L.R.A., N.S., 529, where nothing suspicious appeared on the face of the checks. As we have seen, the record does not show that the bank did anything to locate the altered checks other than to serve on plaintiff a notice to produce them, even though there was testimony indicating that two checks were in the possession of the

district attorney. The possibility that the bookkeeper may have destroyed some or all of the checks does not render inapplicable the rule that the bank, having made payments on the basis of altered checks, is responsible unless it can affirmatively show that the loss was not caused by its negligence. Cf. *Basch v. Bank of America*, 22 Cal.2d 316, 331-334, 139 P.2d 1; *Sommer v. Bank of Italy, etc., Ass'n*, 109 Cal.App. 370, 373, 375-376, 293 P. 98.

[5] The evidence offered by the bank would support a finding that it was not negligent, but there is nothing in the record which compels such a conclusion or warrants a directed verdict on this ground.

[6, 7] The directed verdict cannot be justified, as contended by defendant, on the theory that plaintiff is barred under the doctrine of election of remedies by reason of the recovery of judgment against the bookkeeper for damages resulting from alteration of the checks. The doctrine is based on estoppel and, when applicable, operates only if the party asserting it has been injured. See *Steiner v. Rowley*, 35 Cal.2d 713, 720, 221 P.2d 9; *Commercial Centre Realty Co. v. Superior Court*, 7 Cal.2d 121, 129, 59 P.2d 978, 107 A.L.R. 714; *Campanella v. Campanella*, 204 Cal. 515, 521, 269 P. 433; *Mansfield v. Pickwick Stages*, 191 Cal. 129, 131, 215 P. 389; *Hines v. Ward*, 121 Cal. 115, 120-121, 53 P. 427; *Perkins v. Benguet Consol. Min. Co.*, 55 Cal.App.2d 720, 758, 132 P.2d 70. Here the evidence does not show as a matter of law that defendant was in any way injured or prejudiced by plaintiff's action against the bookkeeper.

The judgment must be reversed for the reasons discussed above, and it is unnecessary to consider other claims of error asserted by plaintiff.

The judgment is reversed.

SHENK, CARTER, TRAYNOR and SCHAUER, JJ., concur.

EDMONDS, J., concurs in the judgment.

45 Cal.2d 57

A. P. COVIELLO, Petitioner,**v.****The STATE BAR of California, Respondent.****L. A. 23030.****Supreme Court of California,****In Bank.****Aug. 5, 1955.**

Disciplinary proceedings. The Board of Governors of State Bar recommended that attorney be suspended from the practice of law for six months, and attorney filed a petition to review such recommendation. The Supreme Court held that evidence sustained findings and recommendation of Board.

Attorney suspended from practice of law for six months.

Opinion, 275 P.2d 482, vacated.

1. Attorney and Client ⇨53(1)

Attorney was under duty in disciplinary proceedings to present to local committee and to Board of Governors of State Bar any evidence he deemed favorable to himself. West's Ann.Bus. & Prof.Code, §§ 6067, 6068, 6106; Rules of Procedure of State Bar, rule 39.1, West's Ann.Bus. & Prof.Code following section 6087.

2. Attorney and Client ⇨57

Attorney, who neglected in disciplinary proceedings to present to local committee and to Board of Governors of State Bar evidence he deemed favorable to himself, could not rightly demand in his petition for review either that such evidence should be considered by Supreme Court or that he was entitled to another hearing before board. West's Ann.Bus. & Prof.Code, §§ 6067, 6068, 6106; Rules of Procedure of State Bar, rule 39.1; West's Ann.Bus. & Prof.Code following section 6087.

3. Attorney and Client ⇨54

Where attorney neglected in disciplinary proceeding to present to local committee and to Board of Governors of State Bar evidence he deemed favorable to himself, board properly denied his motion for trial de novo or to reopen case for further testimony. West's Ann.Bus. & Prof.Code, §§

Cal.Rep. 285-286 P.2d-39

6067, 6068, 6106; Rules of Procedure of State Bar, rule 39.1, West's Ann.Bus. & Prof.Code following section 6087.

4. Attorney and Client ⇨38

Where actual deception of opposing counsel is intended and is shown, it is not necessary that actual harm result in order to merit disciplinary action. West's Ann. Bus. & Prof.Code, §§ 6067, 6068, 6106.

5. Attorney and Client ⇨46

Fact that, after full disclosure was made, client of attorney who was charged with the intentional deceiving of opposing counsel received same settlement which had been negotiated for prior to disclosure, was immaterial in disciplinary proceedings. West's Ann.Bus. & Prof.Code, §§ 6067, 6068, 6106.

6. Attorney and Client ⇨53(2)

Evidence sustained finding of Board of Governors of State Bar that attorney should be suspended from practice of law for six months. West's Ann.Bus. & Prof. Code, §§ 6067, 6068, 6106.

A. P. Coviello in pro. per., Hiram T. Kellogg and John C. Miles, Los Angeles, for petitioner.

Ernest W. Pitney, Los Angeles, Jack A. Hayes and Garrett H. Elmore, San Francisco, for respondent.

PER CURIAM.

This is a proceeding to review a recommendation of the Board of Governors of The State Bar that petitioner August Paul Coviello be suspended from the practice of law in this state for a period of six months. The local committee had recommended a three months' suspension. In making its recommendation the Board took into consideration a prior suspension of thirty days ordered by this court. Coviello v. State Bar, July 14, 1953, 41 Cal.2d 273, 259 P.2d 7.

Petitioner was originally charged (December 9, 1952) with violations of his oath and duties as an attorney and the commission of acts involving moral turpitude, Business & Professions Code, §§ 6067, 6068, 6106, in that he entered into a con-

tingent fee agreement to represent Florence V. Anderson in a domestic relations matter. During the second day of the hearing, on January 22, 1953, a second count was added charging that "between the 10th day of July, 1952, and the 21st day of August, 1952 [he] filled in, or caused to be filled in, the name of a grantee in two certain deeds dated July 30, 1951, theretofore signed and acknowledged by Clyde Norbert Anderson, Jr. and Florence Anna Anderson without proper authority or any authority, and did thereafter exhibit or cause said deeds to be exhibited to opposing counsel for the purpose of obtaining an advantage for [his] client and for [himself] in the settlement of matters then pending." Petitioner was given five days in which to file his return, but none was filed. Hearings were resumed on March 4, 1952. Five hearings were held after the addition of Count Two. The local committee made findings of fact in accordance with charges contained in the notice to show cause except that in the finding on Count Two it added the words "from Clyde N. Anderson, Jr." after the words "without proper or any authority." No mention was made in the recommendation of the disciplinary proceedings then before this court on review. *Coviello v. State Bar*, supra, 41 Cal.2d 273, 259 P.2d 7.

On hearing before the Board of Governors, which included an appearance and oral argument by petitioner and his counsel and a motion by petitioner for a trial de novo or to reopen the case for further testimony, the Board dismissed the first count, denied his motion, and made findings upon Count II in lieu of those of the trial committee. The portion of the findings of which petitioner seeks review are as follows:

"II

"On or about July 10, 1952, respondent was engaged by Florence V. Anderson to represent her in a domestic relations matter with Clyde N. Anderson, Sr.

"III

"Respondent on said date received possession of two deeds dated July 30, 1951, in each of which no grantee was named.

While said deeds were in his possession the name of Florence V. Anderson was inserted as grantee in each deed. Respondent knew of such insertions at the time they were made or shortly thereafter. Thereafter respondent exhibited said deeds to Harold M. Davidson, counsel for Clyde N. Anderson, Sr., for the purpose of obtaining an advantage for respondent's client and himself in the settlement of matters then pending. Respondent did not disclose to Harold M. Davidson the facts regarding the invalidity of the deeds."

Petitioner contends that the "findings, conclusions and recommendations of the local committee, as approved by the Board of Governors, are not supported by the evidence", and asks that he be exonerated of the charges of unprofessional conduct. He also asks that the matter be re-opened for the taking of further evidence.

It appears from the record that on July 10, 1952, petitioner was employed by Florence V. Anderson to clarify her marital status with Clyde N. Anderson, Sr. She agreed to pay petitioner one-half of any money or property obtained by her as her share of community property from Clyde N. Anderson, Sr. over and above \$4,693, which amount she claimed to have advanced to Anderson, Sr. from her personal funds. The marriage of Florence V. Anderson and Anderson, Sr. was bigamous. The board dismissed Count I and the finding of the trial committee thereon, obviously on the ground that the agreement in question was not, under the circumstances, promotive of divorce and therefore was not within the type of contingent fee agreements prohibited by the law of this state. See *Krieger v. Bulpitt*, 40 Cal.2d 97, 251 P.2d 673. The substituted finding made by the board, that petitioner was engaged to represent Florence V. Anderson in a domestic relations matter, is therefore not prejudicial to petitioner and forms no basis for the disciplinary measures recommended.

Prior to petitioner's employment by Florence V. Anderson he had represented Ruth W. Anderson (now Ruth Cain) in a divorce suit and quiet title action against Clyde N. Anderson, Sr. in which Ruth had

sought a community interest in certain properties. Among these properties were three parcels of real property, as to which the record title stood in the name of C. N. Anderson, Jr. and Florence Anna Anderson, his wife, and an \$8,000 trust deed of which a Mr. Warner S. Stokes was the apparent owner. These persons were joined as parties defendant in the above-mentioned actions and the matters were consolidated for trial. Each of the defendants denied that Anderson, Sr. owned any interest in the properties. Judgment was rendered for defendants but a motion for a new trial was granted on October 19, 1951.

On August 29, 1951, Anderson, Sr. went to Mexico with Florence V. Day, with whom he had been cohabiting, and married her. They returned to Los Angeles and lived together as man and wife until June, 1952, when he became seriously ill and was hospitalized. It was during this period of hospitalization, when Anderson, Sr. was reportedly in a dying condition, that Florence separated from him and the negotiations hereinafter related took place.

When Florence V. Anderson employed petitioner on July 10, 1952, she turned over to him certain documents which tended to confirm his belief that Anderson, Sr. was the real owner of the assets which were in issue in the Ruth W. Anderson actions. There is no evidence that petitioner used this information for the purpose of extortion in pressing Ruth's demands for settlement. There is evidence that he used this information for the purpose of pressing Florence's demands for settlement and that in so doing he committed the acts set forth in Finding III of the board.

Among the documents handed to petitioner by Florence V. Anderson were two blank deeds, signed and acknowledged by C. N. Anderson, Jr. and Florence Anna Anderson under date of July 30, 1951. Florence V. Anderson told petitioner that these properties belonged to Anderson, Sr., that he had given the deeds to her before they were married and had promised her that if she married him she could have her name inserted therein as grantee. During

the absence of petitioner, Florence V. Anderson brought to his office a typewriter belonging to Anderson, Sr. and requested Mrs. Coviello, petitioner's wife and secretary, to type the words "Florence Vivion Anderson as her separate property" in the blank spaces for the grantee's name in these two deeds. She explained that she brought the typewriter with her because she wanted the deeds to appear regular so that they would be entitled to recordation. The question of Florence's authority to fill in the deeds is a collateral issue with which we are not here concerned. Petitioner was exonerated by the board as to any actual participation in the alteration of the deeds. It is not therefore necessary to discuss the evidence presented on this issue.

Immediately upon his employment by Florence V. Anderson to press her claims against Anderson, Sr. petitioner informed Harold M. Davidson, attorney for Anderson, Sr., of such employment. Prior negotiations for a settlement between these parties had been unsuccessful. Davidson testified that petitioner told him that Anderson, Sr. didn't own a thing and had deeded everything he owned to Florence V. Anderson. Davidson stated that he examined the deeds at petitioner's office and that at that time the deeds were complete and regular on their face; that he commented to petitioner on the fact that all the typing appeared to have been done on the same typewriter at the same time and had stated "It's funny Clyde denies to me that he ever gave Florence any deed." Petitioner, with knowledge of the alteration, exhibited the deeds to Davidson without disclosing to him that the deeds had been filled in or the circumstances under which the alterations were made. After several conferences between Davidson and petitioner, on August 8, 1952, Davidson prepared a property settlement agreement. Following further consultation between Davidson and petitioner, Davidson made some changes in the agreement on August 9th. Petitioner then gave the agreement to Florence V. Anderson for execution and advised her to sign it "without hesitation." Her signature thereto was acknowledged before petitioner as a notary public on

August 12, 1952. The agreement recited that the deeds were executed by Clyde N. Anderson, Jr. and his wife at the request and direction of Anderson, Sr. in favor of Florence V. Anderson "as her sole and separate property." Neither Florence nor petitioner at that time called Davidson's attention to any falsity in these recitations. By their silence they indicated that the recitals in the agreement were true.

After executing the agreement Florence attempted to discharge petitioner as her attorney and to withdraw from her fee arrangement with him but she allowed him to represent her at a general meeting held on August 21, 1952, in the office of Davidson which was called for the purpose of settling the claims of herself and of Ruth Anderson Cain against Anderson, Sr. At that time Florence declared that the recitations in the agreement of August 8th were not true; that she had never told petitioner that she had authority to fill in her own name; that she had told petitioner that Anderson, Sr. had promised to have her name *and his* filled in after the settlement of Ruth's claims; and that when she first showed the blank deeds to petitioner he had exclaimed, "I don't think you know what you have really got." She replied that the deeds didn't mean anything; that there was no name in them; and that he answered, "Well, I'm working on something big. If you do just what I say we'll both come out of this ahead."

Davidson testified that he had told everyone at the meeting on August 21st that in view of the facts brought out that evening he would have to consult again with his client before approving the consummation of the agreement. Davidson's testimony that he had gone out to the hospital the following day to see his client was objected to by petitioner and the subject was not pursued. This is important only because petitioner now seeks to augment the record to include an affidavit by attorney Ralph A. Harper that he had called upon Anderson, Sr. at the hospital on August 21, 1952, and a photostatic copy of the pass showing the date of this visit. These are offered to impeach the testimony of Davidson that he had visited Anderson, Sr. on August

22nd, at which time some other attorney, whose name he did not recall was present. Had there been no successful objection interposed by petitioner any discrepancy in this regard might have been cleared up at the hearing. The affidavit and pass are also offered to corroborate petitioner's testimony that he had notified Davidson as to the alteration of the deeds and to support his contention that the only logical reason that Anderson, Sr. had called in another attorney was because he had learned about the alterations in the deeds. The affidavit states that Harper had been asked by Anderson, Sr. to discuss with him "personal problems of a domestic nature"; that the latter had requested him to ascertain the whereabouts of a Mrs. Florence Anderson; and that on or about August 25, 1952, he had been advised that Anderson, Sr. did not wish any further action taken. The affidavit does not refer to the deeds or to the property settlement agreement, and does not show any relevancy to the issues before us. Furthermore, petitioner does not show that he could not have produced this affidavit and pass at the hearing or that he could not have subpoenaed Harper.

Also offered in augmentation of the record are documents pertaining to the Ruth W. Anderson actions. These are offered to show that those matters were pending on August 21st, and to support petitioner's argument that it would have been to his interest to use the blank deeds to press the claims of his client Ruth. It is noted that petitioner had a contingent interest in half the recovery made on behalf of either client (with the exception above noted as to his contract with Florence V. Anderson and her money claim). The fact of the pendency of the Ruth actions does not rebut the evidence or the strong inferences from the evidence that petitioner attempted to deceive Davidson as to the validity of the deeds in negotiating the property settlement for Florence V. Anderson.

An affidavit of Ruth Anderson Cain is offered by Anderson relating to a conversation between Ruth and Florence after the latter had become dissatisfied with petitioner's services (a time obviously after

August 9, 1952) with reference to the deeds. Objections to Mrs. Cain's testimony on this subject were sustained at the disciplinary hearings. The statement in the affidavit that in this conversation Florence had said she would cause her name to be filled in on two of the deeds is inconsistent with the testimony of petitioner and his wife as to the time when the deeds were filled in. Other statements irrelevant to the issues in this proceeding are contained in the affidavit.

The testimony of Britton Basore, a relative of Anderson, Sr., that in a conversation at the hospital between Davidson and Anderson, Sr. prior to August 21, 1952, he had heard that petitioner had some deeds that were "filled out" and that Anderson, Sr. had denied giving Florence V. Anderson any deeds, is not inconsistent with Davidson's testimony that the deeds had been represented to him as completed deeds.

Petitioner requests that Davidson and Anderson, Sr. be required to appear and answer pertinent questions as to their knowledge of the purpose of the execution of the blank deeds on July 30, 1951, and also concerning their knowledge prior to August 21, 1952, of the filling in of the deeds. The first expressed purpose is also irrelevant to the issue. As to the second, the evidence is sufficient to show that as of August 9th Davidson had not been informed by petitioner of the alteration in the deeds which had been exhibited to him, and that by such deliberate silence on the part of petitioner Davidson had been deceived.

[1-3] Petitioner had ample opportunity to cross-examine Davidson and Basore at the hearings and to subpoena witnesses. One of the important issues was the date upon which petitioner had made a disclosure to Davidson of the facts about the alteration of the deeds. Petitioner's own testimony in this regard was vague and does not tend to establish any date prior to August 9th. He was under a duty to present to the local committee and to the board any evidence which he deemed favorable to himself. He may not neglect to do this and rightly demand in his petition for review either that such evidence should be con-

sidered by this court or that he is entitled to another hearing before the State Bar. *Glover v. State Bar*, 13 Cal.2d 229, 232, 88 P.2d 922; *Tapley v. State Bar*, 8 Cal.2d 167, 170, 64 P.2d 404; *Shaeffer v. State Bar*, 220 Cal. 681, 687, 32 P.2d 140; *Stafford v. State Bar*, 219 Cal. 415, 26 P.2d 833. The board properly denied his motion for a trial *de novo* or to reopen the case for further testimony for lack of compliance with Rule 39.1, Rules of Procedure, State Bar Rules.

There is no merit to petitioner's contention that he did not have reasonable notice of the charges against him contained in Count II.

[4, 5] The gravamen of the offense with which petitioner is charged is the intentional deceiving of opposing counsel. It is not necessary that actual harm result to merit disciplinary action where actual deception is intended and shown. *Lady v. State Bar*, 28 Cal.2d 497, 504, 170 P.2d 460; *Pickering v. State Bar*, 24 Cal.2d 141, 145, 148 P.2d 1. It is not therefore material that after full disclosure was made petitioner's client received the same settlement which had been negotiated for prior to disclosure. Discipline had been imposed upon attorneys in misleading opposing counsel as to signatures on documents, *Hallinan v. State Bar*, 33 Cal.2d 246, 200 P.2d 787; *Allen v. State Bar*, 36 Cal.2d 683, 226 P.2d 569. Such conduct falls short of the honesty and integrity required of an attorney at law in the performance of his professional duties. The evidence shows that petitioner dealt unfairly with opposing counsel in a dishonest manner, "manifestly not in accordance with good morals or honest dealings." *Lantz v. State Bar*, 212 Cal. 213, 298 P. 497, 500.

[6] The findings, conclusions and the recommendation of the Board of Governors are sufficiently supported by the evidence and are approved. The application to produce further evidence before this court or to remand the cause for further hearing before the board, is denied. The petitioner is suspended from the practice of law in this state for a period of six months commencing thirty days after the filing of this opinion.

134 Cal.App.2d 445

Max SNYDER, Plaintiff and Respondent,
v.

Ruth S. SNYDER, Defendant and Appellant.

Ruth S. SNYDER, Plaintiff and Appellant,
v.

Max SNYDER, Defendant and Respondent.
Civ. 20956, 20749.

District Court of Appeal, Second District,
Division 2, California.

July 20, 1955.

Actions for divorce by both husband and wife. From the interlocutory judgments of the Superior Court, Los Angeles County, William P. Houghton, J., finding residence of the husband and wife to be joint tenancy property, the wife appealed. The District Court of Appeal, Moore, P. J., held that where house was owned jointly by husband and wife, the Superior Court, in a divorce action, did not have the power to divide the property held in joint tenancy, notwithstanding it may award community property and the homestead.

Judgment affirmed.

1. Husband and Wife ⇨14(3)

Where husband invested over \$2,600 of his separate money as down payment in home, and \$2,000 more for which he became personally responsible, and notwithstanding that his wife invested only \$1,400 as down payment, husband consented to place title to home in joint tenancy, such device vested each spouse with a half interest in the home with a right of survivorship in the entire property. West's Ann.Civ.Code, §§ 161, 683.

2. Husband and Wife ⇨262(1, 2)

A joint tenancy deed may rebut the presumption that property acquired after marriage, except by gift or inheritance, is community property and also, it raises the presumption that the property is held in joint tenancy, thereby imposing upon the party contending that it is community property to prove such to be the fact.

3. Joint Tenancy ⇨3

Whether the evidence is sufficient to overcome the presumption of joint tenancy arising from the deed itself is a question of fact for the court's determination.

4. Appeal and Error ⇨1010(1)

Where there is substantial evidence to sustain a finding by the trial court, the District Court of Appeal will not substitute its own conclusions.

5. Husband and Wife ⇨14(3)

In consolidated actions for divorce by both husband and wife, evidence was sufficient to sustain finding that title to the home of husband and wife was held in joint tenancy by them.

6. Divorce ⇨249(3)

In divorce action, court did not have the power to divide property held in joint tenancy, notwithstanding it may award community property and the homestead.

Marshall T. Hunt, Los Angeles, for appellant.

Simon Taub, Beverly Hills, for respondent.

MOORE, Presiding Justice.

An action for divorce was filed by Mrs. Snyder on January 4, 1952, to which respondent filed his answer. A reconciliation was effected in the summer. On October 14, 1952, respondent filed his action for divorce which was duly consolidated with that of appellant. Two sets of findings and conclusions were made and two judgments of divorce were awarded *appellant*. Dissatisfied with the court's finding that the equity in the home place is "joint tenancy property," the wife has appealed from the "interlocutory judgments of divorce" which are as follows: (No. 20749) that plaintiff Ruth is entitled to a divorce; that she is awarded the furniture and furnishings in the home and the interest of the parties in the nursery school, but that the home on Collins Avenue is joint tenancy property and not community property; (No. 20956) that judgment be entered by defendant Ruth against Max and

that Max recover nothing by reason of his complaint.

The finding in each action with reference to the home is that the "residence at 12252 Collins Avenue, North Hollywood, California, is found to be joint tenancy property and not community property."

Inasmuch as appellant attacks no feature of the judgments other than the finding with respect to the joint tenancy, this discussion will be confined to that issue. Appellant contends that the court ignored the circumstances of the parties from which it could have found that the home was community property despite the fact that its title stood in joint tenancy.

Respondent counters with the arguments (1) that property acquired in joint tenancy "with separate funds of the parties is presumed to be joint tenancy, unless there is evidence to the contrary; (2) that a verdict will not be disturbed if there is any evidence to support it."

[1] The parties separated January 2, 1952, but in the following June a reconciliation was effected and they purchased a home on Collins Avenue. To make the down payment, respondent paid out of his separate funds \$2,674.03 and borrowed \$2,000 from a Texas bank. Appellant added \$1,400 she had remaining out of the \$3,000 she withdrew from their joint account when they separated in January. To these sums they added \$1,000 which they borrowed on their joint account and the total was applied to the cash payment on the home. Notwithstanding that the husband invested over \$2,600 of his separate money in the home, and \$2,000 for which he had become personally responsible, and that Mrs. Snyder paid only \$1,400, he consented to place the title in joint tenancy. Such device vested each spouse with a half interest in the home, Civil Code, §§ 161, 683, with right of survivorship in the entire property.

[2-4] Now that the marriage is terminated, appellant desires to recover the home, or to have a partition thereof on the theory that it is community property. The record discloses no proof of a mutual intention of the parties that it should be a part of the

community estate. The circumstances indicate that their mutual intention was otherwise. They were married November 3, 1949, remained together only 14 months before the wife sued for divorce. Though reconciled in June, 1952, they again separated in September. Not only was the title of the home taken in joint tenancy, but the behavior of the parties does not indicate that they would have desired the home to be community property. On the contrary, the facts argue that both might, in the future, prefer to keep their holdings separate. Especially is this true with respect to the husband. Not only had appellant been impecunious towards him but neither herself nor her children had been courteous or respectful to respondent. Under such circumstances, the finding of a "joint tenancy" title is a rational determination of that issue. It is supported by the deed itself which conveyed the property "in joint tenancy." Such a deed may rebut the presumption that property acquired after marriage, except by gift or inheritance, is community. Also, it raises the presumption that the property is held in joint tenancy, thereby imposing upon the party contending that it is community to prove such to be the fact. *Edwards v. Deitrich*, 118 Cal.App.2d 254, 260, 257 P.2d 750. Whether the evidence is sufficient to overcome the presumption of joint tenancy arising from the writing itself is a question of fact for the court's determination. *Gudelj v. Gudelj*, 41 Cal.2d 202, 212, 259 P.2d 656. Where there is substantial evidence to sustain a finding by the trial court, this court will not substitute its own conclusions. *Fischer v. Keen*, 43 Cal. App.2d 244, 250, 110 P.2d 693.

[5] Not only is the finding justified by the form of conveyance, but the conduct of the parties, prior and subsequent to their reconciliation indicates a drifting apart. The home was a stormy household while respondent abode there. Heated arguments supplanted serenity and antagonistic concepts rebuffed good will. The trial court must have been persuaded that the parties, under such circumstances, were not likely to transmute separate property into community. The evidence abundantly warrants the finding.

[6] In dissolving a marriage, the court's jurisdiction does not extend to the separate property of either party; neither has it the power to divide property held in joint tenancy, notwithstanding it may award community property and the homestead. *Conard v. Conard*, 5 Cal.App.2d 91, 93, 41 P.2d 968. Therefore, the finding that the home was held in joint tenancy will not be disturbed. *Crawford v. Southern Pac. Co.*, 3 Cal.2d 427, 429, 45 P.2d 183; *Juchert v. California Water Service Co.*, 16 Cal.2d 500, 503, 106 P.2d 886; *Ward v. Ward*, 15 Cal.2d 234, 237, 100 P.2d 773.

Judgment affirmed.

McCOMB and FOX, JJ., concur.



134 Cal.App.2d 479

In the Matter of Jane Popo GI, a minor.

COUNTY OF ALAMEDA, a political subdivision of the State of California,
Appellant,

v.

COUNTY OF CONTRA COSTA, a political subdivision of the State of California,
Respondent.
Civ. 16568.

District Court of Appeal, First District,
Division 2, California.
July 21, 1955.

Proceeding to have minor made a ward of Juvenile Court. The Superior Court, County of Contra Costa, Norman A. Gregg, J., adjudged minor to be a ward of the Juvenile Court, and entered an order transferring case from Contra Costa to Alameda County, and Alameda County appealed. The District Court of Appeal, Kaufman, J., held that where minor's mother and father were divorced by a decree which gave legal custody of minor to mother who lived in American Samoa but father, who moved from Contra Costa County to Alameda

County during proceedings, had had physical custody of minor for last six years, Contra Costa County had jurisdiction.

Order reversed.

1. Appeal and Error ⇐106

Order of court transferring case of minor to another county on ground minor was a resident thereof, is subject to a direct attack against the finding of the residence of minor to be in county to which transfer is ordered. Welfare and Institutions Code, §§ 880, 885.

2. Venue ⇐28

Proceedings arising under the Welfare and Institutions Code respecting minors, are governed by the specific provisions for the method of determining the residence of the child of separated parents. Welfare and Institutions Code, § 17.1; West's Ann. Gov.Code, § 244(d).

3. Domicile ⇐5

In case of proceeding under Welfare and Institutions Code involving minor child of divorced parents, residence of person to whom custody of child has been awarded must control legal residence of child until such custody order is changed by court making decree or until another court which has jurisdiction has determined that a change is necessary and for the best interests of the child. Welfare and Institutions Code, § 17.1.

4. Infants ⇐16.4

Where divorce decree gave legal custody of minor to mother who lived in American Samoa but father, who had moved from Contra Costa to Alameda County since the proceedings to have a minor declared a ward of Juvenile Court were instituted, had had physical custody of minor for last six years, county where proceedings were instituted should have retained jurisdiction over minor and of proceedings. Welfare and Institutions Code, §§ 700, 700 (k), 701, 721, 880, 885.

5. Divorce ⇐402(1)

Custody decrees of other states and countries are not entitled to full faith and credit but are generally enforced as a matter of comity.

6. Divorce ⚡402(6)

Courts, may, in their discretion, disregard foreign custody decree and inquire into and determine for themselves what are the best interests of the child and what may promote its welfare.

J. F. Coakley, Dist. Atty., Alameda County, R. Robert Hunter, Chief Asst. Dist. Atty., William S. Coit, Deputy Dist. Atty., Oakland, for appellant.

Francis W. Collins, Dist. Atty., Martinez, for the County of Contra Costa, Douglas M. Quinlan, Deputy Dist. Atty., Richmond, for respondent.

KAUFMAN, Justice.

This is an appeal by Alameda County from an order made by the Judge of the Juvenile Court of the County of Contra Costa in accordance with Section 880 of the Welfare and Institutions Code, transferring the case of Jane Popo Gi, a minor, to appellant county on the ground that she was a resident thereof. Such an order is made appealable by Section 885 of the Welfare and Institutions Code.

The parties agree that the only point in issue is whether or not Jane Popo Gi is a legal resident of Alameda County.

Jane Popo Gi was born in Pago Pago, Samoa in 1940. Her parents who were also born in American Samoa, and were divorced in Pago Pago in 1945 by a decree which gave custody of Jane to the mother. Her father remarried the same year in Samoa. In 1948 while he and his present wife were living in Honolulu, T. H., Jane's mother gave physical custody of the child to the father in Honolulu where she remained with him for about two years. The family then moved to California where they have lived since that time. They made their home in Richmond, County of Contra Costa, from 1951 until September 15, 1954, at which time Jane's father moved the family to Oakland with the intention of establishing residence there. Mr. Gi is presently stationed at Treasure Island with the United States Navy.

Jane's mother has always resided in Samoa, her present address being Fagaitua Samoa-American Tuituila.

On August 18, 1954, less than a month before the removal of the family to Oakland, a petition was filed in the Juvenile Court of Contra Costa County alleging that Jane Gi came within the provisions of Section 700(k) (in danger of leading an immoral life), of the Welfare and Institutions Code. A hearing was held on October 4, 1954 and the allegations of the petition were found to be true. The judge further found that on the date of the hearing Jane was a resident of Alameda County because her father was a resident of that county. The order declared the minor to be a ward of the Juvenile Court of Contra Costa County and ordered the case transferred to the County of Alameda. Appellant requested a transcript of the testimony on which the transfer order was based, but was informed by Contra Costa County that transcripts were not made of Juvenile Court hearings, and that the basis of the order was the fact that the father was the only parent of the child within the continental United States and that he had actual custody of the child since 1948. The transfer order recited that "to this order of transfer is attached a copy of said original petition, together with a summary of all the facts in the possession of this Court, or of the Probation Officer of this County, covering the history of said alleged minor." The order further stated that "said minor * * * is the daughter of Faaloua Petelo Gi who resides at 1109 Poplar Street, Oakland, California. Said minor is therefore a resident of Alameda County." Respondent apparently concedes that legal custody of the minor was given to the mother by the divorce decree. The probation report attached to the transfer order shows that the mother in Samoa still retains custody of the child under the provisions of that decree.

Appellant contends that application of the statutory law to the facts of this case compels a finding that the legal residence of the minor is that of the mother in Samoa, and that the removal of the ward to Alameda County and the change of her father's

residence thereto cannot affect her legal residence. Respondent argues that the legal fiction that a minor child who has been awarded to the custody of the mother takes the residence of the mother, should not control, for if that were true the Juvenile Court would not have jurisdiction of such a child although it lived within the boundaries of this state. This is not true, however, as under Section 721, Welfare and Institutions Code, any county in the state in which the child is physically present has jurisdiction of such child if its case falls within any of the provisions of Sections 700 and 701 of that Code. The question here, rather, is whether the minor herein had such residence in Alameda County as is required to support the order of transfer to that county.

[1] Respondent's contention that the decision by Contra Costa County is final and may not be questioned by Alameda County is not valid. *County of Los Angeles v. Superior Court*, 128 Cal.App. 523, 18 P.2d 112, is cited in support of that proposition. That case simply held that a transfer order similar to that in the present case was not subject to collateral attack. In the cited case the Superior Court of Los Angeles County adjudged the child to be a resident of Alameda County. The Superior Court of Alameda County then heard the matter, adjudged the child to be a resident of Los Angeles County, and ordered the child transferred back. Los Angeles County brought the matter up by mandamus to compel Alameda County to comply with the first order of transfer. No appeal was taken by either county from either transfer order. The court therein did not determine that such an order was nonappealable at that time (1933) but stated that it was not necessary to pass on that question. That such an order is now appealable cannot be questioned for the Legislature in 1943 made it appealable by either the county in which the court determining residence is situated or the county to which the minor is ordered transferred. Sec. 885, Welfare and Institutions Code. It is therefore clear that such order is subject to a direct attack against the finding of residence of the child

in the county to which the transfer is ordered.

[2] While Government Code, Section 244(d) sets forth the general rule that residence of the father during his life determines the residence of the unmarried minor, the method of determining the residence of the child of separated parents is set forth in detail in Section 17.1 of the Welfare and Institutions Code. Therefore any proceedings arising under that code are governed by those specific provisions, for Section 17.1 states that "Unless otherwise provided under the provisions of this code, the residence of a minor person shall be determined by the following rules". Subdivision (a) of that section provides that "The residence of the father determines that of the child during the lifetime of the father, unless the father has abandoned the child, has been legally deprived of his custody, or is in fact living separate and apart from the mother of the child; in the latter case the residence of the child is determined by the residence of the parent who has his custody."

In the case herein the father unquestionably had the physical custody of the child, for the mother who held legal custody had permitted the child to live with the father since 1948. Prior to 1953, the court would certainly have been free to interpret the statute so as to permit a transfer order to be based on physical custody alone.

However, in 1953, the Legislature removed all doubt as to the meaning to be given the word "custody" in subdivision (a), for subdivision (d) was then added which reads as follows:

"Wherever in this section it is provided that the residence of a child is determined by the residence of the person who has his custody, 'custody' means the legal right to custody of the child unless that right is held jointly by two or more persons, in which case 'custody' means the physical custody of the child by one of the persons sharing the right to his custody."

[3] Therefore, in the case of divorced parents, the residence of the person to whom the custody of the child has been

awarded apparently must control the legal residence of the child until such order is changed by the court making the decree, or until another court which has jurisdiction has determined that a change in custody is necessary for the best interests of the child. While the first legal custody order remains unaffected by a later decree of a court of competent jurisdiction, the child's residence must follow that of the parent entitled to custody, regardless of where the child may be living. *Titcomb v. Superior Court*, 220 Cal. 34, 29 P.2d 206; *Harlan v. Industrial Accident Commission*, 194 Cal. 352, 359, 228 P. 654; *In re Casella's Guardianship*, 133 Cal.App. 80, 81, 23 P.2d 782. Respondent cites *Currin v. Currin*, 125 Cal.App.2d 644, 654, 271 P.2d 61, to the effect that under the provisions of subdivision (a) and (b) of Section 17.1 of the Welfare and Institutions Code after separation of the parents the child takes the domicile of the parent with whom it lives. That was a divorce action, hence the determination there was of the meaning of custody prior to any legal custody decree. Furthermore the court was concerned with a case which arose in 1952, prior to the enactment of subdivision (d) of Section 17.1, Welfare and Institutions Code. Appellant also cites a footnote in *Sampsell v. Superior Court*, 32 Cal.2d 763, 774, 197 P.2d 739, to the effect that after separation of the parents the child takes the domicile of the parent with whom it lives, but this case was decided in 1948, long before the enactment of subdivision (d).

Section 880 of the Welfare and Institutions Code provides that whenever a petition is filed in a county other than the minor's residence or whenever subsequent to the filing of such a petition, the residence of such person is changed to another county the case may be transferred to the Juvenile Court of the county wherein such person then resides "after the court has made a finding of the facts upon which it has exercised its jurisdiction over such person and has adjudged such person to be a ward of the juvenile court, and the juvenile court of the county wherein such person then resides shall take jurisdiction of the case upon the filing with it of such finding of

the facts and order adjudging such person to be a ward of the court and of an order transferring the case."

[4] The Contra Costa Superior Court in its findings stated that the residence of the father was Alameda County and that therefore the child was a resident of said county. However, since the only evidence as to the legal custody of the child is that it is still held by the mother, this fact compels a finding that under Section 17.1 of the Welfare and Institutions Code, the residence of the child is that of the mother and not Alameda County. Thus the order of transfer from Contra Costa to Alameda County is unsupported and the County of Contra Costa under Section 880 of the Welfare and Institutions Code should have retained jurisdiction of this case.

[5, 6] It is true that the custody decrees of other states and countries are not entitled to full faith and credit in this state. *Foster v. Foster*, 8 Cal.2d 719, 68 P.2d 719. However such decrees are generally enforced as a matter of comity. See, *In re Memmi*, 80 Cal.App.2d 295, 299, 181 P.2d 885. The courts of this state may, of course, inquire into and determine for themselves what are the best interests of the child and what may best promote its welfare. The court may in its discretion disregard the foreign decree. *Dotsch v. Grimes*, 75 Cal.App.2d 418, 171 P.2d 506. Here, however, Section 17.1 requires the legal custody order to be followed. Undoubtedly the Superior Court of Contra Costa County would have jurisdiction to change the custody of the child from the mother to the father if it were to the child's best interest on application duly made by the father, and in such case the child's residence would follow that of the father under the statute. But this the court did not do.

In view of the foregoing we conclude that the order appealed from does not find support in the record before us.

Order reversed.

NOURSE, P. J., and DOOLING, J., concur.

134 Cal.App.2d 733

**PEOPLE of the State of California,
Plaintiff and Respondent,
v.**

**Van Phillpot EVANS, Defendant and
Appellant.**

Cr. 1032.

**District Court of Appeal, Fourth District,
California.**

Aug. 1, 1955.

Defendant was convicted in the Superior Court of San Diego County, Dean Sherry, J., of sale of narcotics, and he appealed. The District Court of Appeal, Barnard, P. J., held that there was no substantial evidence which would have supported finding of entrapment, and that defendant's requested instructions on doctrine of entrapment were properly refused.

Judgment affirmed.

1. Criminal Law ⚖️37

Entrapment is good defense when criminal design originates with officer who induces law-abiding citizen, by persuasion or deceit, to commit crime which he would not have committed in absence of such inducement.

2. Criminal Law ⚖️37

It is only when the criminal design does not originate with accused, and decoy is used to ensnare an innocent man by deceitful representations, inducement or allurements into commission of crime, that there is entrapment.

3. Criminal Law ⚖️739(1)

Question of entrapment is one of fact for jury, if there is substantial evidence in record which would support that theory.

4. Criminal Law ⚖️770(2), 814(3)

Defendant is entitled to instructions based upon theory of his defense, but court may refuse instructions on any theory which is not supported by substantial evidence.

5. Criminal Law ⚖️814(8)

In prosecution for sale of narcotics, there was no substantial evidence which

would have supported finding of entrapment, and requested instructions on doctrine of entrapment were properly refused. Health and Safety Code, § 11500.

Edgar G. Langford, San Diego, J. Perry Langford, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Marvin Gross, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant and one Stanton were charged with the sale of narcotics on October 27, 1954, in violation of section 11500 of the Health and Safety Code. The defendant was also charged with two prior convictions of felony. He pleaded not guilty, but admitted the prior convictions. A jury found him guilty and he was sentenced to prison. He has appealed from the judgment on the sole ground that the court refused to give instructions on the doctrine of entrapment, which were requested by him.

As stated by the appellant, the evidence was without conflict except as to minor details. On October 16, 1954, one McBee, a state narcotic officer who was accompanied by one Covington, saw the appellant in a small cafe in San Diego. McBee inquired of Evans as to where he could obtain some marijuana, and Evans referred him to a man called "Junior". Later that night McBee saw Evans on the street and complained that the "stuff" he had gotten from "Junior" was bad. On several occasions over the next few days, McBee saw Evans and asked his help in locating the person from whom McBee had purchased the bad narcotics on the 16th. Evans told him that he did not know the person's real name but would try to find out. On October 27, at about 8:00 p. m., Evans and Stanton were walking on Market Street when they met Covington. Covington inquired of Evans about purchasing some marijuana. Evans testified that he held him to see Stanton; that Covington and Stanton started to walk off; that "then Stanton called me, and said 'Come on'"; that they walked to the corner and he, Evans, said he was going to the barber shop; that Covington said "We

will drop you off there. Come on"; that he went on with them and in about a block they saw McBee parked in a car; that Covington got in first and then he and Sutton got in; that McBee asked "Where to?"; that Stanton gave McBee directions, and after they had gone a few blocks Stanton told McBee to stop; that Stanton got out, walked off a little ways, and "went down in front of his pants"; that Stanton then came back, got in the car and "leaned over to McBee * * * in other words, they did some transacting"; that McBee asked "Is this good?", saying he had been "palmed" once and wouldn't like it to happen again; that "I spoke up and told him yes, it was good"; that when he got out of the car McBee handed him two one dollar bills; that he asked "What is this for?" and Covington said it belonged to Stanton; and that he then said, "Come on Stanton, I got two bills." Appellant further testified that McBee did not say anything to him about the price; that he had never sold any marijuana; that he did not intend to sell marijuana to McBee on this occasion; and that he told the officers that "everbody I ever knowed sold them three for two". Evidence was received that he had told the officers, in an interview, that on the 27th he had told McBee that these cigarettes were good; that he always tells inquirers where to get "hot stuff"; that "If a guy says it is all right * * * why I tell a guy I stand behind it"; that he told McBee on the 27th "I stand behind it"; and that the regular price of marijuana cigarettes was three for \$2.00.

McBee testified that after he stopped the car he told Evans that he wanted three marijuana cigarettes; that Stanton got out and walked to a point opposite the rear of the automobile; that he was in sight all the time and there was no one anywhere near him; that Stanton returned in less than a minute and got in the car; that while Stanton was out of the car he, McBee, asked Evans what the three cigarettes would be; that Evans said \$2.00, and he gave Evans the \$2.00; that when Stanton returned he handed McBee three marijuana cigarettes; that he told Evans that he wanted the "stuff" to be good; that Evans

replied that he would stand behind it; that Evans then told Stanton "I have got the bread"; that this means "I have the money"; and that Stanton and Evans then got out of the car and he drove off.

Another officer testified as to what the appellant told him on October 29, at the police station, and a tape recording of appellant's interview with several officers at about that time was introduced in evidence, in both of which the appellant admitted the general facts as above stated.

[1-3] It is well settled that entrapment is a good defense when the criminal design originates with an officer who induces a law-abiding citizen, by persuasion or deceit, to commit a crime which he would not have committed in the absence of such inducement. *People v. Raffington*, 98 Cal. App.2d 455, 220 P.2d 967. However, it is only when the criminal design does not originate with the accused, and a decoy is used to ensnare an innocent man by deceitful representations, inducement or allurements into the commission of the crime, that there is entrapment. *People v. Lagomarsino*, 97 Cal.App.2d 92, 217 P.2d 124; *People v. Lindsey*, 91 Cal.App.2d 914, 205 P.2d 1114. "It is not the entrapping of a criminal that the law frowns upon but the seduction of innocent persons into a criminal career by its officers. *People v. Lindsey*, 91 Cal.App.2d 914, 205 P.2d 1114, 1115. Persuasion and allurement are necessary elements of such a defense, and the evidence must disclose that the defendant had been induced to commit an act which he would otherwise not have done. *People v. Carlton*, 83 Cal.App.2d 475, 189 P.2d 299. It is equally well settled that the question of entrapment is one of fact for the jury, if there is substantial evidence in the record which would support that theory. *People v. Terry*, 44 Cal.2d 371, 282 P.2d 19. It has frequently been held that where there is no substantial evidence in support of that theory instructions on entrapment need not be given. Webster defines "substantial" as: having good substance; strong; considerable in amount or value.

The appellant specifically relies on the recent case of *People v. Valdez*, 132 Cal.

App.2d 783, 283 P.2d 36, where it was held that such an instruction should have been given. In that case the defendant admitted possession of the narcotic, and his sole defense, in the trial and in the argument to the jury, was that he was entrapped into taking such possession after he had abandoned a prior possession. The defendant's testimony, if believed, was sufficient to show that there would have been no possession except for the pathetic appeal and persuasion of an agent for the officers.

[4, 5] While it is well settled that a defendant is entitled to instructions based upon the theory of his defense, the court may refuse instructions on any theory which is not supported by substantial evidence. *People v. Gallagher*, 107 Cal.App. 425, 290 P. 504. In the instant case the entire defense, as disclosed by the evidence, was that the appellant had nothing to do with the actual sale of the narcotic and took no part in such a sale, rather than that he was induced or persuaded to commit a criminal act which he would otherwise not have intended to do. There was an utter lack of evidence of any persuasion or inducement being used to induce him to commit the crime, other than the ordinary conversation that would take place between a willing seller and buyer. *People v. Cherry*, 39 Cal.App.2d 149, 102 P.2d 546. The appellant's own testimony discloses nothing more than that, insofar as any element of any inducement or allurement is concerned. By his own admission he was well acquainted with such traffic, and had been in the habit of telling inquirers where they could get such "hot stuff". The only reasonable inference from the evidence is that he was ready in his own mind to participate in this crime and that the officers merely furnished the opportunity. By his own admission he had a close association with the sellers of narcotics, and took a willing part in this transaction. His excuse, which he did not attempt to base upon entrapment, was that he did these various things just to get rid of people who asked him for information concerning "hot stuff". This was so unbelievable, in view of his own admissions and acts, that it is unreasonable

to believe that an instruction on entrapment would have affected the result. Viewing the question as one of fact, there was no substantial evidence which would have supported a finding of entrapment. *People v. Alamillo*, 113 Cal.App.2d 617, 248 P.2d 421.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



134 Cal.App.2d 538

Louise WARD, Plaintiff and Appellant,

v.

William A. KNAPP, Defendant and Respondent.

Civ. 8605.

District Court of Appeal, Third District,
California.

July 22, 1955.

Widow of passenger brought action against driver of automobile to recover for death of passenger when driver went to sleep and ran off highway. The Superior Court of Solano County, Harlow V. Greenwood, J., entered judgment adverse to widow, and she appealed. The District Court of Appeal, Van Dyke, P. J., held that instructions that doctrine of assumption of risk might apply and be a defense to the action even though passenger did not have knowledge of the risk, if, in exercise of ordinary care, he should have had knowledge, were erroneous, and that giving of such erroneous instructions was reversible error, where verdict for driver might have been based on a finding by jury that driver had not been guilty of wilful misconduct within meaning of automobile guest statute, but also might have been based on finding by jury that even though driver was guilty of wilful misconduct, yet passenger was negligent in not having learned of it and

hence had assumed the risk of riding with the driver.

Judgment reversed.

1. Negligence ⇨105

Doctrine of assumption of risk does not apply unless there is actual knowledge of the danger.

2. Negligence ⇨135(3)

Proof of knowledge of danger, which will render doctrine of assumption of risk applicable, may be circumstantial.

3. Automobiles ⇨246(36)

In action against driver of automobile by widow of passenger to recover for death of passenger when driver went to sleep and ran off highway, instructions which told jury that doctrine of assumption of risk might apply and be a defense to the action even though passenger did not have knowledge of the risk, if, in exercise of ordinary care, he should have had knowledge, were erroneous. Vehicle Code, § 403.

4. Appeal and Error ⇨1064(1)

Automobiles ⇨246(36)

In action against driver of automobile by widow of passenger to recover for death of passenger when driver went to sleep and ran off highway, wherein verdict for driver might have been based on finding that driver had not been guilty of wilful misconduct within meaning of automobile guest statute, but wherein verdict might also have been based on finding that passenger had assumed the risk, giving of erroneous instructions which told jury that doctrine of assumption of risk might apply and be a defense to the action even though passenger did not have knowledge of the risk, if, in exercise of ordinary care, he should have had knowledge, was reversible error. Vehicle Code, § 403

VAN DYKE, Presiding Justice.

This is an action for damages brought by plaintiff and appellant Louise Ward for the alleged wrongful death of her husband, Billy B. Ward, who was killed while riding in an automobile driven by defendant and respondent. Appellant by her complaint charged that Ward's death was caused by the wilful misconduct of respondent in that, while aware that he was suffering from lack of sleep, he nevertheless, continued to drive his automobile at a high rate of speed at night upon a wet and slippery highway with the result that he fell asleep while so driving and lost control of the automobile which overturned and killed Ward. The evidence as to the actions of respondent and as to the occurrence of the accident came mainly from respondent and was as follows: As respondent was returning to San Francisco from Sacramento and at about 2:30 a. m. he picked up Ward as a hitch-hiker. Ward sat in the front seat on respondent's right until the accident occurred. It had been raining, the highway was wet and respondent was driving from 50 to 55 miles per hour. A short time before the accident respondent became drowsy. The heater in the car was on and he shut it off. He opened the window next to him and moved close to it and loosened his jacket. He continued to drive. While driving down a grade he started nodding and a short distance ahead where there was a curve he fell asleep for about five seconds. He missed the curve. The vehicle went over onto the right shoulder of the road, then back and into the opposite travel lane where it turned over. It was stipulated the death of Ward was caused by injuries then received.

At the request of respondent the trial court instructed the jury upon assumption of risk, giving the following instructions:

"There is a legal principle commonly referred to by the term 'assumption of risk,' which now will be explained to you:

"One is said to assume a risk when he freely, voluntarily and knowingly manifests his assent to dangerous con-

Oscar A. Kistle, Albert H. Mundt, Sacramento, for appellant.

Taft, Wright & Hopkins, Vallejo, for respondent.

duct or to the creation or maintenance of a dangerous condition, and voluntarily exposes himself to that danger, or when he knows, *or in the exercise of ordinary care would know*, that a danger exists in either the conduct or condition of another, or in the condition, use or operation of property, and voluntarily places himself, or remains, within the area of danger."

"It should be noted that to bar recovery, assumption of risk must be voluntary. To be voluntary, these two factors must be present: First, the person in question must have actual knowledge of the danger, *or the conditions must be such that he would have such knowledge if he exercised ordinary care*. Second, he must have freedom of choice. This freedom of choice must come from circumstances that provide him a reasonable opportunity, without violating any legal or moral duty, to safely refuse to expose himself to the danger in question." (Italics added.)

The jury returned a general verdict in favor of respondent, and appellant on appeal assigns the giving of the instructions on assumption of risk as error, contending, first, that there was no evidence in the case justifying the submission to the jury of the issue of assumption of risk, and, second, that the instructions as given were prejudicially erroneous. Little need be said as to the error in giving the quoted instructions since there was included therein the matter which we have italicized. This Court had occasion in *Plotts v. Albert*, 120 Cal.App.2d 105, 260 P.2d 621, 622, to reverse a defense judgment for the giving of the same instructions as were given here and we based our holding that the instructions were erroneous upon the case of *Hayes v. Richfield Oil Corp.*, 38 Cal.2d 375, 240 P.2d 580. We quoted the following from that case:

"* * * The doctrine of assumption of risk is based on the theory that there has been a voluntary acceptance of a risk, and such acceptance, whether express or implied, requires knowledge

and appreciation of the risk. [Citing cases.] Where the facts are such that the plaintiff must have had knowledge of the hazard, the situation is equivalent to actual knowledge, and there may be an assumption of risk; but where it merely appears that a person could or should have discovered the danger by the exercise of ordinary care, the defense is not assumption of risk but contributory negligence.'"

[1-4] It is now well settled in California that the doctrine of assumption of risk does not apply unless there is actual knowledge of the danger. Of course proof of such knowledge may be circumstantial. The instructions given told the jury wrongfully that the doctrine might apply and be a defense to the action even though Ward did not have knowledge of the risk if in the exercise of ordinary care he should have had knowledge. On this issue, therefore, the only remaining question is whether or not the error in giving the instructions was prejudicial to the point where the judgment appealed from must be reversed. We think it was. This was a case where the defense verdict might have been based upon a finding by the jury that respondent had not been guilty of wilful misconduct as that term is defined in the guest statute. Veh.Code, sec. 403. It might also have been based upon a finding by the jury that even though respondent was guilty of wilful misconduct yet Ward was negligent in not having learned of it and hence had assumed the risk of riding with him. It cannot be said from this record upon what the jury did base its verdict, that is, upon a correct premise or upon a premise derived from the fault in the instructions. Under such circumstances the error is substantial and requires a reversal of the judgment appealed from.

In what we have said we are not to be understood as holding that from the evidence given in this case there was an issue to be decided by the jury as to whether or not Ward had assumed the risk of respondent's conduct. It is contended by the appellant that the evidence, even under proper instructions, would not support a

holding that Ward had assumed that risk and appellant's arguments in view of the record here are most persuasive. However, the record may not be the same upon the retrial of the action and we think it unnecessary to this decision that we discuss the matter.

The judgment is reversed.

FINLEY, Justice pro tem., concurs.



134 Cal.App.2d 677

Irma R. HARDIN, Plaintiff and Respondent,
v.

KEY SYSTEM TRANSIT LINES, a corporation, and C. R. Glotfelty, Defendants and Appellants.

Civ. 16328.

District Court of Appeal, First District,
Division 2, California.

Aug. 1, 1955.

Rehearing Denied Aug. 31, 1955.

Hearing Denied Sept. 21, 1955.

Action by automobile driver against railroad and motorman for injuries arising out of automobile-train collision wherein evidence disclosed that train was standing still with a red flashing light against it when motorman saw automobile coming at a relatively high speed on dark night with heavy rain and that he had given a warning signal but that automobile did not diminish speed and he started train when automobile was quite near. From an adverse judgment of the Superior Court, Alameda County, Cecil Mosbacher, J., the railroad and motorman appealed. The District Court of Appeal held that evidence justified instruction on the last clear chance doctrine.

Judgment affirmed.

1. Negligence ⇨138(4)

An instruction stating the last clear chance doctrine is proper in negligence action when there is evidence showing that

plaintiff has been negligent and as a result thereof is in a position of danger from which she cannot escape by exercise of ordinary care, that defendant has knowledge that plaintiff is in such a situation, and knows, or in exercise of ordinary care should know, that plaintiff cannot escape from such situation, and had the last clear chance to avoid accident by exercising ordinary care but failed to do so, and that plaintiff was injured as a proximate result of such failure.

2. Negligence ⇨83.8

Where danger and helplessness of plaintiff occurs nearly simultaneously with occurrence of accident, defendant cannot be said to have had a last clear chance to avoid the accident by exercise of ordinary care.

3. Railroads ⇨351(2)

In action by motorist against railroad for damages arising out of an automobile-train collision, wherein evidence disclosed that train was standing still with red light flashing against it when motorman saw automobile coming at a relatively high speed on dark night with heavy rain and that he gave warning signal but that automobile did not diminish speed and that he started train when automobile was quite near, evidence justified instruction on the last clear chance doctrine.

4. Railroads ⇨350(13)

In action by motorist against railroad for damages arising out of automobile-train collision, question whether automobile driver could have avoided the accident by swerving to her left the same as preceding motorist had done was a question for the jury.

5. Negligence ⇨83.10

Continuing negligence of injured party does not deprive him of benefit of last clear chance doctrine if all the required elements for application of that doctrine are present.

6. Negligence ⇨136(32)

Only when there is no substantial evidence, conflicting or otherwise, which would justify application of last clear

chance doctrine should the court keep it from the jury as a matter of law.

7. Railroads ☞351(2)

In action by automobile driver against railroad for damages arising out of automobile-train collision, wherein motorman testified concerning a company rule requiring motorman to obey traffic signals and that blinking red lights at crossing where accident occurred required motorman to stop, evidence justified instruction that violation of company rule could be considered on issue of railroad's negligence. Vehicle Code, §§ 477, subd. 1, 552.

Donahue, Richards, Rowell & Gallagher, Oakland, for appellants.

J. Adrian Palmquist, George W. Hauer, Oakland, for respondent.

PER CURIAM.

Plaintiff brought action for damages suffered when her car collided with a train of defendant Key System Transit Lines, herein further called the Key System, operated by defendant Glotfelty as motorman. She obtained a verdict and defendants appeal from the judgment entered accordingly. Their only grievances are that the court erred in giving an instruction on last clear chance and one other instruction to be mentioned later.

The accident happened at approximately 5:20 in the morning of March 18, 1952, at the intersection of San Pablo Avenue and Yerba Buena Avenue in Alameda County. San Pablo Avenue runs north south. On Yerba Buena Avenue the Key System has three tracks, crossing San Pablo Avenue at approximately right angles, of which the center one is the eastbound track, on which the train involved ran. Plaintiff was driving south on San Pablo Avenue, going to her work. There were two southbound lanes on San Pablo Avenue over and above the parking lane at the curb. Plaintiff was driving in the outer (western) one of these two lanes. It was dark and raining hard. It had been raining for some time and there were puddles. At the intersection the traffic lights were flashing yellow for traf-

fic on San Pablo and flashing red for the Key System trains. The Key System had a stop for eastbound trains just west of San Pablo Avenue and immediately before the accident happened the train in question was stopped there. Defendant Glotfelty testified, mainly under Section 2055, Code of Civil Procedure, that at the stop the front of the train was 3 or 4 feet west of the westerly curb of San Pablo. When he saw the light sign indicating that all doors of the train were closed so that he could start, he rang the gong. Before starting he looked to the right and to the left. To the right there were three or four northbound cars. They were just crossing or going to cross the tracks. Traffic was light. To the left he saw two cars coming southbound. He testified that they were about 150 feet away but conceded that in a deposition of January 20, 1953 he had stated that when he saw plaintiff's car first it was 100 feet away and in his earliest deposition of April 24, 1952 he had also said that his best estimate was that the nearest car was 100 feet away. When as a witness he drew on the map the place where he saw plaintiff's car first, its front was according to scale very little over 100 feet from the track. The car which thereafter had the accident was in the outside lane next to the parked cars. The other car was in the inside lane a little back of the first. When he saw the cars there he was still in a stopped position. He estimated the speed of the first car at that time at 25-30 miles an hour, but he conceded that in the first deposition he had estimated the speed at at least 30 to 35 miles an hour. He did not make an estimate of the speed when he saw the oncoming cars from the train. He also testified "I knew that she was going too fast for safety" but this testimony was stricken on plaintiff's motion as a conclusion of the witness, although it would have been admissible as to the defendant's knowledge of plaintiff's danger. He testified that he knew that the distance required for stopping would be lengthened by the reaction time of the driver, the speed of the car and the wetness of the road. The other car which was first somewhat behind plaintiff's car passed her and went on in

front of the train. It was travelling 5 or 10 miles faster. It passed plaintiff's car between the crosswalk over San Pablo at the northside of the intersection and the train tracks. (The distance between the crosswalk and the center tracks is 45 to 50 feet.) He drew the cars on the map as passing in the crosswalk. When the two cars were in that position the train was still standing still. After a recess defendant asked to correct the latter statement; he was then first starting up, moving a foot or two. Later as a witness for defendants he testified that about that time he realized that she was not going to stop; he threw on the emergency and the train stopped nearly immediately, within a foot or two. When the car hit the train the car was still going at approximately the same speed, she appeared not to have slowed up at all. The train was then stopped. The other south-bound car passed just in front of the train when it came to a stop. He was familiar with a company rule that the motorman or the conductor should in case of an accident offer for signature to the person involved a pink card which contains something to the effect that the operator is not to blame for the accident. No such card was offered to the plaintiff.

The witness Neuberger, a police officer, when called to the scene of the accident, found the car crashed head on into the side of the train at the front wheels, roughly 5 feet back from the front end. The front of the train was stopped even with the most westerly rail of the old car tracks on San Pablo. (This is approximately 8 feet from the middle line and 28 feet from the westerly curb of San Pablo.)

The witness Bradford at the time of the accident had been sitting in a car parked at the west curb of San Pablo headed south. He drew the front of the car on the map at approximately 110 feet north of the middle track. He saw that a spray of water thrown up from a puddle hit plaintiff's car when the other car in the inner lane passed it. He drew the puddle at approximately equal distance from the center track of the Key System and the crosswalk. The other car passed approximately three feet in front of the train. The witness heard the

gong of the train before it started. When he heard the gong neither of the cars was yet in sight; they were still north of his car.

Parts of a deposition of Mr. Houdek, who was riding in plaintiff's car at the time of the accident, was read into evidence. He had been sitting in the front seat at the right side. Their speed was 20 to 25 miles. He saw the train first when he was 30 feet from it. At the same time plaintiff hit the brakes. The train was then moving out, crossing the western curbline of San Pablo. It was going slower than their car, but was picking up speed. The traffic was light. One car passed then, near the tracks. Just after he saw the train, that other car, which was starting to get ahead of them, swerved to the left and picked up speed. Their own car did not change course. It went 15 feet after the brakes had been applied, and hit the train at its front wheels. The train was then moving. Their car was not going very fast at that time; about 20 or 15 miles, maybe not even that.

Plaintiff's testimony was to the same effect as the above evidence of Mr. Houdek. She also testified that her brakes, windshield wipers and lights were working well. She did not hear a bell. She saw the train first when she was 25 feet away but she drew her car as then in a position in the crosswalk approximately 50 feet away. The train was then moving and even with the west curb of San Pablo. She was then going approximately 23 miles and hit the brakes. She did not swerve. The other car passed her after she passed the crosswalk and splashed her when she was almost at the tracks. She knew that trains were passing and stopping there. The headlight of the train and the inside lights were on.

[1,2] There is some more partly conflicting testimony of the same witnesses, but the above is sufficient to justify the giving of the instruction on last clear chance. It is undisputed that "An instruction stating the doctrine is proper when there is evidence showing: '(1) That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of

ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; (2) that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and (3) has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure.'” *Daniels v. City & County of San Francisco*, 40 Cal.2d 614, 619, 255 P.2d 785, 788; *Doran v. City and County of San Francisco*, 44 Cal.2d 477, 283 P.2d 1. Appellant contends that in this case the stated evidence cannot be considered to prove all the above elements required for the applicability of the doctrine: If plaintiff was negligent in nearing the tracks, she was not in danger until the train started moving and after the moment at which the motorman had knowledge of this danger he would have had to stop instantaneously to prevent an accident. In cases where the danger and helplessness of the plaintiff is created so nearly simultaneously with the accident the defendant does not have a *clear* chance to avoid the accident by exercise of *ordinary care*. *Rodabaugh v. Tekus*, 39 Cal.2d 290, 296, 246 P.2d 663; *Doran v. City & County of San Francisco*, 44 Cal.2d 477, 283 P.2d 1. Appellant contends that the case is on its facts almost identical with *Johnson v. Sacramento Northern Ry.*, 54 Cal.App.2d 528, 129 P.2d 503 in which case a rapid driving motorcycle skidded in daytime under a train crossing the highway at slow speed. We do not agree.

[3] In the *Johnson* case, *supra*, it is said: “It is only in exceptional circumstances that the doctrine may be applied to cases involving collisions between two moving vehicles or at least in cases where the injured party is driving a rapidly moving vehicle for in such cases the act creating the peril ordinarily occurs practically simultaneously with the happening of the accident and the party sought to be charged

can not be said to have had a *last clear* chance to avoid the accident *after* the discovery of the injured party’s peril.” 54 Cal.App.2d 532, 129 P.2d 505. The exceptional circumstances in this case, not present in the *Johnson* case, are that the train was standing still with a red flashing light against it when the motorman saw plaintiff’s car coming in its direction at a relatively high speed on a dark night with heavy rain; that he had given a warning signal with his electric gong but that the car did not diminish speed and that he started the train only when the car was quite near, defendant motorman’s testimony being in conflict as to whether he had not yet started the train or had just started the train, when the car was away only 50 feet or less.

It is not true that plaintiff could not be in danger and the defendant could not know of that danger until the train was in motion. Suppose that the motorman had seen a drunken man lie down in front of the stopped train. Could it be accepted that only after the operator had started the train the man was in danger and that the applicability of the last clear chance doctrine depended on whether the operator could thereafter timely stop the train or not? At least when the motorman received the signal for departure any person nearing the tracks unaware of a possible movement of the train was in danger. Because of that danger the motorman sounded the gong and looked out to both sides before starting. If at that time he observed facts indicating that the driver of an oncoming car was inattentive and therefore in danger of continuing onto the tracks the motorman undoubtedly had a clear chance to prevent an accident as he simply had to wait a few seconds longer before starting the train. The jury could hold that waiting those few seconds would not constitute more than ordinary care. The jury could also find plaintiff negligently inattentive and as a result thereof in danger.

[4, 5] Appellant contends, however, that plaintiff could escape by the exercise of ordinary care as shown by the fact that the other car escaped by swerving. Con-

sidering that the other car was in a better position to escape because it was in a lane further from the oncoming train and was going at a higher speed and that nevertheless that car only just succeeded in passing in front of the train, the question whether plaintiff could also have escaped in that way was evidently for the jury. In this respect it should be noted that total unawareness of danger as well as physical impossibility can cause inability to escape by ordinary care, *Doran v. City & County of San Francisco*, supra, 44 Cal.2d 477, 283 P.2d 1, and "that the 'continuing negligence' of the injured party does not deprive him of the benefit of the last clear chance doctrine if all the required elements for the application of that doctrine are present". *Doran v. City & County of San Francisco*, supra, 44 Cal.2d 486, 283 P.2d 7.

[6] The treatment of the rule as to total unawareness (negligent inattention) in Section 480 of the Restatement, Torts is instructive with respect to this case. It is said there in Comment b: "* * * the defendant is liable only if he realizes or has reason to realize that the plaintiff is inattentive and consequently in peril * *". However, it is not necessary that the circumstances be such as to convince the defendant that the plaintiff is inattentive and, therefore, in danger. It is enough that the circumstances are such as to indicate a reasonable chance that this is the case. Even such a chance that the plaintiff will not discover his peril is enough to require the defendant to make a reasonable effort to avoid injuring him. Therefore, if there is anything in the demeanor or conduct of the plaintiff which to a reasonable man in the defendant's position would indicate that the plaintiff is inattentive and, therefore, will or may not discover the approach of the train, the engineer must take such steps as a reasonable man would think necessary under the circumstances. If a train is at some little distance, the blowing of a whistle would ordinarily be enough, until it is apparent that the whistle is either unheard or disregarded. The situation in which the plaintiff is observed may clearly indicate that his inattention is likely to per-

sist and that the blowing of the whistle will not be effective. If so, the engineer is not entitled to act upon the assumption that the plaintiff will awaken to his danger but may be liable if he does not so reduce the speed of his train as to enable him to stop if necessary." See also *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, 523, 74 P. 15, 63 L.R.A. 238. The circumstances showing inattentiveness will seldom be observed from a moving train early enough to give the engineer a clear opportunity to take effective measures by ordinary care, but, as noted before, such does not apply in this case, when the defendant motorman was aware of circumstances which might be considered as indicating unawareness before he started the train. Whether from the circumstances observed a reasonable man would have concluded that there was danger of continuing unawareness of the plaintiff and whether he therefore in the exercise of ordinary care should have abstained from setting the train in motion were questions of fact for the jury. To the question of last clear chance the normal rule applies that only when there is not any substantial evidence, conflicting or otherwise which could justify the application of the last clear chance doctrine the court should keep it from the jury as a matter of law. Only in such a case is the giving of an instruction on last clear chance reversible error. *Doran v. City & County of San Francisco*, supra, 44 Cal.2d 486, 283 P.2d 7. We have concluded that such is not the case here.

[7] The other instruction of which appellants complain reads: "While a violation of a company rule by a company employee, if you find such to exist, would not constitute negligence per se, it would be a circumstance for the jury to consider on the issue of defendant's negligence." They contend that the only rule referred to in the evidence, which could have been violated was the one concerning the pink card disculpating the operator, mentioned before. However, the defendant Giotfelty also testified, that company rules are that in a situation like in this case he had to obey traffic signals, and that for him the blinking red light meant that he had to

make a stop and proceed like at a boulevard stop sign. See § 477, subd. 1, Vehicle Code. In connection with the fact that the court instructed on said Section 477, subd. 1, and on Section 552, Vehicle Code relating to a boulevard stop, but also gave the instruction that at the time and place of the accident the train operated by defendant was not a vehicle within the meaning of said code sections, the instruction complained of correctly permitted the jury to consider the question, whether at the time the train proceeded, plaintiff's car constituted an immediate hazard in the sense of Section 552, *supra*, and therefore the driver violated the company rules as to the obeying of traffic signals, by driving into the intersection.

Judgment affirmed.



134 Cal.App.2d 619

**In the Matter of the Application of Robert
M. FROST, for a Writ of Habeas
Corpus.
Cr. 2634.**

District Court of Appeal, Third District,
California.

July 27, 1955.

Habeas corpus proceeding brought by father who sought his release on ground that he was being unlawfully imprisoned. The District Court of Appeal, Van Dyke, P. J., held that order awarding mother temporary custody of child, which had previously been placed under custody of father by court order, and directing that matter of permanently changing custody of child be continued to a certain future date, was an order changing existing custody status of child and was appealable, and father was not in contempt for having disobeyed the order pending appeal.

Father discharged from custody.

1. Divorce ⇨312.4

An appeal from an order modifying custody provisions of divorce decree suspends power of trial court to enforce such order.

2. Divorce ⇨305, 312.1

Order awarding mother temporary custody of child, which had previously been placed under custody of father by court order, and directing that matter of permanently changing custody of child be continued to a certain future date, was an order changing existing custody status of child and was appealable, and father was not in contempt for having disobeyed the order pending appeal.

3. Divorce ⇨312.1

Where there is an existing decree fixing legal custody, any change of legal custody constitutes an appealable order.

Frances Newell Carr, Sacramento, for petitioner.

Robert K. Stone, Chico, for real party in interest.

VAN DYKE, Presiding Justice.

Petitioner, Robert M. Frost, filed his petition with this Court asking a writ of habeas corpus on the ground that he was being unlawfully imprisoned by the Sheriff of Butte County, California. The writ was issued and petitioner placed on bail pending determination of the issues presented by the return to the writ.

On September 17, 1952 in an action brought in the Superior Court for Butte County an interlocutory decree of divorce was granted to Frances Eloise Frost, wife of petitioner, and by the terms of that decree the custody of the minor child of the parties was awarded to Frances. On January 15, 1954, on application of petitioner, the court modified the interlocutory decree by giving custody of the minor to petitioner, which order for change of custody became final. On the 15th day of June, 1955, on application of Frances, the court made an order which, as petitioner herein contends, modified the existing custody order,

by again awarding custody of the minor to Frances. The court ordered petitioner to deliver the child to her. On June 21, 1955 petitioner appealed. Thereafter petitioner was ordered to show cause why he should not be adjudged in contempt of court for refusing to deliver the child to Frances. He took the position that his appeal had statutorily stayed the execution of the order appealed from and that the court was, therefore, without jurisdiction to enforce that order or to find him in contempt for having disobeyed it. He was adjudged guilty of contempt and imprisoned until such time as he should purge himself of contempt by delivering the minor child pursuant to the order from which he had taken his appeal.

[1] An appeal from an order modifying the custody provisions of a divorce decree suspends the power of the trial court to enforce such order. The perfected appeal automatically constitutes a stay of proceedings and precludes the trial court from interfering with custody as it existed at the time of appeal. In re Barr, 39 Cal.2d 25, 243 P.2d 787. The foregoing rules of law are not contested by respondent nor is it argued that the contempt order imprisoning petitioner until he shall have obeyed the order of the court appealed from does not constitute a direct attempt by the trial court to enforce that order pending appeal.

[2] The sole contention of respondent is that by reason of the form of the order it was and is non-appealable and may, therefore, be appropriately enforced by imprisoning petitioner until he shall have obeyed it. This contention cannot be sustained. The order appealed from is based on an order to show cause why the existing custody should not be modified. The court found expressly that the minor needed the supervision and care of her mother, that the best interests of the child "would be best subserved by changing the custody of said child to the said defendant". It was then found that the residence of the mother was not adequate in size to permanently house her, her present husband and the minor, and, therefore, the court stated

that "the change of custody of said minor child should not be made permanent until a proper showing is made by the defendant that she had procured sufficient and adequate housing facilities." It was further found that the mother's "present residence is sufficient for temporary custody of said minor child only." Having made these express findings, the court "ordered, adjudged and decreed that the interlocutory decree as modified, wherein custody of the minor child of the parties hereto, namely Leslie Adrienne Frost, was awarded to the plaintiff, *should be and it is hereby modified as follows: * * **" It was then decreed that the mother of the minor was "awarded temporary custody of said child, * * *, until September 21, 1955, at 10:00 A.M." and that "said child is to be produced in court on said date; that the matter of permanently changing the custody of said child * * * be, and the same is hereby, continued to September 21, 1955 at 10:00 A.M. for the purpose of determining whether or not sufficient and adequate housing facilities have been procured by the defendant." It was then ordered that the petitioner herein "deliver * * * the custody of said minor child".

It is argued that the foregoing constituted no change of legal custody, but a mere temporary shifting of the physical control and custody until the date to which the proceeding was ordered continued for further hearing.

[3] The order appealed from was clearly stated to be an order changing the custody from the existing custody status and transferring that custody to the mother of the minor. Such an order is appealable. Stating that it is not permanent and that it may be changed later if conditions as to permanent housing be not met by a fixed time does not detract from its effect as a custodial change. In the last analysis all custody decrees are temporary in the sense that there remains in the court a continuing jurisdiction from time to time to change them. If this order could by reason of its language be construed to be non-appealable as being only a temporary order then an order using the same language but re-

ferring to a date three years or ten years in advance for further determination as to whether it should longer continue in force would likewise be non-appealable, with the result that by merely setting dates for further hearings the trial court would be given final power and the right of appeal from changes in custody decrees would be abolished. There is much involved in legal custody beyond mere temporary physical care and control such as exists during the exercise of visitation rights. And where there is an existing decree fixing legal custody any change of legal custody constitutes an appealable order.

The petitioner is discharged from custody and the bail heretofore given is exonerated.

BEDEAU, J. pro tem., concurs.



134 Cal.App.2d 769

Garlan EPLEY, an Individual doing business under the fictitious firm name and style of Retailer's Credit Association, Plaintiff and Respondent,

v.

Charles I. CUNNINGHAM, Defendant and Appellant.
Civ. 8606.

District Court of Appeal, Third District,
California.
Aug. 2, 1955.

Action to recover debt owing on book account. The Superior Court, Sutter County, Warren Steel, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that plaintiff could prove case by showing transactions from which debt arose, and without producing books reflecting the account.

Judgment affirmed.

1. Account, Action on ☞17

A pleading alleging existence of balance due and owing on book account is basically an ordinary action to collect debt, and principal distinction between action of debt and one based upon book account is longer limitation period in case of book account.

2. Account, Action on ☞21

Plaintiff who alleged balance due and owing on book account could prove case by showing transactions from which debt arose, and without producing books reflecting the account.

3. Accord and Satisfaction ☞26(3)

Account, Action on ☞22

In action on indebtedness on book account, evidence supported findings of existence of debt and nonexistence of any accord and satisfaction.

Sutter, Elledge & Carter, Modesto, for appellant.

Heenan & Arnoldy, Marysville, for respondent.

VAN DYKE, Presiding Justice.

This appeal is from a judgment in the sum of \$1,044.78 rendered against defendant and appellant. Plaintiff and respondent filed a complaint wherein he alleged that within the four years last past defendant became indebted to respondent's assignor on an open book account, in the sum adjudged to be due, for labor and materials furnished by said assignor to appellant. The answer denied generally all the allegations of the complaint and affirmatively pleaded that there had been an accord and satisfaction of the demand sued on. The court found that the allegations of the complaint were true, that the allegations of accord and satisfaction were not true, and gave judgment in the amount sued for.

During the course of the trial when the respondent sought to prove the debt alleged to be owing, by evidence other than books reflecting a book account, appellant objected that the cause of action pleaded was one based on a book account and that it could only be proved by the production of qualified books reflecting the account. The objection

was overruled and respondent's assignor was permitted to testify orally to the transactions which he claimed resulted in a debt in the amount sued for, supporting his testimony by various documents called "purchase orders" and other records between respondent's assignor and appellant. Appellant assigns this as error.

[1,2] A pleading alleging the existence of a balance due and owing on a book account is basically an ordinary action to collect a debt. The reference to a book account is important only where, save for such an allegation, the action would be subject to the bar of the statute of limitations. Because a book account kept in the ordinary course of business creates a situation where the parties are not left entirely to recollection the legislature has seen fit to grant a greater period of time in which the action may be brought. There is little, if any, other significance or distinction between an ordinary action of debt and one based upon a book account. But even though a suit be brought in the form of an action based on a book account it is still permissible for plaintiff to prove the debt by oral testimony and by evidence other than a qualified book account. In this case there was substantial evidence to prove the debt sued on. The cause was fully tried. Both respondent's assignor and appellant testified concerning the pertinent transactions between them. It is true that respondent testified that he did, in fact, have a set of books which reflected the transactions making up his cause of action and that he had not brought the books to court. However, appellant made no pretrial demand that the books be produced, nor did he ask during the trial that they be brought in. His position was that respondent could only prove his cause by the books of his assignor.

Concerning such a situation Wigmore says:

"Since the book is merely a statement about the transaction, and is not the transaction itself, the Parol Evidence rule does not apply, and therefore the transaction, as such, can be proved oral-

ly without producing or accounting for the book." Wigmore on Evidence, 3rd ed., sec. 1558.

The author cites *Cowdery v. McChesney*, 124 Cal. 363, wherein the following appears at page 365, 57 P. 221, at page 222:

"In excluding evidence of the items of the account, a copy of which was in plaintiff's claim against the estate of Kasson, and also set out in the complaint in this action, and in ordering that the account must be proved before the plaintiff would be permitted to go into the items of it, the court erred. The only way an account can be proved ordinarily is by establishing by evidence the several items of the same, and the oral evidence of persons having personal knowledge of the transactions is the best evidence of the items unless there is something to indicate that such items accrued in pursuance of, or are the result of, a written contract between the parties. The fact that one or both of the parties have kept a book account of their transactions does not affect the rule of evidence, and the oral testimony of eye and ear witnesses to the transactions in which the various items of an account accrued is still primary, and not secondary, evidence of such items."

[3] Appellant argues that the finding that appellant was indebted on a book account is not supported by the evidence. That is true to the extent that no book account was proved. But this leaves fully supported the essential finding of debt and the variance is not material.

Appellant had pleaded accord and satisfaction but nothing more need be said upon this issue than that the evidence was sharply in conflict as to whether there had been such accord and satisfaction and the court's finding that there had not been is sufficiently supported.

The judgment is affirmed.

SCHOTTKY, J., and FINLEY, Judge pro tem, concur.

Arthur W. HILL and Norman C. Cissna,
Petitioners.

v.

The SUPERIOR COURT of the State of
California, In and for the COUNTY OF
HUMBOLDT, Respondent.

Civ. 8594.

District Court of Appeal, Third District,
California.

July 28, 1955.

Rehearing Denied Aug. 22, 1955.

Hearing Granted Sept. 21, 1955.

Original proceeding by two attorneys for writ commanding Superior Court, Humboldt County, to allow reasonable compensation for services and expenses in criminal case wherein attorneys as court-appointed counsel had defended one charged with murder of one individual, assault upon another with intent to commit murder, kidnapping of both victims while armed with a deadly weapon, and with three prior convictions for felonies. The District Court of Appeal, Van Dyke, P. J., held that, under circumstances shown by the record, an allowance of \$500.00 to each attorney was so inadequate as to constitute such abuse of discretion that mandate would be issued to compel redetermination.

Writ issued.

1. Mandamus ☞72

Exercise of judicial discretion cannot be controlled by mandate, but exception to this rule exists in that if discretion has been abused, so that what was done amounts to refusal to exercise jurisdiction rather than error in the exercise thereof, mandate is applicable remedy if other conditions for remedy are met.

2. Attorney and Client ☞132

Penal Code provision providing for allowance to court-appointed attorneys for representing indigent clients in criminal cases could not be construed as vesting entirely and exclusively in Superior Court the determination of what sums should be paid, as making such determinations final. Pen. Code, § 987a.

* Opinion vacated 293 P.2d 10.

3. Attorney and Client ☞132

Term "reasonable compensation" as used in statute providing for allowances to court-appointed attorneys for representing indigent clients in criminal cases should receive same interpretation as that generally given to such phrase in civil and criminal proceedings generally or as given where such services are performed under implied contract for reasonable compensation. Pen. Code, § 987a.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable Compensation".

4. Attorney and Client ☞132

Under statute providing for allowance to attorneys appointed by court to defend indigent clients in criminal cases, much is left to discretion of judge who is to fix reasonable compensation, but it is a controlled and judicial discretion which has limits so clearly discernible that action above or below range of discretion can be detected, and when it clearly exists such action constitutes not use of discretion but the abuse thereof and a refusal to obey a statutory mandate. Pen.Code, § 987a.

5. Attorney and Client ☞141

Mandamus ☞61

Under circumstances shown by record of proceeding by court-appointed attorneys for allowance of fees in criminal case, allowance of \$500 to each attorney was so inadequate as to constitute such abuse of discretion that mandate would be issued to compel redetermination of reasonable compensation. Pen.Code, § 987a.

Hill & Hill, Eureka, for petitioners.

Harold L. Hammond, Dist. Atty., Eureka, and Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondents.

VAN DYKE, Presiding Justice.

This is an original proceeding in which petitioners seek a writ directed to the respondent court, commanding it to allow to them reasonable compensation for services rendered and necessary expenses incurred in acting as court-appointed counsel to de-

fend a person charged with the murder of one individual, an assault upon another with intent to commit murder, the kidnapping of both victims while armed with a deadly weapon, and with three prior convictions of felonies.

The petition alleges that petitioner Hill was appointed to represent one Witham in preliminary proceedings before the Judge of the Eureka Judicial District sitting as a magistrate upon a complaint charging him with the commission of the aforementioned crimes; that petitioner Hill made two appearances on behalf of the accused, which included services during the preliminary examination; that the defendant was held to answer and that the petitioners were both assigned to act as counsel for the defendant in the proceedings in the Superior Court; that after the trial and subsequent proceedings in the Superior Court had been concluded, petitioners, basing their application upon affidavits as to the services performed, applied to the Superior Court, under the provisions of Section 987a of the Penal Code, for a determination by that court of reasonable compensation to be paid to them out of county funds for their services and for their necessary expenses.

In their applications each of the petitioners asked the court to fix the sum of \$5,000 as such reasonable compensation to be paid to each. The court proceeded upon the applications and ordered that each petitioner was entitled to \$500 for compensation and necessary expenses. Thereafter there was filed in this Court a petition for a writ of mandate, whereunder petitioners asked this Court to declare that the allowance made, in view of the services rendered, was not reasonable compensation and that it departed so far from that standard as to amount to an abuse as distinguished from the exercise of discretion in the fixing of the sum allowed. An alternative writ was issued. Issues of fact were raised in the answer of respondent and this Court ordered a reference for the purpose of permitting the parties to produce such evidence as they might desire in support of the factual issues of the petition and the return. The following is a statement of the services rendered by petitioners which are not now in dispute:

Petitioner Hill was first appointed during the preliminary proceedings and petitioner Cissna was then appointed and both thereafter represented Witham under such appointment. The Judge who tried the cause of *People v. Witham* and who fixed the fees to be paid petitioners stated during the reference that he believed both Mr. Hill and Mr. Cissna excellently performed their duties as attorneys and officers of the court, that they ably represented the defendant, that they protected his legal rights and did all that could be expected of them as attorneys appointed by the court. Both counsel were experienced attorneys and prominent figures practicing before the bar in their county. They both were established in their profession and enjoyed substantial practices. The following appears as to Hill: It was specifically conceded during the reference that he was a recognized leader of the bar in the vicinage. He had for 20 years maintained a law office in Eureka. He appeared in the preliminary proceedings before the magistrate, making two court appearances. After the filing of the information he appeared with defendant in the Superior Court on his arraignment and upon two other occasions prior to trial. He fully participated in eight full days of trial and one night session lasting until 2:30 A.M. after the cause had been submitted to the jury. He appeared twice in court after trial for the purpose of hearing the report of the probation officer and the pronouncement of judgment. During the trial he prepared and submitted instructions on behalf of defendant. During the preparation for trial he made trips to Hydesville, Alton, Fortuna and Arcata, interviewing witnesses and examining the scene of the alleged crime. He made seven calls and held conferences with the defendant at the county jail. He interviewed numerous witnesses in his office and at Hydesville, Alton, Fortuna and Arcata. He attended to the subpoenaing of witnesses, including instructing the sheriff as to location of the persons he desired served. He reviewed the transcript of the preliminary examination and of the trial, marking and indexing portions of testimony taken at the trial, as transcribed during the trial at his request. He conducted

research in the law relative to the case and therein had the assistance of two attorneys in his office. He made numerous telephone calls and held several consultations with co-counsel Cissna. A partial, but not complete, record of time spent in preparation shows 25½ hours of working time and this excluded time spent in court and time spent in reviewing transcripts. The services of petitioner Cissna need not be recounted in detail since they were much the same, in fact almost identical, save for the preliminary proceedings, as those of Hill. He showed the time consumed in preparation to exceed four days and he spent the same time in court during and after trial as has been related concerning Hill. The record does not show the verdict of the jury, except that it is shown that the death penalty was not inflicted.

In so far as material here, Section 987a of the Penal Code provides:

"In any case in which counsel is assigned in the superior court to defend a person who is charged therein with crime, or is assigned in a * * * justice court * * *, to represent such a person on a preliminary examination * * *, such counsel, except in a county, or city and county, in which there is a public defender, shall receive a reasonable sum for compensation and for necessary expenses, the amount of which shall be determined by the court, to be paid out of the general fund of the county."

At all times material here there was no public defender in Humboldt County. The foregoing legislation enacted in 1951 was amendatory of legislation newly enacted in 1941, by which the legislature worked a departure from the long-existing court practice of appointing counsel to represent indigent defendants without any provision made for compensation. Under this former practice, the attorney served as a part of his public duty under his oath. The legislature in 1941 provided that the board of supervisors might by ordinance provide that in any case in which counsel is assigned in the superior court to defend a person who is charged therein with crime and who is un-

able to employ counsel, such counsel, upon recommendation of the court or a judge thereof might receive a reasonable sum for compensation and for necessary expenses, the amount of which should be determined by the board. The principal change in the current legislation upon the subject is to vest in the superior court which appointed counsel and heard the cause the power and duty to determine and allow reasonable compensation for services and necessary expenses.

It appears factually that each of the petitioners spent the equivalent of at least 13 full working days preparing and trying the case in the superior court. It appears also that each of them was maintaining an active practice; that each maintained offices in which their practice was conducted; and that Witham, therefore, received the benefits of these practical and necessary aids in the preparation and trial of his cause at the expense of petitioners. In addition, it appears that there was approximately \$100 out of pocket money spent by counsel in travel and other expenses. Subtracting this cash expenditure from the amount allowed, we have \$900 allowed as reasonable compensation for better than 26 full working days of competent experienced counsel, or approximately a gross compensation of \$35 per day. Hill testified that in his civil practice he generally charged and received a retainer fee, plus \$150 per day for each day in court or fraction thereof; that for out of court work the fee generally charged and received was at the rate of \$20 per working hour; that the retainer fee, depending upon the nature of the case, might be anywhere upward from a minimum of \$150. There was testimony of practicing attorneys with offices in Eureka, giving it as their opinion that a reasonable fee in the instant case would be from \$3,250 to \$5,000 for each petitioner.

[1] Respondent by both demurrer and answer has raised the issue of the availability of mandate in this matter. The assertion is made that mandate will never issue to control the exercise of discretion; that the determining of a reasonable compensation involves discretion and that man-

date is, therefore, not available herein. It is true that the exercise of discretion cannot be controlled by mandate, but that is not the basis of the application for the writ here made. The rule relied on parallels the rule in certiorari and in prohibition that error within the scope of jurisdiction cannot be reviewed and that a court is not under a duty to determine a matter in a particular way. Witkin's *Calif. Procedure*, Vol. 3, page 2530. An exception to the rule, however, is that if discretion has been abused, so that what is done amounts to a refusal to exercise jurisdiction rather than error in the exercise thereof mandate is an applicable remedy if other conditions for the remedy are met. We think all conditions for the remedy are met here if it be assumed that petitioners have shown abuse of discretion to the degree indicated and, therefore, that this Court acted properly when heretofore it overruled respondent's demurrer upon this ground.

[2-5] It is contended for respondent, here represented by the Attorney General, that a proper construction of the subject legislation would be that it was intended by the legislature to vest entirely and exclusively in the superior court the determination of what sum should be paid and that such determination is final. We think the legislation cannot receive that construction. It is true, as we have said, that throughout the English-speaking world the burden has been laid upon attorneys to give their services freely and without compensation to the indigent in need of them; but the very fact that the practice endured so long demonstrates that the legislature has intended for policy reasons of its own that this practice should be departed from in criminal causes. It is not for us to question the wisdom of that departure. The statute now declares that counsel, appointed to serve, and serving, an indigent charged with crime, shall receive "reasonable compensation" for his services. The phrase is a familiar one and the legislature, many of whose members are lawyers, must have selected the phrase as one reasonably adapted to accomplish the legislative will and to carry out its policy that hereafter attorneys so appointed and serving would be compensated. We see no

reason why this familiar phrase should receive any other interpretation than that generally given to it in civil and criminal proceedings where it so frequently appears, or other than it has generally received when, as is usually the case, attorneys perform services for clients under an implied contract that they will be reasonably compensated therefor. We see no justification for an artificial construction of the phrase as used in this legislation, based merely upon the long history of uncompensated service to indigents charged with crime, or to persons having civil rights which they were financially unable to enforce in the courts. To hold otherwise would be to say that the legislature had not at all intended that lawyers should be paid reasonable compensation in such cases, but that they should be paid something more than nothing, which they had theretofore received; that, therefore, an allowance in this case of \$1 to each petitioner would have to be accepted by him as "reasonable compensation". It has often been held that the phrase "reasonable compensation" as applied to the services of attorneys is a standard with which the profession and courts are so familiar that the courts may from their knowledge of the meaning of the phrase as applied to a case tried before the court arrive at a sum that will furnish reasonable compensation; and that expert or opinion evidence upon the subject need not be introduced. These things, however, do not argue a right of a court to arbitrarily determine what is a reasonable compensation in a given case. Necessarily, much is left to the discretion of the judge who is to fix reasonable compensation, but it is a controlled and judicial discretion which has limits so clearly discernible that action above or below the range of discretion can be detected, and when it clearly exists such action constitutes not the use of discretion but the abuse thereof, the refusal to obey a statutory mandate. We think such a case is here presented. When one considers that established, experienced attorneys enjoying substantial practices must maintain, in order to serve their clients, expensive plants and a staff of well-trained assistants, such as clerks, stenographers and the like, it is seen

to be doubtful indeed, if not impossible, that such attorneys could unlock their doors in the morning for \$35 per day.

The award made by respondent is annulled. The cause is remanded with instructions to rehear the applications of petitioners and redetermine, in view of what has here been said, reasonable compensation for the services rendered by them. Let a peremptory writ of mandate to that effect issue.

SCHOTTKY, J., concurs.



134 Cal.App.2d 729

Marguerite GRAHAM, Plaintiff and Respondent,

v.

A. F. FLORY, Defendant and Appellant.
Civ. 5108.

District Court of Appeal, Fourth District,
California.

Aug. 1, 1955.

Action against hay dealer to recover value of hay grown on land owned by plaintiff and her husband. The Superior Court of Imperial County, L. J. Mouser, J., rendered judgment for plaintiff. Defendant appealed. The District Court of Appeal, Barnard, P. J., held that evidence was sufficient to support finding that transaction between plaintiff and defendant was a sale and not a consignment of the hay and, therefore, that title passed to defendant.

Affirmed.

1. Appeal and Error ⇨173(5)

Parties ⇨75(3, 4)

Defense that actions concerning community property must normally be brought by husband must be specially pleaded and was waived by defendant's failure to assert it at his earliest opportunity and issue could not be raised for first time on appeal.

2. Sales ⇨52(5)

In action against hay dealer to recover value of hay grown on land owned by plaintiff and her husband, evidence was sufficient to support finding that transaction between plaintiff and defendant was a sale, not a consignment of the hay, and, therefore, that title passed to defendant.

3. Evidence ⇨545

In action against hay dealer to recover value of hay grown on land owned by plaintiff and her husband, evidence was sufficient to support implied finding that plaintiff was qualified to testify as an expert with respect to the weight of hay.

Fred M. Riedman, Long Beach, for appellant.

Charles F. Sturdevant, Jr., El Centro, for respondent.

BARNARD, Presiding Justice.

This is an action to recover the value of certain hay. The hay was grown on land in Imperial County belonging to the plaintiff and her husband, and was owned by them. A few days prior to May 15, 1952, the plaintiff and the defendant entered into some arrangement for the sale of the hay. The defendant, who testified that his occupation was that of a hay dealer or commission merchant, had a place of business at Paramount, in Los Angeles County. On May 15, 1952, he sent a man named Lester to plaintiff's ranch to pick up the hay, giving him a written order. Lester presented the pickup order to the plaintiff and loaded 310 bales of hay on his truck. As Lester attempted to drive across a bridge over a canal owned by the Imperial Irrigation District, which canal adjoined the plaintiff's property, he missed the bridge and the truck tipped over and spilled the hay into the canal and along its bank.

The canal had only a little water in it at the time but the agents of the Imperial Irrigation District told the plaintiff to get the hay out of the canal as they intended to turn in a large amount of water in a day or two. On the same day, May 15, the plaintiff phoned to the defendant and told him about the accident and why the hay must be

moved at once. The defendant told her to get a "loader" to get the hay out of the canal, that he would pay the cost, and that he would send a truck at once to get the hay. She got the loader and the hay was put on the bank of the canal, along the county road. The defendant did not send for the hay, which remained in that position for more than four months. On August 4, the plaintiff brought this action. On September 20, a man who said he was sent by the defendant came and picked up the hay. This man took the hay to the nearest scales, where it was weighed. The plaintiff then told this man not to take the hay out of the valley until she had seen her attorney. Later, she told him to take the hay to another one of her ranches where it would be safe. He did so, and the hay remained there until the time of the trial.

The complaint in this action alleged the sale of hay of the reasonable value of \$706.20, for which the defendant agreed to pay. In a second cause of action an account stated was alleged, whereby the defendant agreed that he was indebted to plaintiff in the sum of \$706.20. A third cause of action alleged an open book account in the same amount. The defendant entered a general denial as to each cause of action. The court found that all of the allegations of the complaint are true, and that none of the denials contained in the answer are true. A judgment was entered in favor of the plaintiff, from which the defendant has appealed.

[1] The appellant first contends that "actions concerning community property must normally be brought by the husband", citing cases supporting that contention. However, it has been held that such a plea, being dilatory in its nature and not affecting the liability of the defendant, is not favored and must be specifically pleaded; and that it is waived by the defendant's failure to assert it at his earliest opportunity. *Grove v. Charles W. Barrett Co.*, 87 Cal. App. 165, 261 P. 739; *Tingley v. Times Mirror Co.*, 151 Cal. 1, 89 P. 1097. This issue was not raised by the pleadings here and the only thing that appears in the evidence is that the plaintiff was asked if she was living with her husband and if the hay belonged

to them both, and she answered both questions in the affirmative. No objection was raised at a time when it could have been cured, and no request to amend the answer appears. The issue may not be here raised for the first time on appeal.

[2] It is next contended that under the oral contract between the parties the defendant was a selling agent or factor for the plaintiff; that the defendant told the plaintiff that he would get the hay and sell it at the highest price obtainable and would deduct \$1.50 per ton as his commission, plus the hauling charges, and remit the balance to the plaintiffs; that there was no intention that title to the hay should pass to the defendant; and that the fact that on May 15, the truck driver loaded the hay on the truck does not establish that title had so passed. These contentions are based entirely upon a conflict in the evidence. While defendant's testimony, if believed, would support these contentions the plaintiff's testimony was flatly to the contrary. She testified that she had not sold or delivered the hay to the defendant upon a consignment basis; that the defendant never said anything to her about a consignment transaction in regard to this hay; that in a telephone conversation shortly prior to May 15, she told the defendant that the hay was in good condition and asked what he would pay for it; and that he told her he would pay \$33 a ton, and that he would send a truck down for the hay. The court believed the plaintiff's testimony, which supports the findings made. The fact that the plaintiff later demanded that the defendant's agent should not remove the hay from the county, and that he put it in a safe place, indicates that she was trying to preserve a lien on the property or to protect her right to payment, but does not conclusively show that she exercised such a dominion over the property at that time as to establish the fact that title had not passed. It is interesting to note, in connection with the question as to whether this was a sale or a consignment that the defendant offered no excuse for not picking up the hay shortly after the accident and doing nothing for over four months. If, as he claimed, he was to sell this hay on commission, and was free to

charge all hauling costs and expenses to the plaintiff, the natural thing would have been for him to send for the hay at once and proceed on that basis. The fact that he did not do so justifies an inference which further supports plaintiff's testimony.

[3] The final contention is that the plaintiff was not qualified to testify as to the weight of the hay, and that the court erred in overruling an objection thereto. It is further argued in this connection that when the hay was weighed in September, 1952, a weight ticket was undoubtedly made and that this weight ticket should have been made available to the court. The action involved the weight of the hay on May 15, 1952, and not in September. There is no evidence that plaintiff ever saw this weight ticket, and the only reasonable inference from the evidence is that it was in the possession of the defendant. The evidence is sufficient to support the court's conclusion that the plaintiff was qualified to testify as an expert with respect to the weight of this hay, and is sufficient to support the implied finding in that regard.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



135 Cal.App.2d 79

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**George Edward SNYDER, Defendant
and Appellant.
Cr. 5391.**

District Court of Appeal, Second District,
Division 1, California.

Aug. 15, 1955.

Prosecution for attempted robbery. Defendant entered a plea of guilty. From the judgment of the Superior Court of Los Angeles County, Harold W. Schweitzer, J., the defendant appealed. The District Court

of Appeal, Doran, J., held that action of trial judge in taking plea of guilty and in acquiescing in defendant's insistence that he did not need aid of counsel was not an abuse of discretion.

Affirmed.

1. Criminal Law ⇨625

In prosecution for attempted robbery, defendant's mental state was a question for trial judge. Pen.Code, §§ 1018, 1368.

2. Criminal Law ⇨1158(2)

Only where there has been abuse of discretion of trial judge in determining question of defendant's sanity may trial judge's action be disturbed on appeal. Pen. Code, §§ 1018, 1368.

3. Criminal Law ⇨273, 641(1)

In prosecution for attempted robbery, even though trial judge was of opinion that accused was in need of psychiatric treatment, trial judge's action in taking plea of guilty and in acquiescing in defendant's insistence that he did not need aid of counsel was not an abuse of discretion. Pen.Code, §§ 1018, 1368.

George Edward Snyder, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

DORAN, Justice.

In the within action the defendant pleaded guilty to attempted robbery. Two prior convictions were admitted.

The appellant, in propria persona, filed a notice of appeal, which is written in long-hand by appellant, and is as follows:

"This is my notice of appeal in Case of People v. Snyder—case #169465. Final court decision & sentence was made on Jan. 19, 1955 at 12:30 p m in Dept. 41, Hall of Justice, Judge Harold Schweitzer presiding.

"Given Reasons For Appeal

"#1. Court sentenced defendant without court appointed Psychiatrist yet recommended defendant be sent to Terminal Island Facility of Dept. of Corr. at Terminal

Island, Reason therefore being plea of *guilty* by reason of insanity be entered!

"#2. Court technical immunities in record of plea proceedings held Dec. 29, 1954 in Dept 44 in favor of offering probationary hearing after defendant *waived same* because of certain knowledge probation would not be granted on inmate with *two prior convictions!!*

"#3. During sentencing *double jeopardy* was prewarned to Court in light that defendant would serve time all over again for time previously served. Time element was shown explicitly—Jan 19, 1955—Dept 41—#169465 People v. Snyder.

"#4. Innumerable Court irregularities in evidence from time of Preliminary Hearing—#124921 Div 40 of Municipal Court on Dec 14, 1954 to judgment 1/19/55.

"Defendant, Snyder, Geo. E undersigned, being own legal attorney requests all necessary court documents, briefs, plea & oral plea & plea & sentencing & *certified* manuscripts to assist him in necessary appeal of case #169465; and that said documents be made & sent him free of charge as soon as Clerk of Court is convenience; said documents to be forwarded & registered to defendant.

"Very truly yours,
/s/ George W. Snyder
"#346931—
"Case #169465

"Official Notice of Appeal filed *within 10 days* limits!!" (Emphasis included).

A brief memorandum on behalf of appellant was filed by the Criminal Appeals Committee of the Los Angeles Bar Association. Quoting therefrom:

"The transcripts on appeal have been carefully studied. The undersigned has advised the appellant that the grounds stated in his notice of appeal—among which is that of double jeopardy—do not seem to be well taken, * * *

"However, there are three matters which greatly disturbed the undersigned in reading the transcript. They will be stated under three separate headings.

Cal.Rep. 285-286 P.2d-41

"I

"Should a trial Judge who thinks that an accused is in need of psychiatric treatment and recommends it, take a plea of guilty from such an accused.

"II

"Should a trial judge who is of the opinion that an accused is in need of psychiatric treatment acquiesce in such accused's insistence that he does not desire the aid of counsel?

"III

"The right to be represented by counsel is doubly important when there are two counts, under one of which the defendant might have been found guilty only of a misdemeanor, rather than a felony."

The trial judge urged the defendant several times to be represented by counsel, for example,

"The Court: My advice to you is that you obtain the services of a lawyer of your own choosing, or, if not, I will appoint the Public Defender to represent you.

"The Defendant: I believe I have a right within the Constitution to represent myself.

"The Court: You do have that right."

[1] The defendant's mental state was a question for the trial judge. Penal Code, § 1018; Penal Code, § 1368. As pointed out by respondent,

[2, 3] "Since the question whether a 'doubt' has arisen as to defendant's sanity is for the determination of the trial judge, it is only where there is an abuse of that discretion that the trial judge's action may be disturbed on appeal. People v. Gilberg, 197 Cal. 306, 317, 240 P. 1000." See also People v. Perry, 14 Cal.2d 387, 94 P.2d 559, 124 A.L.R. 1123; and People v. Fountain, 170 Cal. 460, 150 P. 341, also People v. Adams, 92 Cal.App. 6, 19, 267 P. 906.

There is no merit to the appeal.

Affirmed.

WHITE P. J., and DRAPEAU, J., concur,

John CLARK, Plaintiff and Appellant,
v.

C. C. CUIN, Imperial Horsemen's Association, a corporation, Hugh Keating, individually and in his official capacity as Constable of Justice Court of the County of Imperial, State of California, Second Judicial Township, et al., Defendants,

C. C. Cuin, Respondent.
Civ. 5109.

District Court of Appeal, Fourth District,
California.

Aug. 9, 1955.

Hearing Granted Oct. 5, 1955. *

Action to quiet title to real property between plaintiff who claimed title by purchase at execution sale and defendant, an alleged redemptioner from plaintiff. The Superior Court of Imperial County, L. J. Mouser, J., rendered judgment for defendant. Plaintiff appealed. The District Court of Appeal, Mussell, J., held that where judgment lien was obtained against real property sold to plaintiff at execution sale and defendant, assignee of judgment lienor, attempted to effect a redemption of the real property but was tendered payment of the judgment by attorneys of purchaser and court ordered clerk to enter satisfaction of judgment, defendant had no further interest in the real property and was bound by satisfaction of judgment.

Reversed.

1. Judgment ☞899

Where a judgment lien was obtained against real property sold to purchaser at execution sale and assignee of judgment lienor attempted to effect a redemption of real property but was tendered payment of the judgment by attorneys of purchaser and court ordered clerk to enter satisfaction of judgment, assignee of judgment lienor had no further interest in the real property and was bound by satisfaction of judgment.

2. Judgment ☞780(1)

The statutory lien of a judgment upon real estate of the judgment debtor can
* Opinion vacated 295 P.2d 40..

attach only upon property in which such debtor has a vested legal interest and the right to redeem carries no vested interest in land.

Dickenson, Sattinger & McKee, El Centro, for appellant.

Charles F. Sturdevant, Jr., El Centro, for respondent.

MUSSELL, Justice.

This is an action to quiet title to 80 acres of land in Imperial county. Plaintiff claims title by purchase at an execution sale and defendant Cuin, by way of cross-complaint, seeks a decree quieting his title to the property as a redemptioner from plaintiff.

There is no dispute as to the following facts: The property involved was acquired by Imperial Horsemen's Association on February 16, 1948. On November 18, 1949, the firm of Bratton and Sturges filed suit against the Horsemen's Association and attached the real property involved. A judgment was entered in favor of Bratton and Sturges and filed on May 12, 1950. A writ of execution was then issued and the land was sold at execution sale on October 20, 1950, to plaintiff John Clark for the sum of \$4,700. A certificate of sale was issued to Clark and recorded in Imperial county November 17, 1950. On November 25, 1949, one Lee Reams filed an action against the said Horsemen's Association and attached the real property previously attached by Clark in his action. A judgment in the amount of \$679.63 in favor of Reams and against said Horsemen's Association was entered on April 10, 1951, and an abstract thereof was recorded in Imperial county on April 29, 1951. On October 1, 1951, Reams assigned his said judgment to the defendant C. C. Cuin and this assignment was recorded October 15, 1951. On October 11, 1951, there was delivered, on behalf of Cuin, to constable Hugh Keating, the selling officer at the execution sale at which plaintiff Clark purchased said property, the following documents: (1) A copy of the judgment certified by the clerk in the Reams v. Imperial

Horsemen's Association action; (2) A copy of the assignment of the Reams judgment, verified by the affidavit of Cuin and affirming the amount then actually due on the judgment; (3) A notice of redemption and cashier's check in the amount of \$5,076. Notice of redemption was thereafter served on the sheriff of Imperial county and was recorded October 13, 1951. On October 11, 1951, constable Keating executed and delivered to Cuin a certificate of redemption, which was recorded October 13, 1951.

On October 18, 1951, attorneys Dickenson and Cline tendered the sum of \$707.38 to defendant Cuin in payment of the Lee Reams judgment. Cuin refused to accept this tender and said attorneys then on October 19, 1951, deposited the amount tendered to the account of Cuin in the El Centro branch of the Bank of America. A duplicate deposit slip was mailed to Cuin and thereafter Cuin transferred \$707.38 to the trust account of his attorneys. Subsequent to this transfer attorneys Dickenson and Cline filed a motion to compel satisfaction of the judgment in the Reams v. Imperial Horsemen's Association case and on August 29, 1952, the superior court of Imperial county made its order directing the clerk to enter satisfaction of this judgment. Cuin appealed from said order and it was affirmed by this court in *Reams v. Imperial Horsemen's Association*, 119 Cal. App.2d 714, 260 P.2d 125. On December 24, 1951, constable Keating executed and delivered a deed to the property involved to Cuin and recorded the deed the same date.

[1] The record herein shows that Cuin obtained an assignment of the Reams judgment on October 1, 1951; that on October 11, 1951, he delivered certain documents to the constable, together with a cashier's check in the sum of \$5,076 in an attempt to effect a redemption of the property and that the constable issued a certificate of redemption. However, on October 18, 1951, attorneys Dickenson and Cline tendered the sum of \$707.38 to Cuin in payment of his judgment. Cuin refused to accept the money and following his refusal, the su-

perior court, after hearing on a motion therefor, ordered the clerk to enter satisfaction of this judgment. Cuin appealed from that order and it was affirmed by this court in *Reams v. Imperial Horsemen's Association*, 119 Cal.App.2d 714, 260 P.2d 125. That decision has become final and Cuin's judgment was paid and satisfied as of October 18, 1951. In that action appellant Cuin claimed that his use of the Reams judgment in the redemption proceedings was a defense to the motion, and this contention was by the court held to be untenable. Cuin's lien ceased to exist when his judgment was satisfied. *City Properties Co. v. Fitzmaurice*, 42 Cal.App. 16, 183 P. 267; *In re Baby's Estate*, 87 Cal. 200, 25 P. 405; *Salveter v. Salveter*, 11 Cal.App.2d 335, 337, 53 P.2d 381; 15 Cal. Jur. 226; 23 C.J. 716; 33 C.J.S., Executions, § 254, p. 531, note 62. Cuin's judgment was satisfied as of October 18, 1951, and he then had no further interest in the real property involved. Therefore, the evidence does not support the trial court's finding that Cuin is the owner of and entitled to possession of the property.

[2] Appellant contends that Cuin had no judgment lien entitling him to redeem since the legal title to the property passed to Clark at the execution sale on October 20, 1950, and Cuin's judgment was not obtained until April 10, 1951, at which time the Imperial Horsemen's Association had no title or interest in the property subject to a judgment lien. There appears to be merit in this contention as it was held in *Helvey v. Bank of America*, 43 Cal.App.2d 532, 534, 111 P.2d 390, 393, that the statutory lien of a judgment upon real estate of the judgment debtor can attach only upon property in which such debtor has a vested legal interest and that the right to redeem carries no vested interest in land. Cuin relies upon *Stetson v. Sheehan*, 52 Cal.App. 353, 200 P. 387, as holding to the contrary, but as was said in *Helvey v. Bank of America*, supra, commenting on the *Stetson* case: "In that case, it is clear that the vested legal title was in the judgment debtor at the time of the recordation of the lien." In the instant case the vested legal title was in Clark when he

purchased the property at the execution sale. *Elbert, Ltd. v. McKenna*, 116 Cal. App.2d 480, 483, 254 P.2d 107. Cuin's judgment was not obtained until long after the debtor's property had passed to Clark. Thereafter Clark had legal title and all that the debtor had was a right to redeem. However, since we have concluded that Cuin's judgment lien, if any, was extinguished by the satisfaction of the judgment and he is bound by the judgment satisfying it, we deem it unnecessary to pass upon this contention.

The judgment is reversed.

BARNARD, P. J., concurs.



134 Cal.App.2d 440

Lloyd J. SEAY, Plaintiff and Appellant,

v.

Otis ALLEN, Eagle Rock Petroleum Co., a corporation, Leo V. Valols, Fred S. Beecher, C. John Terrano, Ashton L. Bigler, Grace Bigler, LeRoy W. Cate, Martha N. Cate, Robert G. Clayton, Katherine Cunningham, Gertrude M. Ryan, Darrow Development, Inc., a corporation, Joseph S. Davis, Kathryn M. Davis, Elsie Drake, Charles L. Eckel, Kathryn T. Eckel, Walter Eisenhauer, May K. Eisenhauer, Albert J. Erleg, Mildred S. Erleg, Eva C. Fansher, Earl H. Fritchman, Helen Fritchman, Irvin C. Fritz, T. M. Gairdner, Helene M. Gairdner, Reuben Greenspoon, Stella Greenspoon, E. P. Hample, Jr., Louise Tate Hample, L. H. Herwick, Norbert Himmelein, Hane Himmelein, Geraldine Hulsemann, Rufus B. Hurst, Arthur W. Johnson, Aleatha F. Johnson, Cecil M. Johnson, Clifford R. Jones, Helen B. Jones, John N. Langfitt, Edith F. Langfitt, Garland E. Lincoln, Pauline J. Lincoln, Caroline Lopez, William A. McDowell, Edyth R. McDowell, David R. McMonigle, Margaret I. McMonigle, Gertrude Medart, Gus H. Medart, William Harvey Morgan, Alice Grace Morgan, F. W. Moulton, Valentine Murray, Mrs. Valentine Murray, Lillian Hill Murtagh, Patricia Lou Murtagh, John

H. Nichols, Nina B. Nichols, Frank Novak, Martha Novak, Joe M. Ollvas, Helen K. Ollvas, H. P. Parker, R. F. Parker, Otto Peters, Elizabeth E. Peters, Joseph Pawsner, John B. Quinn, Hazel Quinn, Charles S. Remy, Mary Reynolds Remy, Mary Love Richardson, A. H. Roesch, Thomas G. Rotella, Gloria Rotella, Ada Sablin, Grant N. Scott, Dorothy E. Scott, Charles F. Sexton, Annabelle Sexton, B. F. Smallwood, Francis Smallwood, Lawrence A. Snyder, Ruth M. Speex, John E. Spence, Anna Marie Spence, Lillian M. Springer, Salvatore Squillace, Rose Squillace, Phillip G. Taylor, Simon N. Thompson, Karen J. Thompson, Edward F. Van Fossen, Edward M. Warman, Clara A. Warman, Helen Warman, Edwin W. Winkler, Alice E. Winkler, J. B. Wightman, Evelyn A. Wightman, Harold O. Wolfe, Nana A. Wolfe, Ida C. Zarucchi, Lena Zarucchi, L. C. Riley, William D. Hill, Doe Two Through Doe One Hundred, inclusive, and Chieftan Oil Co., a Corporation, Defendants and Respondents.

Civ. 20870.

District Court of Appeal, Second District,
Division 2, California.

July 20, 1955.

Hearing Denied Sept. 15, 1955.

'Action to quiet title to mineral rights under lease on government land. The Superior Court, Los Angeles County, J. F. Moroney, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that where original lessee under mineral lease on government land assigned lease to corporation, in return for stock, and, thereafter, acquiesced in corporation's renewal of lease and making of contract with drilling company, and stood silent as corporation and drilling company expended large sums in protecting their title and in conducting a drilling campaign, his claim that corporation had failed to comply with provisions of first lease or had broken conditions of assignment was barred by laches.

Judgment affirmed.

1. Mines and Minerals 6-74

Where original lessee under mineral lease on government land assigned lease to

corporation, in return for stock, and, thereafter, acquiesced in corporation's renewal of lease and making of contract with drilling company, and stood silent as corporation and company expended large sums in protecting their title and in conducting a drilling campaign, his claim that corporation had failed to comply with provisions of first lease or had broken conditions of assignment was barred by laches. Act Aug. 8, 1946, § 15, 30 U.S.C.A. § 181 note; Act July 29, 1942, § 1, 30 U.S.C.A. § 226b; 30 U.S.C.A. §§ 181 et seq., 226.

2. Appeal and Error — 671(3), 907(3)

Where appellant brought only clerk's transcript, without transcript of evidence, findings were presumptively correct, and contention that evidence did not support findings could not be considered.

B. W. Kemper, Lloyd J. Seay, Los Angeles, in pro. per., for appellant.

Jesse A. Hamilton, Lakewood, for respondent Chieftan Oil Co.

MOORE, Presiding Justice.

Plaintiff appeals from a judgment denying his demand that his title be quieted in certain acreage which had been leased to him by the United States as potential oil land. He seeks a reversal on the grounds that (1) the findings do not support the judgment; (2) the evidence does not support the findings. Inasmuch as the latter ground contemplates a study of the transcript of the evidence, it cannot be considered on an appeal based solely as is this, upon the judgment roll and certain exhibits.

The findings are that a lease was executed February 1, 1946, under an act of February 25, 1920, 41 Stat. 437, as amended, 30 U.S.C.A. § 181 et seq. In April 1947 appellant contracted with Riley and Hill for the development of the oil resources underlying the half section so leased to him by the General Land Office. That firm

thereupon sold various interests in such operating agreement to the individual defendants who by virtue thereof assert an interest in the oil land adverse to appellant. After such sales, Riley and Hill caused to be incorporated the Eagle Rock Petroleum Company, herein referred to as "Eagle" which acquired the rights of Riley and Hill in the operating agreement. Eagle obtained a permit for the issuance of securities. Thereafter on March 29, 1950, appellant assigned his lease to Eagle in consideration of 75,000 shares of its capital stock, and the operating agreement was cancelled. On April 18, 1950, the Bureau of Land Management approved the assignment. Thereupon Eagle posted a lessee's bond in the sum of \$5,000 and complied with every term of the lease and with all terms of the permit to issue its shares. Drilling had been commenced as required, but had ceased February 11, 1949. The original lease to appellant expired January 31, 1951, and was not renewed or extended. In fact, it could not have been either renewed or extended for the excellent reason that Seay's assignment of the lease divested him of all interest in the land, as tersely observed by the Bureau of Land Management of the Department of Interior. Thereafter, Eagle leased the same land from the United States on August 1, 1951. The permit to issue shares of Eagle expired November 20, 1951.

Contrary to appellant's allegations, he made no demand that Eagle comply with the permit and continue drilling operations on the leased land; neither did the corporation refuse to do so. On December 3, 1951, appellant served upon Eagle a notice of rescission of his assignment of the lease and a demand for repossession, based upon the failure of Eagle to deliver the consideration for such lease.

At all times prior to the last mentioned date, but after the execution in February 1946 of the lease to appellant, the law provided¹ that the title holder of a "non-

1. Code of Federal Regulations: Title 43, Public Lands: Interior

"Section 192.130 *Preference right to a new lease.* Upon the expiration of its five-year term the record title holder of

a noncompetitive lease issued prior to August 8, 1946 and maintained in good standing, who has not filed a notice of election pursuant to section 15 of the act of August 8, 1946 [30 U.S.C.A. §

competitive lease issued prior to August 8, 1946, and maintained in good standing, who has not filed a notice of election pursuant to section 15 of the act of August 8, 1946, may apply for a new lease for the same land pursuant to * * * Section 1 of the act of July 29, 1942 * * * provided the leased land is not then within the known geologic structure of a producing oil or gas field." C.F.R. Title 43, Public Lands, p. 374, Part 192, sec. 130. At no time did appellant file or cause to be filed a notice of election pursuant to Section 15 of the last quoted act or apply for a new lease. The oil and gas lease had been maintained in good standing. On January 19, 1951, Eagle applied for a new lease under act of August 8, 1946, *supra*.

On July 13, 1951, in the City of Los Angeles, California, a special meeting of the board of directors of Eagle was duly assembled, at which time it was unanimously resolved to complete the best deal obtainable in order to procure a new lease and to secure the issuance of the lessee's bond and negotiate for arrangements to produce oil and gas. At that time, appellant was present and stated that he at one time had people interested in the lease of the land but that they are no longer so because of the legal entanglement involving the corporation. Also, he there said that he was unable to assist in the procurement of the lessee bond.

August 1, 1951, a new lease (No. 085647) on the same land was issued to Eagle for a term of five years and so long thereafter as oil and gas are produced in commercial quantities. Also, Eagle procured the issuance of a lessee's bond, paid the premium and retained counsel to carry out the resolution of the board. Such new lease was acquired by virtue of the preferential

rights of appellant which had been, by virtue of the transfer of his lease, assigned to Eagle.

On December 3, 1951, appellant gave notice of rescission of his assignment of lease on March 29, 1950, and nine days later Eagle entered into a new drilling agreement with the Chieftan Oil Company whereby Eagle reserved definite interests in the productive wells to be drilled by Chieftan. After executing the drilling contract, Chieftan proceeded with its performance. Although it expended large sums of money in repairing roads to the property, appellant at no time made objection during the performance of such acts prior to filing the instant action, with the exception of serving his notice of rescission and demand for possession.

Chieftan's acts were performed with appellant's knowledge and acquiescence; he made neither claim nor demand on Eagle at the time the latter applied for the new lease, or when Eagle posted the lessee's bond required by the lease.

[1] Appellant has been guilty of laches and unreasonable delay in the prosecution of this action. During such period, by virtue of its expenditures for land rental, bond premiums, filing fees, attorney's fees and administrative costs and of its liabilities incurred by agreements in writing relating to the leased property, Eagle's leasehold rights cannot be defeated by appellant's belated complaint of Eagle's failure to comply with the provisions of the first lease or of the breach of the assignment thereof. Every defendant is in equally as secure a position in that he has contributed funds for such expenditures and for the reduction and elimination of indebtedness. Eagle, its officers and directors, subjected themselves

181 note], may apply for a new lease for the same land pursuant to the provisions of section 1 of the act of July 29, 1942 (56 Stat. 726; 30 U.S.C. § 226b), provided the leased land is not then within the known geologic structure of a producing oil or gas field. Any lease issued under this section will be for a period of five years and so long thereafter as oil or gas is produced as provided in section 17 of the act [30 U.S.C.A. § 226] and

will be subject to the rules and regulations then in force.

"To obtain such a new lease, the lessee must, within the period beginning 90 days prior to the date of expiration of the lease and ending on the date of expiration, submit an application in accordance with section 192.42, accompanied by a proper filing fee and the first year's rental of 50 cents per acre or fraction thereof."

to liability in order to procure the issuance of a lessee's bond July 1951, without which a new lease would not have been issued to Eagle on August 1, 1951. Without such new lease there would have been nothing to give rise to appellant's action inasmuch as the new lease would not have been issued but for such expenditures. By reason of the above facts, it would not be fair, just or equitable to allow appellant to prevail with this action.

By finding such facts, the trial court correctly disposed of appellant's action. If he did not bow out by his assignment of the first lease to Eagle and by his receipt of the consideration for the lease, he severed all connection with the property (1) when his lease expired; (2) when he acquiesced in the new lease to Eagle and in Eagle's contract with Chieftan Oil for the drilling of well; (3) by his standing silently by as Eagle and Chieftan expended large sums in protecting their title and in conducting a drilling campaign on the leased land. If he had believed himself to be invested with title to a lease on the property, he would, as a reasonably prudent operator, have asserted his claim when the Land Office made the second lease to Eagle, and as an honest operator he would have advised both corporations of his claims when they continued to expend moneys to protect and develop the lease. Appellant's notice of rescission had no factual basis. He had exchanged his lease for shares in Eagle. A failure to deliver them is not presumed to have been a fraudulent inaction.

[2] Without a transcript of the evidence, it is not possible to determine that the findings made were not justified. Coming here with only the clerk's transcript, such findings are presumptively correct. Exhibits do not necessarily constitute all the evidence of a trial. If overwhelming evidence contrary to the findings had been adduced, it could effect no change in the judgment roll so long as such evidence is not before this court. *Woodmen of the World v. Rutledge*, 133 Cal. 640, 644, 65 P. 1105. It was incumbent upon appellant to produce the evidence here which he contends would have required a different

finding; having failed to do so, he gets no relief. *Citizens National Trust & Saving Bank and Title Insurance & Trust Co. v. Maher*, 6 Cal.2d 386, 388, 57 P.2d 917. A mere recital of grievances will not suffice.

The conclusions of the trial court are correct.

The judgment is affirmed.

McCOMB and FOX, JJ., concur.



134 Cal.App.2d 606

Michael DE LUCA, Petitioner and Appellant,

v.

BOARD OF SUPERVISORS OF LOS ANGELES COUNTY and Valley Land Development Company, a Co-Partnership, Defendants and Respondents.

BARTHOLOMAE CORPORATION, a California Corporation, Petitioner and Appellant,

v.

BOARD OF SUPERVISORS OF LOS ANGELES COUNTY and Valley Land Development Company, a Co-Partnership, Defendants and Respondents.

Civ. 20867, 20868.

District Court of Appeal, Second District,
Division 3, California.

July 27, 1955.

Hearing Denied Sept. 21, 1955.

Proceedings on petitions to review grant of variance by Zoning Board as approved by Regional Planning Commission and affirmed by Board of Supervisors. The Superior Court, Los Angeles County, Arnold Praeger, J., denied each petition for writ of review and appeals were taken. The District Court of Appeal, Ashburn, J. pro tem., on original hearing, held that the petitions were insufficient, 285 P.2d 43, and, on rehearing, reaffirmed its position.

Order affirmed in each case.

Opinion, 285 P.2d 43, vacated.

1. Appearance Ⓒ24(1)

As general rule, one who has been notified to attend a certain proceeding and does so, cannot be heard to complain of alleged insufficiency of the notice, which has in such instance served its purpose.

2. Appearance Ⓒ24(5)

Rule that one who has been notified to attend a certain proceeding and does so cannot be heard to complain of alleged insufficiency of notice applies to one who appears in a lawsuit after defective service of process upon him.

3. Motions Ⓒ23

Rule that one who has been notified to attend a certain proceeding and does so cannot be heard to complain of alleged insufficiency of the notice applies to one who responds to a notice of motion without adequate notice.

4. Administrative Law and Procedure Ⓒ454

Rule that one who has been notified to attend a certain proceeding and does so cannot be heard to complain of alleged insufficiency of the notice applies to one who appears in an administrative proceeding without the notice to which he is entitled by law.

5. Municipal Corporations Ⓒ621.40

Rule that one who has been notified to attend a certain proceeding and does so cannot be heard to complain of alleged insufficiency of the notice applies to a hearing upon a zoning application.

6. Counties Ⓒ21½

In proceedings on petitions to review grant of variance by Zoning Board, as approved by Regional Planning Commission and affirmed by county Board of Supervisors, it was incumbent upon petitioners to aver facts which would show absence or excess of jurisdiction, and allegations would have to be sufficient to overcome statutory presumption of regularity and legality of official action. West's Ann.Code Civ.Proc. § 1963, subd. 15.

7. Counties Ⓒ21½

In proceedings to review grant of variance by Zoning Board as approved by Regional Planning Commission and affirmed by county Board of Supervisors, petitions

which did not allege that petitioners were misled by notice of application to establish, operate and maintain a "land reclamation project" which was in fact a public dump, or allege facts showing they were entitled to notice or allege that petitioners did not attend the hearing and participate therein, were insufficient to overcome presumption of regularity and legality of official action. West's Ann.Code Civ.Proc. § 1963, subd. 15.

Mize, Kroese, Larsh & Mize and Royal E. Hubbard, Santa Ana, for appellants.

Harold W. Kennedy, County Counsel, Edward H. Gaylord, Deputy County Counsel, Los Angeles, for respondent Board of Supervisors of Los Angeles County.

Burke, Williams & Sorensen, Los Angeles, for respondent Valley Land Development Co.

ASHBURN, Justice pro tem.

These cases involve the same facts and identical law points, with one exception which needs no comment. Each is an appeal from an order denying petition for writ of review. Counsel for the respondent Board of Supervisors stood upon a memorandum of law filed in opposition to the application and the ruling must be tested by the allegations of the petition. That of DeLuca will be reviewed; the Bartholomae Corporation petition contains the same allegations.

Petitioner says he is the owner of certain real property upon which he has a residence; it is located within zones A-1 and M-3 under the county zoning ordinance, No. 1494, and the maintenance of a public dump in those zones is prohibited; respondent Valley Land Development Company filed an application with the Regional Planning Commission of the County requesting that a zone exception be granted "to permit a public dump" upon its land which is in the immediate vicinity of that of petitioner; the zoning ordinance requires ten days notice of hearing of such an application, i. e., by publication in a newspaper, and by post card mailed to all persons whose names and addresses appear on the assessment roll as

owning property within a distance of 500 feet from the exterior boundaries of the area to be occupied by the use for which the variance is sought; notice was published and mailed; each gave notice of a hearing of a request for an exception to the A-1 zone "in order to establish, operate and maintain, a land reclamation project" on the subject property. Each petition also says that there are only two land owners in the vicinity of applicant's property which are within 500 feet of its exterior boundaries, and that one of those owners is said Valley Land Development Company. The petition says the notice was published as required and was mailed to the persons required by the ordinance, but does not show whether petitioner received one or whether he ever saw or knew its contents. It is alleged that a public hearing was held by the Zoning Board, which made findings favorable to the application and recommended that the exception applied for be granted; that thereafter the Regional Planning Commission approved and adopted said finding and recommendation. Also that, within the time prescribed by the ordinance, an appeal was taken by Bartholomae Corporation to the Board of Supervisors and the decision of the Regional Planning Commission was affirmed. It was alleged further, by way of conclusion, that the establishment of a dump as contemplated would constitute a nuisance; also that it would depreciate the value of petitioner's property.

The petition and the briefs on appeal assert an excess of jurisdiction in that the published and mailed notices "contain no adequate intimation of the true subject matter of the application, namely permission to establish a public dump on the property described"; that they "are not real notice, or in truth and in fact any notice at all." The gist of the argument is that a public dump is not "a land reclamation project" and that the notice is essentially misleading; that the object of a notice is an opportunity to interested persons to be heard and hence it must adequately inform as to the true nature and subject matter of the hearing. Also that "when the method for the exercise of the power is prescribed by the stat-

ute such method is the measure of the power to act. * * * When the statute requires notice and hearing as to the possible effect of a zoning law upon property rights the action of the legislative body becomes *quasi* judicial in character, and the statutory notice and hearing then becomes necessary in order to satisfy the requirements of due process and may not be dispensed with." *Hurst v. City of Burlingame*, 207 Cal. 134, 141, 277 P. 308, 311. Appellant relies upon *Kane v. Board of Appeals of City of Medford*, 273 Mass. 97, 173 N.E. 1, which holds in effect that such a notice must be a real and not a misleading one.

Counsel for respondent Board of Supervisors argue "As a practical matter there is no distinction between a land reclamation project and a dump, when the reclamation is carried on by means of a sanitary fill operation. * * * In view of the modern practices of land reclamation the terms 'land reclamation project' and 'public dump' are sufficiently synonymous so that notice of one constitutes notice of the other," and they say that the zoning ordinance provides: "Section 224. Land Reclamation Projects Defined. The disposal of rubbish and unwanted material in such a manner so as to fill up holes and other depressions or in other ways make the property more usable shall be known as a land reclamation project."

We find it unnecessary to resolve these questions propounded by counsel for the petition fails to aver any facts showing injury to petitioner as a result of the alleged inadequacy of the notice. The point is raised by respondent and is meritorious.

Petitioner does not specifically allege that his property is within 500 feet of the exterior boundaries of that of Valley Land Development Company, although his allegations are obviously designed to give that impression,—that he was entitled to mailed notice. Not only does petitioner fail to disclose whether he was in fact entitled to notice by mail, or whether one was received in that manner, or whether he acquired knowledge of the contents of a published notice, or whether he was misled thereby into staying away from the hearing, but he does not

tell the court whether he did attend and participate in the meeting, with or without protest as to the form of the notice.

[1-5] The general rule is that one who has been notified to attend a certain proceeding and does do so, cannot be heard to complain of alleged insufficiency of the notice; it has in such instance served its purpose. This rule applies to one who appears in a lawsuit after defective service of process upon him, 21 Cal.Jur. § 4, p. 477, to one who responds to a notice of motion without adequate notice, 18 Cal.Jur. § 7, p. 652. Also to one who appears in an administrative proceeding without the notice to which he is entitled by law. 2 Cal.Jur.2d § 108, p. 202; *Howe v. State Bar*, 212 Cal. 222, 231, 298 P. 25; *Light v. State Bar*, 14 Cal.2d 328, 331-332, 94 P.2d 35; *Farmers' etc., Bank v. Board of Equalization*, 97 Cal. 318, 325, 32 P. 312. The rule also applies to a hearing upon a zoning application. See *Hopkins v. MacCulloch*, 35 Cal.App.2d 442, 451, 95 P.2d 950; *Livingstone Rock, etc., Co. v. County of Los Angeles*, 43 Cal.2d 121, 129, 272 P.2d 4; *Keeling v. Board of Zoning Appeals*, 117 Ind.App. 314, 69 N.E.2d 613, 616; *Wilson v. Township Committee of Union Tp.*, 123 N.J.L. 474, 9 A.2d 771, 772; *Hancock v. City of Boston*, 1 Metc. 122, 123, 42 Mass. 122, 123.

[6] It is incumbent upon the petitioner to aver facts which show an absence or excess of jurisdiction. 10 Cal.Jur.2d § 212, p. 348; § 68, p. 141; § 86, p. 166; *Chambers v. Board of Supervisors*, 57 Cal.App. 401, 407, 207 P. 288; *Landtbom v. Board of Fire Com'rs*, 98 Cal.App. 629, 632, 277 P. 369; *Traders' Credit Corp. v. Superior Court*, 111 Cal.App. 663, 666, 296 P. 99; 2 Cal.Jur.2d § 212, p. 348. And, as there is a presumption of regularity and legality of official action, Code Civ.Proc. § 1963, subd. 15, the allegations must be sufficient to overthrow the same. In *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 56 S.Ct. 159, 80 L.Ed. 138, the court affirmed an order dismissing a suit to enjoin enforcement of an order of the Oregon Department of

Agriculture prescribing use of a certain type of container for berries. Concerning the sufficiency of the allegations, the court said at page 185 of 296 U.S., at page 163 of 56 S.Ct.: "It is urged that this rebuttable presumption of the existence of a state of facts sufficient to justify the exertion of the police power attaches only to acts of Legislature; and that where the regulation is the act of an administrative body, no such presumption exists, so that the burden of proving the justifying facts is upon him who seeks to sustain the validity of the regulation. The contention is without support in authority or reason, and rests upon misconception. * * * But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies. Compare *Aetna Ins. Co. v. Hyde*, 275 U.S. 440, 447, 48 S.Ct. 174, 72 L.Ed. 357 [364]".

Beverly Oil Co. v. City of Los Angeles, 40 Cal.2d 552, 254 P.2d 865, was an attack upon the application of a zoning ordinance to plaintiff's nonconforming use. At page 559 of 40 Cal.2d, at page 869 of 254 P.2d the court said: "The burden rests upon the plaintiff to establish the invalidity of the ordinance in its application to the property involved. The plaintiff's failure to sustain this burden raises a presumption of the existence of such facts as are sufficient to sustain the ordinance. *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 56 S.Ct. 159, 80 L.Ed. 138, [101 A.L.R. 853]."

[7] If petitioner was misled in any substantial way by the notice in question or if he was not present at the hearing, it was necessary for him to show the fact in his petition; as he has not done this the presumption of lawful action is not overthrown and his petition was properly denied.

The order denying certiorari is affirmed in each case.

SHINN, P. J., and VALLÉE, J., concur.

134 Cal.App.2d 485

Joe CAMPERI et al., Plaintiffs and Appellants,

v.

Anna CHIECHI, etc., Defendant and Respondent.

In the Matter of the ESTATE of Ciro CAMPERI, Deceased.

Joe CAMPERI et al., Contestants and Appellants,

v.

Anna CHIECHI, as Executrix, etc., and Rosolino CAMPERI, Devisee and Legatee, Respondents.

Civ. 20321, 20322.

District Court of Appeal, Second District, Division 2, California.

July 21, 1955.

Rehearing Denied Aug. 11, 1955.

Hearing Denied Sept. 15, 1955.

Action to contest will and action against executrix to set aside deeds, to recover proceeds of condemnation, for accounting and to impress trust on certain property, were consolidated for trial. The Superior Court, Los Angeles County, H. S. Farrell, J., denied revocation of probate and rendered judgment for executrix and plaintiffs appealed. The District Court of Appeal, Fox, J., held that evidence was sufficient to support trial court finding that no undue influence existed in execution of will by testator, but that refusal of court to admit testimony germane to issue of character of one daughter's title to insurance funds, of which she was named beneficiary, whether upon trust basis or as outright beneficiary, was prejudicial error.

Judgment denying revocation of probate affirmed; judgment for executrix reversed in part and remanded with directions.

1. Wills ⚡52(1), 55(1)

Where unsoundness of mind is ground of will contest, it is presumed that testator was competent to execute will and burden rests on contestant to prove affirmatively and by preponderance of evidence that testator was of unsound mind at time he executed instrument.

2. Wills ⚡55(1)

Testimony of lay witnesses as to mental condition of testator at or about time of execution of will, when accepted by court, gives substantial support to finding of competency.

3. Wills ⚡50

A testator is of sound and disposing mind if, at time of making his will, he has sufficient mental capacity to understand nature of his testamentary act, to understand and recollect nature and situation of his property, and to remember and understand his relations to natural objects of his bounty whose interests are affected by the will.

4. Wills ⚡49

Circumstance that testator is uneducated and illiterate, unable to read handwriting, and unable to write, except to sign his name, has no bearing upon his mental sanity or testamentary capacity.

5. Wills ⚡302(1, 3)

In action to contest will, evidence was sufficient to establish due execution of will and fact that testator had knowledge of its contents.

6. Wills ⚡109

Will drawn in accordance with intentions of testator and executed in due form of law is valid even though written in language not understood by testator where it is shown he had full and accurate knowledge of its contents.

7. Wills ⚡119, 120

Testator need follow no particular form with respect to request for attestation or declaration that instrument is his will and express declaration and request are unnecessary if such are sufficiently indicated to witnesses by testator's conduct and actions.

8. Wills ⚡155(1)

Undue influence which justifies setting aside of will must be such as deprives testator of his free agency, destroys freedom of his purpose, and renders testamentary instrument expression of will of another, rather than his own, and it must operate at time will is made.

9. Wills ⇨163(4)

Where beneficiary who unduly profits from will occupies confidential relationship towards testator and there is proof of activity on his part in procuring preparation or execution of will, rebuttable presumption of undue influence arises.

10. Wills ⇨163(2)

Mere existence of confidential relationship between testator and beneficiary does not bring into play presumption of undue influence where beneficiary has not participated in making of the will.

11. Wills ⇨166(1)

In action to contest will, evidence was sufficient to support trial court's finding that no undue influence existed which operated on testamentary act and displaced testator's free will.

12. Wills ⇨166(4)

Securing attorney designated by testator at his request to draw will does not constitute participation.

13. Wills ⇨166(1)

Fact that will is prepared from directions given by testator to his attorney when no one else is present is very strong evidence that it was testator's voluntary act.

14. Wills ⇨166(5)

Where disposition of property is shown to have been consciously inspired by logical, if erroneous, reasons harbored in mind of testator, no inference is compelled that decedent's volition did not accompany testamentary act, simply because will appears unjust to certain natural objects of his bounty.

15. Wills ⇨400

In action to contest will question of undue influence was one of fact and trial judge having reasonably found evidence to weigh more heavily in favor of finding of absence of undue influence, his finding would not be disturbed on appeal.

16. Deeds ⇨196(3)

Presumption of invalidity of deed because of existence of relationship of trust between grantor and grantee, may be overcome where it is manifest that grantor acted voluntarily and with full understanding,

and that benevolent act was engendered in testator's own mind without overreaching or improper importunity on part of grantee. West's Ann.Civ.Code, § 2235.

17. Deeds ⇨78

Whether donee of deed has rebutted presumption of invalidity by showing transaction was untainted by undue influence is question for trier of facts.

18. Appeal and Error ⇨1010(1)

Before appellate tribunal would be justified in reversing finding of trial court that there was no unfairness, fraud, or undue influence on part of donee of deed, it must appear that there is no substantial evidence to support such finding.

19. Gifts ⇨38

Influence acquired by means of acts of kindness and attention, good offices and devoted administrations, is not undue if no deceit is practiced and gift is voluntary act of donor.

20. Deeds ⇨211(4)

Lack of independent advice by grantor is not of and in itself ground for vitiating deed under circumstances of confidential relationship, but is fact to be weighed by trial court in determining whether grantor acted voluntarily and with complete understanding of transaction.

21. Deeds ⇨54

Validity of properly executed deed of conveyance depends on its delivery by grantor with concomitant intent of transferring property described therein to grantee.

22. Deeds ⇨56(2)

If at time he parts with possession of deed grantor intends to divest himself of title to property conveyed, there is effective delivery of deed passing title irrevocably to grantee.

23. Deeds ⇨56(2), 66

Solution of question of whether effective delivery of deed takes place is grounded entirely on intention of grantor, which is question of fact to be determined by trial court on all pertinent evidence.

24. Deeds ⇨208(7)

In action against grantor's executrix to set aside deeds, evidence was sufficient

to support trial court finding that at time grantor gave completed deed to his attorney he intended to make presently operative transfer of title to grantee.

25. Appeal and Error ⇨1012(1)

When trial court has declared deed to be exactly what it purports to be, appellant cannot expect reversal of such determination unless evidence is almost overwhelmingly the other way.

26. Contracts ⇨324(1)

Deeds ⇨144(2)

Promise of grantee named in deed to take care of grantor's obligations and living expenses is most reasonably construed as mere personal covenant, for breach of which cause of action for damages would lie.

27. Trusts ⇨44(1)

In action against executrix to impress trust on certain property of testator, evidence was insufficient to establish that grantee named in deeds to such property held it in trust.

28. Joint Tenancy ⇨3

In action against beneficiary to impress trust on certain property of testator, evidence was sufficient to overcome presumption of undue influence with respect to opening of joint tenancy account between testator and his daughter and to show that testator recognized that his death would transfer title to such funds to his daughter by operation of law.

29. Joint Tenancy ⇨3

In action against executrix to recover proceeds of condemnation, evidence was sufficient to support trial court's determination that no undue influence existed in procuring deposit of such funds in joint account of testator and his daughter.

30. Counties ⇨167

County warrant may be transferred by payee by assignment.

31. Banks and Banking ⇨126

Where county warrant in payment for condemnation sale was endorsed and deposited in bank and joint account given full credit therefor, relationship subsisting between bank and joint depositor was not

that of principal and agent but one of creditor and debtor.

32. Banks and Banking ⇨127

Where bank received county warrant in payment for condemnation and placed amount thereof to credit of joint depositors, it succeeded to their right to receive payment thereon and warrant itself was no longer subject to depositor's control, and subsequent death of one joint depositor did not affect bank's right, since as assignee or subrogee of his rights under warrant to receive moneys it was not agent of such depositor. West's Ann.Civ.Code, § 2356.

33. Banks and Banking ⇨123

Fact that credit allowed by bank on deposit other than cash is provisional until ultimate payment is received does not convert creditor-debtor relationship between bank and depositor into one of principal and agent. West's Ann.Financial Code, § 1011.

34. Trusts ⇨17(2), 43(1)

Trusts in personalty may be created orally and may be established by parol evidence.

35. Appeal and Error ⇨1056(1)

Trusts ⇨42

In action against the executrix of estate to impress trust on certain property of testator, refusal of court to admit testimony germane to issue of character of one daughter's title to insurance funds, of which she was named beneficiary, whether upon trust basis or as outright beneficiary, was prejudicial error.

36. Wills ⇨400

In action to contest will, appraisal of witness' testimony and evaluation of weight to be accorded it, was for trial court.

Edmond Gattone, Warner I. Praul, Los Angeles, for appellants.

John E. Sisson, Los Angeles, for respondents.

FOX, Justice.

Slightly less than six months after the will of Ciro Camperi (referred to herein as Ciro) was admitted to probate and letters testamentary issued to one of his five

surviving children, Mrs. Anna Chiechi (designated herein as Anna), a contest of the will was filed. The will had been executed on November 5, 1949, when Ciro was about 86 years old. His death occurred on September 22, 1950. The contestants are Joe and Anthony (Tony), sons of Ciro, Lucy (Lucia) Biondolillo, his other daughter, and Frieda Hanson and Colleen Camperi, the children of Ciro's predeceased son John. The grounds of contest are unsoundness of mind, undue influence exercised on the part of Anna, and want of due execution.

Thereafter, all of those named as contestants, and joined by another of Ciro's sons, Ross (Rosolino) Camperi, initiated an action (No. 604316 below) against Anna individually and as executrix to set aside a deed by which Ciro conveyed certain parcels of real property to Anna, to recover from Anna the proceeds derived from a warrant issued to Ciro by the County of Los Angeles in settlement of a condemnation proceeding, for an accounting of rents and profits allegedly collected by Anna from Ciro's property, and to impress a trust on the above described real and personal property.

Both actions were consolidated for trial by the court sitting without a jury. The court denied the petition for revocation of probate and rendered judgment in Anna's favor. In the companion case Anna likewise prevailed and judgment was rendered against plaintiffs therein. The appeals taken from both judgments are consolidated for purposes of review.

Ciro's last will, a very brief and simple document, devised and bequeathed his estate as follows: To his children Joe and Lucy and his granddaughters Frieda Hanson and Colleen Camperi the sum of \$1 each; the residue, in equal shares, to his remaining children, Anna, Ross and Anthony. Anna was named as executrix without bond.

The principal assignments of error are (1) that the findings of due execution of the will and absence of undue influence by Anna in procuring it are not supported by the evidence and are contrary thereto; (2) (a) that the inter vivos conveyance of real

property from Ciro to Anna made at the time the will was signed was never effectuated by delivery of the deed; (b) that assuming delivery, the conveyance was made upon an oral trust and not as a gift; (c) that Anna procured the deed by virtue of her confidential relationship to Ciro and has failed to rebut the presumption of fraud arising from such transaction; (3) that a joint tenancy bank account agreement between Ciro and Anna was procured by Anna's undue influence stemming from her fiduciary relationship with Ciro. Several other claims of error will be adverted to and considered subsequently.

Background Facts.

The record discloses that Ciro, who was of Sicilian origin, immigrated to the United States in about 1898, at which time he was 35 years old. He had been married abroad six years earlier to Frieda Biondolillo. Frieda died in 1932 and Ciro remained a widower until his death. Ciro's primary occupation was that of a railroad yard laborer for the Southern Pacific Company. He was so employed for almost 24 years until his retirement upon a pension in 1923. This monthly pension was originally \$19.10 but was gradually increased to \$24.10.

Ciro never attended school in Italy and had little, if any, formal education. His principal spoken tongue was the dialect of his native province, but he had sufficient mastery of the basic Italian language to converse with numerous friends who came from various parts of Italy. Although a resident of the United States for over 50 years, his ability to read and write English was fairly limited. However, he could read his name in English, he could identify the months of the year, was able to read his utility bills and could read various items advertised in newspaper sales and their selling prices. He knew the alphabet and was able to write his name in English, although near the end of his life he preferred to sign by a mark as it became increasingly difficult for him to write firmly and clearly. Ciro's English vocabulary was anything but extensive, but he spoke English frequently and intelligibly, comprehended when spoken to in that language, and was

capable of expressing himself satisfactorily enough therein for his ordinary communication requirements. He was able to meet the requirements for obtaining citizenship and became naturalized. A decade or so before his death he used to go alone to his attorney Mr. Sisson, who spoke only English, to consult on legal matters. On other occasions, Anna interpreted or translated for him during legal conferences or medical visits.

Despite his linguistic deficiencies, Ciro was able to maintain his job for 24 years. He also was able to acquire ownership, as of the date of the will here in question, of the home in which he resided, three other houses from which he obtained rents, and two additional parcels of real property which were then the subject of a condemnation proceeding. In 1942, Ciro had sold a parcel of property to the Goodwill Industries, at which time he signed his name to a deed in English. At the same time, he negotiated in English with the Philley Mortgage Company for procuring a check for the proceeds and then went to the California Bank where, speaking English, he had six cashier's checks for \$250 each drawn to each of his then living children as payees (the transactions being a gift as to them).

For much of the time after he was widowed and his children married, Ciro lived mostly by himself. Anna lived across the street from him. For about three years prior to 1947, Ciro had his meals and slept in Anna's home, but passed the daytime hours in his own home. For three months in 1947 he stayed with Anthony. From 1947 until his death in 1950, he lived in his own home. During the last years of his life, Anna took care of him, prepared his meals, brought them to his house, washed, ironed and cleaned for him, and nursed him during illness. One witness testified that decedent told him in 1950 that "if it wouldn't have been for [Anna], * * * nobody would help him, nobody would come around to see him." Ciro spent much of his declining days at church, sometimes going four or five times a day. Anna seems to have been the mainstay in Ciro's later life and he reposed great trust in her.

At his request she collected the rents from his properties and made out receipts for the tenants. When he asked her to, she withdrew funds for him from a bank account in their joint names in which Ciro's money only was deposited. Ciro himself never withdrew money from the account and Anna only when requested by her father. Upon his request, she cashed his pension checks and gave him the money. Ciro often provided her with money for the purpose of paying his bills in the latter years of his life.

The Joint Bank Account.

The record shows that from at least as early as 1927, Ciro, his wife Frieda, and Anna together had a single bank account (No. 9482) with the California Bank. On October 7, 1929, Ciro, Frieda and Anna executed an agreement to hold the above account in joint tenancy. Although Frieda died in 1932, Anna and Ciro continued to maintain the account until May 6, 1937, when the remaining balance of \$37.40 was withdrawn and the account became inactive. When Ciro sold some real property to the Goodwill Industries in 1942, he asked Anna to drive him to the Philley Mortgage Company, where he received a check for \$3,033.99 representing the purchase price. He then asked Anna to take him to the California Bank to accomplish a negotiation of the check. While there he had six cashier's checks drawn in the amount of \$250 as a gift for each of his children and issued one check for \$265 to a contractor. Ciro at first desired to retain the balance of about \$1,200 in cash. However, a bank officer suggested it was too much to keep in cash and Ciro agreed to deposit \$1,000. He informed the bank officer opening the account that he wanted Anna to be named as a joint tenant with him. Thereupon another joint tenancy agreement card was executed by Ciro and Anna under date of April 11, 1942. The text of the agreement was similar to the one signed by Anna and Ciro in 1929 except for a clause relating to the bank's right of recovery against either signatory in the event of an overdraft. Anna testified she had no intimation that her father

would create a new account in joint tenancy until the agreement was presented to her by Ciro and the bank officer for execution.

In July of 1948, Anna was a party to an escrow with the California Bank relative to property she was purchasing. She told Ciro about her deal and he told her she could use the funds from the joint account for the transaction. Thereupon Anna withdrew \$1,625 from the account, bought a cashier's check and deposited it in escrow. On the same day, she reimbursed her father in full from cash which she had in her home. Her father placed the money in an envelope and took it home with him.

The Role of Attorney Sisson.

An understanding of the relationship between John Sisson, Anna's attorney of record herein, and Ciro and Anna is of significance in the resolution of this case. The first contact Sisson had with the decedent's family occurred in 1932, when Ciro's wife died and probate of her estate was necessary. Ciro employed Sisson for this purpose upon recommendation of an officer of the California Bank. In the same year, Ciro visited Sisson alone at his office and engaged him to draw the first of four wills. In 1943, when his son John died, Ciro himself arranged for a second will to be drawn and went by himself to confer with Sisson in its preparation. On occasions Ciro went to Sisson's office alone and on others Anna accompanied him to interpret when difficult expressions were used. In later years Mr. Sisson called on Ciro whenever it was necessary to transact business, almost invariably when Ciro requested Anna to arrange an interview. In 1949, Sisson was engaged to draw a third will for Ciro after condemnation proceedings were instituted by the County of Los Angeles against two parcels of land owned by Ciro and one parcel in which Anna and Anthony each owned a one-half interest. Anna testified that after her father was served with notice of the condemnation suit, he asked her to telephone Sisson to request him to come by. When Sisson ar-

rived, Ciro conversed with him and then engaged him to represent him in the condemnation matter. Anna stated that she thereupon asked Sisson to handle the proceedings involving the home she and Anthony owned. Sisson also prepared Anna's income tax returns and Anna visited his office a number of times after the condemnation actions were pending. When the condemnation matters were settled, Sisson was compensated individually by Ciro, Anthony and Anna out of their separate funds. Sisson also represented Anthony in a case involving a mechanic's lien. When a dispute arose between Anthony and Anna regarding the division of funds derived from the condemnation settlement, Anthony consulted Sisson, who advised him of his right to certain money and stated, "I don't know why she [Anna] is holding it from you." When Anthony sued Anna for this money, she employed Sisson to defend, and the matter was settled upon Anna's turning over to Anthony the amount due him after deduction of attorney's fees.

The Execution of the Will and Deeds.

Sometime prior to November 5, 1949, Ciro informed Anna that he wished to change his will and asked her to telephone Sisson. Ciro stated he was going to leave one dollar apiece to Joe and Lucy and Frieda and Colleen. He also told her he intended to deed two pieces of property to her "with the understanding that I was to meet his obligations, and if he needed money, or anything, it should come from there, and whatever was left, that he wanted me to have it." She testified he intended to deed property to Ross with the same understanding.

In accord with Ciro's request, Anna telephoned Sisson stating simply that her father desired a meeting with him. A few days later Sisson came to Anna's house where Ciro was waiting and spoke to him in private. Anna had no knowledge of what passed between them, although presumably directions for the contents of a new will and the grant deeds were given.¹

1. The court made an order excluding prospective witnesses from the court room.

As Anna's attorney, Sisson was unable to comply with such order. When Sis-

Pursuant to arrangements between Ciro and Sisson, the latter arrived at Anna's home on November 5, 1949, with a form of proposed will and two grant deeds. Sisson's wife, Alyce, accompanied him. Ciro had also made arrangements with Mrs. Maria Cardillo, a long time friend of both Anna and himself, to be present at that time. After the conventional introductions and amenities, Anna left the room and remained in the garden until the transactions to be described were concluded. When Anna left, Ciro stated: "Now we fix the will." After identifying a copy of the will, Mrs. Sisson testified that Sisson read to Ciro in English each part of the will, pausing at frequent intervals to ask if he understood. On each occasion Ciro stated he understood both in English and Italian, employing such expressions as "O.K.," "bene" and "that's right," as well as by nodding his head. She stated that as the reading progressed, Mrs. Cardillo also explained each item read in Italian, Sisson telling her to be sure Ciro understood every word. Mrs. Sisson, a public school teacher who had studied Italian for four years, testified she identified the language used by Mrs. Cardillo as Italian. She testified that Ciro repeated in English "One dollar to Joe, that's right," and that he also stated: "One dollar to Joe and one dollar to Lucy and one dollar to each of the granddaughters." When Sisson read the clause dividing the residue between Anna, Anthony and Ross, Ciro declared, "That's right. That's Okay." When the paragraph naming Anna as administratrix was read to him, Ciro remarked that Anna had taken care of him for many years. In response to Sisson's question, "Do you declare this to be your last will and testament?" Mrs. Sisson testified that Ciro stated, "Yes, I do." Mrs. Cardillo also testified that Ciro declared the document to be his will. She testified she explained its provisions in Italian as Sisson read in English and that Ciro said "Okay." Mrs. Cardillo heard Ciro comment that he wished to leave one

dollar each to Lucia, Joe, Frieda and Colleen.

After the will was read, Ciro was asked whether he wished those present to act as witnesses. He said he did. Whereupon Ciro placed his mark on the will and Mr. and Mrs. Sisson and Mrs. Cardillo signed in the presence of each other. A copy of the will was left with Ciro. The witnesses testified that Ciro was of sound mind and was acting of his own free will.

As soon as the will was signed and witnessed the same parties, still the only ones in the room, turned their attention to the deeds. One deed contained a grant of two parcels of real property to Anna. The other was a grant of property to Ross. The procedure adopted with respect to the will was followed, Sisson reading in English and Mrs. Cardillo explaining his statements in Italian. As the property described in the respective deeds was referred to, Mrs. Sisson testified Ciro pointed in the direction of the location of the property. As he made his mark on the deed to Anna, she testified Ciro stated he wanted Anna to have the property because "she take good care of me. Good Anna take good care." In connection with the deed to Ross, Ciro stated, "That's for Rossé, my son Ross. He been sick." Mrs. Cardillo also testified that Ciro stated, "The house on 19th [Avenue] for Ross." She testified Ciro said, with respect to the deed to Anna, "Okay, I want to give it to her, and I did what I please. * * * In case I need it, I know my daughter give it to me. What I have got left, everything, that's hers." After Ciro had affixed his marks to the deeds and the witnesses had signed, Ciro handed them to Sisson saying, "You take. You take. * * * Put them in the book." Ciro paid Sisson in cash for drawing the will and the deeds and obtained a receipt therefor.

After the Sissons left, Anna did not see the deeds. Her father told her that they were going to be recorded. The first sight of the deeds Anna had was when they reached her through the mail after having

son took the witness stand, appellants objected on the grounds of the court's ruling. The objection was sustained.

Sisson was permitted to testify only as a subscribing witness to the will.

been recorded five days after execution. There was a notation on her deed, in Mr. Sisson's handwriting, that it was to be mailed to her after recording. After having executed the above conveyances, *Ciro* still owned the house in which he resided, real estate which was the subject of a condemnation suit, hidden cash in the amount of several thousand dollars, and a small joint tenancy bank account.

Anna testified that *Ciro* expressed to her his reasons for giving only one dollar to *Joe*, *Lucy* and his two grandchildren. As for *Lucy*, she had eloped and married a cousin against his will; she had maltreated her mother; and her derogatory gossip about *Anna* distressed him. *Joe* was cut off because several years before *Ciro* had loaned him \$2,500 to buy a home, after which *Joe* borrowed \$700 from a loan company to buy a car on the security of the house, thus impairing *Ciro's* security. *Ciro* protested to the loan company and requested they advance no more loans. *Ciro* subsequently paid off the loan on the property himself. With respect to *Frieda Hanson*, *Ciro* was displeased with her because she continually borrowed sums of money from him which were never repaid. *Ciro* stated he was disinheriting *Colleen* because her mother had divorced his deceased son *John*; that her mother had taken all *John's* money, and that both she and her mother had treated *John* and himself poorly.

The Condemnation Suit Proceeds.

In September, 1950, about ten months after the execution of the will and deeds last described, *Ciro* was bedridden by what was to prove his mortal illness. The condemnation proceedings against property belonging to *Ciro*, *Anna* and *Anthony* had been pending since March, 1949, and negotiations for a settlement were being handled by *Sisson*. When the County offered a sum satisfactory to *Ciro*, he caused *Anna* to write *Sisson* signifying his acceptance, in August of 1950. *Sisson* personally delivered the three County warrants issued

in settlement of the suits—one to *Ciro* in the amount of \$8,875.79, one to *Anthony* for \$2,247.77, and a third to *Anna*. *Ciro's* warrant was delivered to him on September 15, 1950, while he was ill in bed, one week before he died. *Ciro* was expecting this money, and was so pleased at its arrival that he sat up in bed to endorse the warrant the next day. Present on this occasion were *Anna*, *Ross*, *Mrs. Cardillo* and one *Jose Roman*. *Ciro's* hand shook as he was making his mark, so *Anna* laid her hand on top of his to steady it while he signed it himself. *Mrs. Cardillo* and *Roman* witnessed his signature, the former testifying *Ciro* was clearly aware that he was endorsing the condemnation check and that he was mentally sound. *Ciro* then handed the warrant to *Anna* and told her to deposit it in the bank, adding: "If I live I will use it and if I do not it is yours, God bless you." *Mrs. Cardillo* phrased *Ciro's* instruction as follows: "Put in bank, any time I need you go get it and spend to me and God bless if I die and everything it is yours, and God bless you." On the sixteenth of September, *Anna* deposited the warrants endorsed by *Ciro* and *Anthony* in the joint tenancy account.² *Ciro* died on September 22, 1950, but the County warrants which had been credited to the account on September 16, 1950, were not actually paid until September 27, 1950.

Ciro's Life Insurance Policy.

Plaintiffs alleged that *Anna* had collected \$750 on an insurance policy on *Ciro's* life which was to be used for his burial and funeral expenses. It was further alleged that *Anna* failed to use the proceeds for such purposes and had converted the funds. During the trial, *Anna* testified that she was the beneficiary of an insurance policy covering *Ciro's* life and had collected its proceeds. She was then asked by appellants' counsel, *Mr. Gattone*, whether there was any agreement with respect to that insurance. The court sustained an objection, stating: "If you have a written contract, you certainly can't change it by oral terms and an implied agreement. If she was the

2. *Anna* returned the proceeds of *Anthony's* warrant in a settlement of the

litigation filed by *Anthony* for its recovery.

beneficiary, that's it." Thereupon, Mr. Gat-tone made the following offer: "We offer to prove at this time that this defendant collected \$750 life insurance, which was made payable to her as beneficiary in trust, and for the uses and purposes that she would pay the decedent's burial and funeral expenses with those proceeds, and we further offer to prove that this defendant did not pay the burial and funeral expenses with those proceeds, but appropriated the funds to her own use." This offer was denied.

The Findings.

The court's findings, epitomized, are: that Ciro was of sound and disposing mind at the time he executed the will, there was no undue influence, and the will was executed as required by law; that the deed of November 5, 1949, conveyed good title to Anna, that Ciro executed said deed while fully competent, that said conveyance was not the result of undue influence or abuse of a confidential relationship on Anna's part, that in creating a joint tenancy bank account with Anna, Ciro fully understood its legal significance; that Ciro's endorsement of the County warrant was not procured by Anna through fraud, undue influence or exploitation of either a confidential relationship or any incompetency of Ciro; that said warrant was deposited pursuant to Ciro's instruction; that Anna never appropriated to her own use any rents, issues, profits or retirement benefits belonging to Ciro, and that Anna is entitled to all monies in the joint account. The court found also that Anna received \$750 as beneficiary of Ciro's life insurance, that it was not true that said insurance was for payment of Ciro's burial and funeral expenses and that Anna did not disburse any of those proceeds for such purposes.

Ciro's Competency.

[1-4] Although appellant's brief refers to testimony concerning Ciro's senility and emphasizes that while Ciro was returning alone from a trip to Louisiana about three years before his death he got off the train in confusion about 50 miles from Los Angeles, no serious or specific challenge is made of the finding that Ciro was mentally competent. Nor could such claim be legiti-

mately advanced. Where unsoundness of mind is a ground of will contest, it is presumed that the testator was competent to execute the will and the burden rests on the contestant to prove affirmatively and by a preponderance of the evidence that the testator was of unsound mind at the time he executed the instrument. In re Estate of Perkins, 195 Cal. 699, 703, 235 P. 45; In re Estate of Lingenfelter, 38 Cal.2d 571, 241 P. 2d 990. Both Mrs. Sisson and Mrs. Cardillo testified that Ciro was of sound mind on November 5, 1949, the very time the will and the deeds were executed. This testimony indicated the rational behavior of decedent, showed that he was in possession of his faculties, and that he knew the extent of his property, its location, and the natural objects of his bounty. Such testimony of lay witnesses as to the mental condition of the testator at or about the time of the execution of the will, when accepted by the court, gives substantial support to the finding of competency. In re Estate of White, 128 Cal.App.2d 659, 668, 276 P.2d 11. A testator is of sound and disposing mind if, at the time of making his will, he has sufficient mental capacity to understand the nature of his testamentary act, to understand and recollect the nature and situation of his property, and to remember and understand his relations to the natural objects of his bounty whose interests are affected by the will. In re Estate of Lingenfelter, supra, 38 Cal. 2d at page 582, 241 P.2d 990. The record is replete with evidence that Ciro was fully cognizant of these factors. As pointed out in Re Estate of Shay, 196 Cal. 355, 360, 237 P. 1079, 1081: "The circumstance that the testator was uneducated and illiterate, unable to read handwriting, and unable to write, except to sign his name, manifestly has no bearing upon his mental sanity or testamentary capacity."

Due Execution of the Will.

[5, 6] In view of Ciro's limited knowledge of the English language, it is argued that the evidence failed to show due execution of the will or that Ciro had knowledge of its contents. The record thoroughly refutes this contention. A will drawn in accordance with the intentions of the testator and executed in due form of law is valid

even though written in a language not understood by the testator where it is shown he had full and accurate knowledge of its contents. In *re Zych's Will*, 251 Wis. 108, 28 N.W.2d 316, 318 (testatrix spoke only Polish, did not speak or understand English); In *re Calo's Estate*, 1 Ill.2d 376, 115 N.E.2d 778 (testatrix of Italian descent, spoke some English, was blind at time will was executed, and signed by a mark); *Quaratiello v. Di Biasi*, 43 R.I. 325, 112 A. 215, 216 (interpreter used to convey contents of will to Italian testator); In *re Carmello's Estate*, 289 Pa. 554, 137 A. 734 (Italian testator with limited knowledge of English, signed by mark); *Hauer v. Hauer*, 44 S.D. 375, 184 N.W. 1 (German testatrix, neither spoke nor understood English); In *re Dybalski's Will*, 199 App.Div. 677, 191 N.Y.S. 809 (testatrix spoke and read only Polish); In *re Knutson's Estate*, 144 Minn. 111, 174 N.W. 617, 619; *Page on Wills*, 3d Ed., sec. 156, p. 315. This rule, virtually universally followed, gives realistic consideration to the manner in which persons living in this country who are not conversant with our language would be expected to transact business of this nature. However, the case at bar represents a far less extreme application of the rule than the cases cited. *Ciro* often communicated in English, had previously executed three wills, and had on occasion discussed legal problems alone with *Sisson*. He alone gave *Sisson* instructions regarding the will, which were simple enough: payment of debts, appointment of an executrix, bequeathing of one dollar each to four persons, and division of the residue in equal shares among three children. There is no reason to believe *Ciro* could not express such ideas in the English at his command. Mr. *Sisson* identified the will admitted to probate as the one read to *Ciro* at the time of its execution. That its contents were fully brought to *Ciro's* attention appears from the fact that he repeated statements read to him verbatim, and made comments showing he fully comprehended not only its substance, but its details, and that it was in accordance with his wishes. In view of the meticulous handling of the reading and translation of the will and *Ciro's* manifest understanding of its provi-

sions, we entertain no doubt that it embodied his testamentary desires.

[7] Appellants also contend that *Ciro* made no declaration that the document was his will and that he made no request to the subscribing witnesses to sign. This claim misconstrues the record and indicates that appellants misunderstand the law. After *Anna* left the room, *Ciro* stated to all present, "Now we fix the will." After the will was read, *Sisson* asked: "Do you declare this to be your last will and testament?" *Ciro* nodded and answered, "Yes. Si." He also responded affirmatively to *Sisson's* question: "Do you wish us to sign as witnesses?" This evidence was sufficient to constitute a publication of the will and a request to sign on *Ciro's* part. In *re Estate of Keizur*, 64 Cal.App.2d 117, 120, 148 P.2d 116; In *re Estate of Offill*, 96 Cal.App. 640, 646, 274 P. 623. A testator need follow no particular form with respect to the request for attestation or the declaration that the instrument is his will and an express declaration and request are unnecessary if such are sufficiently indicated to the witnesses by the testator's conduct and actions. In *re Estate of La Mont*, 39 Cal.2d 566, 569, 248 P.2d 1; In *re Estate of Johnson*, 152 Cal. 778, 780, 93 P. 1015; In *re Estate of Cullberg*, 169 Cal. 365, 368-369, 146 P. 888; In *re Estate of Gray*, 89 Cal.App.2d 478, 484-485, 201 P. 2d 392. Under the circumstances appellants' argument that there was no translation of *Sisson's* questions as to whether the document was *Ciro's* will and whether he wished the witnesses to attest thereto, is mere quibbling. There was no need for such translation, as shown by *Ciro's* responsive affirmation to simple questions.

No Undue Influence by Anna.

[8-10] The undue influence which justifies the setting aside of a will must be such as deprives the testator of his free agency, destroys the freedom of his purpose, and renders the testamentary instrument an expression of the will of another rather than his own; and it must operate at the time the will is made. In *re Estate of Arnold*, 16 Cal.2d 573, 577, 107 P.2d 25; In *re Estate of Higgins*, 156 Cal. 257,

262, 104 P. 6; In re Estate of Llewellyn, 83 Cal.App.2d 534, 561, 189 P.2d 822, 191 P.2d 419. Where a beneficiary who unduly profits from a will occupies a confidential relationship towards the testator and *there is proof of activity on his part* in procuring the preparation or execution of the will, a rebuttable presumption of undue influence arises. In re Estate of White, 128 Cal.App.2d 659, 276 P.2d 11, and the numerous cases there cited. But the mere existence of a confidential relationship between the testator and beneficiary does not bring into play the presumption of undue influence where the beneficiary has not participated in the making of the will. In re Estate of Thompson, 200 Cal. 410, 414, 253 P. 697; In re Estate of Arnold, *supra*; In re Estate of Fraser, 75 Cal.App.2d 99, 104, 170 P.2d 704; In re Estate of White, *supra*.

[11-15] While appellants have liberally sprinkled their brief with the narration of circumstances which might have supported a finding of undue influence, there is ample evidentiary support, even assuming a confidential relation, for the finding of no undue influence operating on the testamentary act and displacing the testator's free will. The record shows that Anna called Mr. Sisson *at* *Ciro's request* when he announced he wanted to change his will, and that *Ciro* and Sisson were closeted alone when *Ciro* gave his attorney his instructions. Securing an attorney designated by the testator at his request to draw a will does not constitute participation. In re Estate of Hull, 63 Cal.App.2d 135, 142, 143, 146 P.2d 242. "The fact that the will was prepared from directions given by the testator to his attorney when no one else was present is very strong evidence that it was the testator's voluntary act. In re Estate of Unger, 188 Cal. 714, 206 P. 1003; 26 Cal.Jur. 728." In re Estate of Fraser, 75 Cal.App.2d 99, 104, 170 P.2d 704, 708. Furthermore, Anna was not even present when the will was executed, and the time, place and arrangements for witnesses were effected by *Ciro* himself. Additionally, the witnesses testified that at the time of the execution of the will *Ciro* was alert of sound mind and aware of precisely what

he was doing. Far from being at variance with decedent's testamentary intentions, as appellants claim, the will was exactly in accord with *Ciro's* intention as expressed to Anna, and corroborated by his expressions of approval as he heard the provisions read. The record is utterly barren of any evidence that Anna importuned *Ciro* or otherwise exerted any pressure on him either to make a will or to make one in favor of only three of the children. Finally, not only is there no showing of activity on Anna's part but there is no indication that Anna profited unduly by the will. She is one of three children who share equally in the residue. While two children and two grandchildren are cut off, it cannot be said as a matter of law that the will as a whole was unnatural. There was evidence that *Ciro* bore certain grievances against these latter relatives and that he had resolved to omit them from his testamentary bounty. Where disposition of property is shown to have been consciously inspired by logical, if erroneous, reasons harbored in the mind of the testator, no inference is compelled that the decedent's volition did not accompany the testamentary act, simply because the will appears unjust to certain natural objects of his bounty. In re Estate of Williams, 99 Cal.App.2d 302, 221 P. 2d 714. The question of undue influence was one of fact and there was abundant evidence that the testament was the product of *Ciro's* uncontrolled will. The trial judge having reasonably found the evidence to weigh more heavily in Anna's favor, his finding may not be disturbed on appeal. In re Estate of White, 128 Cal. App.2d 659, 670, 276 P.2d 11; In re Estate of Keizur, 64 Cal.App.2d 117, 122, 148 P. 2d 116. In the language of In re Estate of Lombardi, 128 Cal.App.2d 606, 613-614, 276 P.2d 67, 71, a case containing some interesting parallels to the matter before us: "Assuming * * * a presumption of undue influence was raised by the confidential relationship of the girls with their mother, and that the burden shifted, proponents have more than rebutted a *prima facie* case, by showing that under the family situation the provision was natural, that the instrument was not at variance with

decédent's expressed testamentary intent, that testatrix had a mind of her own and was not subject to subversion of her will, and, most important, that the daughters were not active in procuring the will."

Deed Passed Title to Anna.

[16-19] As has been recounted, immediately following execution of the will, *Ciro* signed two deeds conveying real property to Anna and to Ross. The deeds were prepared by *Sisson* following a private consultation with *Ciro*, and were executed, outside of Anna's presence, after being read to *Ciro* in English and Italian. Appellants urge that the deed to Anna should be voided because she has failed to overcome the presumption of undue influence emanating from her confidential relationship to *Ciro*. This argument is without merit in the factual context confronting us. Assuming the existence of a relationship of trust and confidence between Anna and *Ciro* and that a presumption of invalidity attended the transaction, Civ.Code, § 2235, such presumption may be overcome where it is manifest that the grantor acted voluntarily and with full understanding, and that the benevolent act was engendered in the testator's own mind without overreaching or improper importunity on the part of the grantee. *Goldman v. Goldman*, 116 Cal.App.2d 227, 234, 253 P.2d 474; *In re Estate of Chamberlain*, 44 Cal.App.2d 193, 198, 112 P.2d 53, 934; *Roeder v. Roeder*, 118 Cal.App.2d 572, 580, 258 P.2d 581. Whether the donee has rebutted the presumption by showing the transaction was untainted by undue influence is a question for the trier of facts. *Roeder v. Roeder*, supra, 118 Cal.App.2d at page 580, 258 P.2d 581; *Azevedo v. Leavitt*, 76 Cal.App.2d 321, 324, 172 P.2d 704, 706. As stated in the *Azevedo* case, supra: "Before an appellate tribunal would be justified in reversing the finding of the trial court that there was no unfairness, fraud, or undue influence on the part of the donee, it must appear that there is no substantial evidence to support such finding." The evidence shows that *Ciro*, unsolicited and unprompted by anyone and purely of his own volition, conceived the idea of making a gift to Anna and pro-

ceeded to consummate all the details of the transaction unguided in any degree by Anna. When the deed was ready for execution, he pointed to the location of the properties and asserted that Anna had taken good care of him. There was other evidence that he appreciated the numerous, diverse, and onerous services Anna had rendered him for many years. In *Re Estate of Chamberlain*, supra, hearing denied, decedent was a paralytic, 86 years old and living with her son *Perry* at the time she gave him \$1,500 and crops worth \$1,453.18. At her death *Perry's* sister and half-brother contended these sums belonged to the estate. In allowing the gifts to stand, despite the existence of a confidential relationship, the court stated [44 Cal.App.2d 193, 112 P.2d 56]: "In disproof of any inference of imposition or undue influence, it is especially significant that the parent owed to the beneficiary a debt of gratitude for filial devotion and service and care during the parent's declining years." It is evident that any influence exercised by Anna over *Ciro* was merely that which a dutiful child impresses upon a parent by acts of filial responsibility, loyalty and obedience—clearly an unimpeachable and irreproachable type of influence. Influence acquired by means of acts of kindness and attention, good offices and devoted ministrations is not undue if no deceit is practiced and the gift is the voluntary act of the donor. *Kelly v. McCarthy*, 6 Cal.2d 347, 364, 57 P.2d 118; *Goldman v. Goldman*, supra, 116 Cal.App.2d at page 235, 253 P.2d 474. It is perfectly natural for a parent to be more bountiful to one of his children who has assumed the greatest burden of care and lavished the highest degree of solicitude upon him. *Walker v. Smith*, 58 Cal.App. 145, 151-152, 208 P. 157; *Carleton v. Bonham*, 60 Cal.App. 725, 740-741, 214 P. 503. The trial court was indubitably satisfied upon substantial evidence that *Ciro* was not imposed upon by Anna, that he was fully aware of the nature and effect of the transaction and that he wished Anna to have the property.

[20] Appellants lay considerable emphasis on the fact that *Ciro* allegedly had

no independent legal advice, apparently assuming that where a confidential relationship is present the absence of independent legal advice establishes fraud as a matter of law. But such is not the law. The rule is correctly stated in *O'Neill v. Dennis*, 109 Cal.App.2d 210, 214, 240 P.2d 376, 379: "Lack of independent advice by the grantor is not of and in itself a ground for vitiating a deed under such circumstances [a confidential relationship] as we have here presented, but is a fact to be weighed by the trial court in determining whether the grantor acted voluntarily and with a complete understanding of the transaction. . . *Brown v. Canadian Industrial Alcohol Co.*, 209 Cal. 596, 289 P. 613; *Laherty v. Connell* [64 Cal.App.2d 355, 148 P.2d 895], *supra*; *Azevedo v. Leavitt*, *supra*." However, it is not amiss to observe that contrary to appellants' observation, *Sisson* was qualified to give *Ciro* legal advice though he was representing *Anna* in the condemnation suit. The facts show that *Ciro* first employed him in his own condemnation proceeding, whereupon *Anna* likewise engaged him. Previously *Sisson* had done no work for *Anna* except for income tax service, while he had drawn three wills for *Ciro* and probated his wife's estate. He had also represented *Anthony*. In short, he was the lawyer for various members of the family and there is not the slightest intimation in the record that he consciously promoted the interests of one against another, or that he did anything but carry out *Ciro's* wishes in the matters here in dispute.

[21-24] Appellants contend that the deed was never delivered to *Anna* because *Sisson* was not specifically instructed to deliver the deed to *Anna* after recordation and *Sisson* had no authority to cause it to be mailed to *Anna*. However, the record shows that *Ciro* told *Sisson* to take the deeds and "put them in the book"; that after the meeting of November 5th, *Ciro* told *Anna* about the deeds and the fact that they were being recorded; and that at the time the deeds were executed *Ciro* told Mrs. *Cardillo*: "I want to give it to her and I did what I please." The validity of a properly executed deed of conveyance

depends on its delivery by the grantor with the concomitant intent of transferring the property described therein to the grantee. *Ogg v. Gunderson*, 74 Cal.App.2d 384, 387, 168 P.2d 793; *Severn v. Ruhde*, 58 Cal. App.2d 704, 137 P.2d 466; *Hansen v. Hansen*, 82 Cal.App. 786, 256 P. 290. If at the time he parts with possession of a deed the grantor intends to divest himself of title to the property conveyed, there is an effective delivery of the deed passing title irrevocably to the grantee. *Williams v. Kidd*, 170 Cal. 631, 638-639, 151 P. 1; *Security-First Nat. Bank of Los Angeles v. Leatart*, 75 Cal.App.2d 211, 214-215, 170 P.2d 687; *Ogg v. Gunderson*, *supra*. The solution of the question of whether an effective delivery took place in the circumstances here shown is grounded entirely on the intention of the grantor, which is a question of fact to be determined by the trial court on all the pertinent evidence. *Williams v. Kidd*, *supra*; *Security-First Nat. Bank of Los Angeles v. Leatart*, *supra*. The evidence and the inferences properly drawn therefrom fully support the finding that at the time he handed *Sisson* the conveyance to *Anna* he intended to make a presently-operative transfer of title to her. There is no evidence that *Ciro* intended to retain dominion over the legal title after surrendering the deeds. There is likewise no merit in the assertion that the deed must fail because *Sisson* did not explain the legal effect of a deed to *Ciro*. The evidence is clear that *Ciro* understood he was parting with title in executing the respective deeds to *Anna* and *Ross*. Furthermore, these deeds were not the first that *Ciro* executed. In 1942, he had signed a deed conveying property to *Goodwill Industries* and in that same year he had executed a deed by which he conveyed property to *Anna* and *Anthony* as tenants in common.

[25-27] It is also argued that assuming a valid conveyance, the court erred in not finding that *Anna* held the property in trust for *Ciro*. Appellants quote testimony by *Anna* that *Ciro* told her he was going to convey the property to her "with the understanding that I was to meet his obligations, and if he needed any money, or any

thing, it should come from there, and whatever was left, that he wanted me to have it." Other testimony from Anna was to the effect that it was understood that if Ciro ever needed money for church contributions, or for clothing, or to sustain him in any way before he died, Anna would give it to him from the property.³ Appellants therefore contend that even though the deed to Anna is absolute in form, the evidence compels the conclusion that Anna held the property as trustee for Ciro. We do not agree. It is settled that when a trial court has declared a deed to be exactly what it purports to be, an appellant cannot expect a reversal of such determination "'unless the evidence is almost overwhelmingly the other way'". *Lombardi v. Tranchina*, 129 Cal.App.2d 778, 780, 277 P.2d 938, 939; *Spaulding v. Jones*, 117 Cal.App.2d 541, 548, 256 P.2d 637. In the case at bar, Anna promised orally that she would take care of Ciro's obligations and living expenses in the event his own resources proved inadequate for such purposes. Such promise is most reasonably construed as a mere personal covenant, for the breach of which a cause of action for damages would lie. *Lavely v. Nonemaker*, 212 Cal. 380, 384-385, 298 P. 976, followed in *Ampuero v. Luce*, 68 Cal. App.2d 811, 157 P.2d 899. In the *Ampuero* case, at pages 815-816 of 68 Cal.App.2d, at page 902 of 157 P.2d, the grantor stated: "I am deeding this property to you * * * and John with the understanding you are supposed to take care of him [grantor's husband] when he needs any money or care, you are supposed to help him out"—language analogous to Ciro's. At most, had Anna failed to adhere to her promise, a finding might have been justified that Anna held the property subject to an equitable charge to the extent Ciro required assistance for his livelihood—a liability clearly distinct from that of a trust. *Woodley v. Woodley*, 47 Cal.App.2d 188, 191, 117 P.2d 722. There is nothing in the record to indicate that Ciro ever required financial assistance or that Anna refused him the necessities of life or any other

filial obligation she was called upon to provide. In any event, whether Anna's promise is construed as a personal covenant or an equitable charge on the property to guarantee performance of the obligation, it is clear that no trust was created and the court properly concluded that Anna held title unencumbered by any claims of appellants.

Anna Entitled to Joint Account.

[28] Appellants argue that Anna has failed to overcome the presumption of undue influence with respect to the opening of the joint tenancy account and assert there is no showing that Ciro appreciated its legal significance. This argument is tenable only by appellants' persistent discounting of facts and inferences which dispel the presumption and by their tenacious emphasis on implications favorable to their claim. However, the evidence shows that Ciro, his wife, and Anna were joint tenants of a bank account as early as 1927. When the new account was opened in 1942, in favor of Ciro and Anna, it was Ciro who suggested to a bank officer that he wanted Anna as a joint tenant. Anna did not participate in the transaction except to the extent of driving her father to the bank at his request to secure several cashier's checks. The deposit of the funds in the bank in the first instance was done upon the advice of a bank officer. From these circumstances, it is clear that Anna did not procure the opening of the joint account. That Ciro fully comprehended the legal incidents of a joint tenancy account appears from his statement to Anna when he directed her to deposit his condemnation warrant in the bank: "If I live I will use it and if I do not it is yours, God bless you." The inference is plainly deducible that Ciro recognized that his death would transfer title to the funds to Anna by operation of law.

Appellants urge that Anna should be charged with \$1,625 drawn from the bank account in 1948 for her personal use. Anna testified she withdrew no funds except at the request, or with the permission, of her

3. There was testimony that such an understanding was also reached between

Ciro and Ross, the grantee of the other conveyance.

father. She explained her withdrawal of the above sum as occasioned by her involvement in a real estate escrow. With Ciro's permission she withdrew the money and bought a cashier's check which she deposited in escrow. She reimbursed her father with money she had at home. The trial court, whose function it was to evaluate the testimony, believed Anna's account of the transaction. It was not inherently improbable, as appellants contend. It is further borne out by the fact that when he died Ciro had several thousand dollars hidden in his home.

Proceeds of County Warrant.

[29] Appellants urge that the court erred in not rendering judgment against Anna for the proceeds of the County warrant (\$8,875.79) deposited in the joint account, contending first that its deposit was procured through Anna's undue influence. The evidence fully sustains the court's determination that no such influence existed in that connection. Ciro was waiting for the warrant and sat up in bed to endorse it; his endorsement was made freely in the presence of Mrs. Cardillo, Jose Roman, Ross Camperi and Anna; he himself directed Anna to deposit the warrant; and his comment that he would use it if he lived but the money would be Anna's if he died, established that he had a precise understanding of the transaction.

[30-33] Appellants' alternate contention is that inasmuch as Ciro died prior to the payment of the warrant, the proceeds thereof were rightfully subject to probate as a part of Ciro's estate. This argument rests on the following chronology: The warrant was deposited on September 16, 1950; the joint account was credited therewith on the same day; Ciro died on September 22d; the County paid the bank as holder of the warrant on September 27th. Premising their argument on the erroneous assertion that the bank was merely Ciro's agent to receive payment of the warrant from the County, appellants contend that Ciro's death before payment re-

voked the bank's agency, citing Civil Code, section 2356.⁴ This argument is specious, since no principal-agency relationship ever came to pass. The deposit of the warrant was not for collection, but was made without condition, qualification or restriction. A county warrant may be transferred by the payee by assignment. *Beals v. Evans*, 10 Cal. 459; *Dana v. City and County of San Francisco*, 19 Cal. 486, 491. When the warrant was endorsed and deposited in the bank and the joint account given full credit therefor, the relationship subsisting between the bank and the joint depositors was not that of principal and agent but one of creditor and debtor. *Newmark Grain Co. v. Merchants Nat. Bank*, 166 Cal. 203, 208, 135 P. 958; *Metropolitan Life Ins. Co. v. San Francisco Bank*, 58 Cal.App.2d 528, 534, 136 P.2d 853; *Plumas County Bank v. Bank of Rideout, etc.*, 165 Cal. 126, 137-139, 131 P. 360, 47 L.R.A., N.S., 552. When the bank received the warrant and placed the amount thereof to the credit of the account, it succeeded to Ciro's right to receive payment thereon and the warrant itself was no longer subject to Ciro's control. His subsequent death did not affect the bank's right, since as assignee or subrogee of Ciro's rights under the warrant to receive the moneys it was not an agent and section 2356 of the Civil Code does not apply. The fact that under section 1011 of the Financial Code the credit allowed by a bank on a deposit other than cash is provisional until ultimate payment is received does not convert the creditor-debtor relationship between the bank and depositor into one of principal and agent. *Plumas County Bank v. Bank of Rideout, etc.*, supra, 165 Cal. at page 136, 131 P. 360; *Gonyer v. Williams*, 168 Cal. 452, 454, 143 P. 736. The cases cited by appellants stand for the propositions (1) that a plaintiff cannot sue the county upon a warrant without showing an assignment to him, and (2) that a warrant is not a negotiable instrument which an assignee may take free of defenses against the payee. Neither of these rules is here pertinent—

4. Civil Code, section 2356, reads: "Unless the power of an agent is coupled with an interest in the subject of the

agency, it is terminated by: (1) Its revocation by the principal; (2) his death; or, (3) his incapacity to contract; * *."

the warrant was duly assigned to the bank, and no action is being brought against the County which, in fact, has paid it in accordance with its terms.

Parol Evidence Improperly Excluded.

[34] As beneficiary of Ciro's life insurance, Anna collected \$750 from the insurer. The court found that it was not true that "the object or purpose of said life insurance was * * * to provide for payment of burial and funeral expenses of Ciro Camperi." During the trial the court sustained an objection to the introduction of oral evidence by appellants regarding an understanding under which these proceeds were payable to Anna. Appellants' offer to prove that Anna agreed to receive these proceeds in trust and to use them to pay Ciro's funeral and burial expenses was refused, the learned trial judge stating: "If you have a written contract, you certainly can't change it by oral terms and an implied agreement. If she was the beneficiary, that's it." This was error. It is well settled that trusts in personalty may be created orally and may be established by parol evidence. *Chard v. O'Connell*, 7 Cal.2d 663, 665, 62 P.2d 369; *Lefrooth v. Prentice*, 202 Cal. 215, 227, 259 P. 947; *Silvey v. Hodgdon*, 52 Cal. 363, 368; Annotation 102 A.L.R. 588. The *Silvey* case, *supra*, is directly pertinent. There, defendant and the insured, her father, agreed orally that if the father procured insurance on his life, made payable to defendant, she would hold the proceeds in trust for the benefit of the other minor children. Defendant collected the amount of the policy but repudiated her trust. The court below permitted proof of an oral trust in the proceeds of the policy. The Supreme Court affirmed, rejected the objection that such evidence contradicted the written policy and held that proof of an oral trust in no way affected the rights or obligations of the insurance company. The court stated: "It is true that a contract between Anthony [the father] and [defendant] Susan M., alone, could not affect the rights of the insurance company. The contract did not purport to affect the rights of the company. In this view it may be assumed that the

company might refuse to pay the amount of the policy to any other person than Susan M. Hodgdon. The contract found by the Court below to have been made by Anthony Silvey and defendant Susan M., in no way added to nor varied the tenor or conditions of the written contract between the insurer and the assured, but simply imposed on the latter [sic] an obligation in respect to the moneys which should come to her hands when the agreement of insurance should be fully executed. We can discover no good reason why the parol trust should not be enforced."

[35] It follows that it was prejudicial error to refuse to admit testimony germane to the issue of the character of Anna's title to the insurance funds, whether upon a trust or as an outright beneficiary.

[36] It would entail a fruitless prolongation of this opinion to discuss other items of evidence which create either a conflict in the testimony or resolve themselves into a matter of credibility of witnesses. An example of this is appellants' frequent reiteration that Mrs. Cardillo testified she was a loyal friend of Anna, with the implication that her testimony should be discounted. However, she also testified she was a devoted friend of Ciro, and her reliability as a witness was in no substantial wise impaired. Be that as it may, it was for the trial court to appraise Mrs. Cardillo's testimony and evaluate the weight to be accorded it, and in this as well as in other disputed areas, we may not arrogate to ourselves the fact finding functions of the trial judge.

The judgment in Case No. 604316 below (No. 20321 on appeal) is reversed with directions to retry only the issue of the beneficial ownership of the proceeds of Ciro's life insurance policy; in all other respects this judgment is affirmed.

The judgment in Case No. 310950 below (No. 20322 on appeal) denying revocation of the probate of the will is affirmed.

Appellants shall bear ninety (90) percent of the costs of the consolidated appeal and respondents ten (10) percent thereof.

MOORE, P. J., and McCOMB, J., concur.

134 Cal.App.2d 792

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.

Harold MILLER, Defendant and Appellant.
Cr. 3055.

District Court of Appeal, First District,
 Division 1, California.

Aug. 3, 1955.

Prosecution for robbery. From a judgment of conviction of the Superior Court, Alameda County, James R. Agee, J., on three counts and order denying motion for new trial the defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence was sufficient to sustain jury verdict.

Affirmed.

1. Robbery ☞24(3)

Evidence identifying defendant as person who committed offense was sufficient to sustain conviction for robbery of store. Pen.Code, § 211.

2. Criminal Law ☞339

In prosecution for robbery of store, evidence submitted by two different witnesses that conflicted as to the height of the accused was admissible for jury evaluation in determining whether accused committed crime charged.

3. Robbery ☞24(3)

In prosecution for robbery of store, testimony of clerk, who was shown two photographs of police line-up, that he believed accused was second one, not on end, in police line-up, was not deprived of its evidentiary quality for evaluation by the jury, although accused appeared in that position in only one photograph as the line-up had been changed for each picture.

4. Criminal Law ☞419(12), 1169(2)

In prosecution for robbery of store, officer's testimony read into evidence as to license number of get-away automobile, that had been given to him on slip of paper by store clerk, who had not testified as to the license number, was hearsay, erroneously admitted, but admission of the testimony

was not prejudicial error in view of the testimonial identification of defendant as one of the offenders. West's Ann.Code Civ.Proc. § 2047.

5. Criminal Law ☞412(1)

In prosecution for robberies of stores testimony that narrated certain statements of defendant placing him in vicinity of the robberies at time they were committed and that gun found in automobile was his, there being testimony that in one of the robberies the shorter of the two men carried a gun, was admissible hearsay admissions against interest.

6. Criminal Law ☞435

In prosecution for robbery of store, piece of paper found in glove compartment of defendant's automobile that bore several street addresses of stores, one of which was the address of store robbed, was relevant and material as tending to show circumstance which connected defendant with that robbery and was admissible in evidence.

7. Criminal Law ☞1171(1)

In prosecution for robbery, failure of prosecution to produce as witness at trial a person who testified at preliminary hearing but who could not identify the defendant was not reversible error.

Lloyd S. MacDonald, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Convicted on three counts charging robbery, violation of section 211, Penal Code, defendant appeals from the judgment and from the order denying his motion for a new trial.

[1] He claims the evidence is insufficient to identify him as the person who committed the offense charged in Count One, robbery during the evening of August 9, 1953, at a Lucky Store situate at 2601 Telegraph Avenue, Oakland. A person who happened to be sitting in a car outside

the store testified that he saw two men get out of a green 1950 Ford that had a dent in its right front door and go into the store. A few minutes later he saw them get back into the car and drive away. He memorized the license number on that car as it went past him. By means of that license number and the above description he later identified the car, and upon it the police found a palm print which was identified as the defendant's. Defendant argues that the lighting was insufficient to enable the witness to make the identification but that does not appear as a matter of law. The witness said that although it was dark the store lights were on and that he did see. It was a question of fact for determination by the jury. There were additional circumstances which also tended reasonably to connect defendant with the commission of the offense. There is not a sufficient basis for a reviewing court to disturb the verdict on the first count.

[2] Count Three charged robbery, October 3, 1953, of a Safeway Store at 40th and Telegraph in Oakland. Defendant was identified by two clerks who worked at that store and were present at the time of the robbery. Defendant questions the credibility of their testimony. One clerk said that the shorter of the two men who held up the store was about five feet seven inches tall and wore a plaid suit. Asked on cross-examination if defendant is that man, the witness said he "looks like him," and "I believe so, yes." Again asked as to the height, he said the man was about five eight or five nine; did not believe he could have been over five feet and ten or eleven inches. The other clerk identified defendant as the shorter of the two men and said he was about five feet ten inches and he wore an Eisenhower-type jacket—"I believe brown check," a brown and white check. Here, says the defendant, are discrepancies in the testimony of these two witnesses so great as to render them unworthy of belief. We do not so view it, as a matter of law. Estimates of a man's height are but approximate and the same jacket might honestly be described as a plaid by one man and a check by another. Also, when a witness says "I believe" or

"I think so" he is not necessarily guessing. *Weingetz v. Cheverton*, 102 Cal.App.2d 67, 72-74, 226 P.2d 742. It is evidence in the case to be weighed by the trier of the facts, not by a reviewing court.

[3] The clerk who positively identified the defendant in court was shown two photos which he recognized as pictures of a police line-up which he saw at the city hall about a week or a week and a half after the robbery. Asked upon cross-examination where defendant was in the line-up he said "I believe he was the second one," not on the end. One picture showed defendant at the extreme left of the line; the other, next to the man at the end. It is apparent from the photographs that they were taken from different positions in the room. Also they were taken at different times because the relative positions of some of the men in line are not the same in each photo. Manifestly, the absence of one of the men (the person at the left end) from one of the photos does not deprive the witness' testimony of its evidentiary quality, for evaluation by the jury not by a reviewing court.

[4] Defendant claims error in the admission of certain testimony. Over objection that it was hearsay, an officer who investigated the robbery charged in Count Three testified that at the store he was given a license number by one of the clerks. It was written upon a slip of paper which the clerk gave him. He put that license number in the report he made of the investigation. He was permitted to read that license number, from the report, into evidence. This was inadmissible hearsay, erroneously allowed in evidence. It is true that the clerk testified he saw the get-away car, observed its license number, wrote that number on a piece of paper, and gave the paper to the police officer, but he did not, on the witness stand, say what the license number was. Obviously, the officer did not use the report "to refresh his memory respecting a fact" (permissible under § 2047 of the Code of Civil Procedure). Not having seen the car at the time of the get-away he could have no "memory" of its license number. Although error, we believe

it was not prejudicial error, particularly in view of the testimonial identification of defendant as one of the offenders. The mere narration of a license number did not add materially to the clerk's testimony that he saw defendant get into an automobile and drive away.

[5] Defendant complains of the admission of testimony narrating certain statements which defendant made after his apprehension in Los Angeles, a few days after the commission of the third offense charged. Those statements were that he lived in San Francisco until October 7, 1953 (thus placing him in the vicinity of the robberies) and that the gun found in the car was his (there was testimony that in one of the robberies the shorter of the two men carried a gun). This, plainly, was admissible hearsay, admissions against interest.

[6] In the glove compartment of defendant's car a piece of paper was found which bore several street addresses in Oakland and Berkeley, each the address either of a Lucky or of a Safeway store. One of them, "2601 Tel," was the address of the store which was the scene of the robbery charged in Count One. This evidence was relevant and material as tending to show a circumstance which tended to connect defendant with that robbery. It was not necessary to prove that the addresses on the piece of paper were written by defendant or that he knew he had it. The presence of the paper in the glove compartment of his car was the significant factor.

[7] Defendant asserts error in the failure of the prosecution to produce as a witness at the trial a certain person who, testifying at the preliminary examination, said he could not identify the defendant. In answer to that we observe that no such facts appear in the record upon this appeal and that even if they did they would not present a ground for reversal.

The judgment and the order appealed from are affirmed.

PETERS, P. J., and BRAY, J., concur.

Gena Ree Monroe O'KEEFE, as Administratrix of the Estate of Leo George Monroe, also known as James Monroe, alias, deceased, Plaintiff and Respondent,

v.

The APTOS LAND & WATER COMPANY, a corporation, Peninsula Properties Company, a corporation, L. J. Miller, Santa Cruz Land Title Company, a corporation, Defendants and Appellants.

PENINSULA PROPERTIES COMPANY, Ltd., Defendant, Cross-Complainant and Appellant,

v.

Gena Ree Monroe O'KEEFE, as Administratrix of the Estate of Leo George Monroe, also known as James Monroe, alias, deceased, and James Monroe, Cross-Defendants and Respondents.

Gena Ree Monroe O'KEEFE, as Administratrix of the Estate of Leo George Monroe, also known as James Monroe, alias, deceased, Plaintiff and Respondent,

v.

SANTA CRUZ COUNTY TITLE COMPANY, a corporation, Aptos Land & Water Company, a corporation, Peninsula Properties Company, a corporation, L. J. Miller, Defendants and Appellants.

PENINSULA PROPERTIES COMPANY, Ltd., Defendant, Cross-Complainant, and Appellant,

v.

Gena Ree Monroe O'KEEFE, as Administratrix of the Estate of Leo George Monroe, also known as James Monroe, alias, deceased, and James Monroe, Cross-Defendants and Respondents.

Civ. 16286.

District Court of Appeal, First District, Division 1, California.

Aug. 3, 1955.

As Modified on Denial of Rehearing

Sept. 2, 1955.

Hearing Denied Sept. 28, 1955.

Quiet title actions, wherein plaintiff contended that her decedent had acquired title by adverse possession and defendants contended that decedent had held, not adversely, but under an unfulfilled oral agreement to buy. The Superior Court, County of Santa Cruz, Andrew R. Schottky, J.,

rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Fred B. Wood, J., held, inter alia, that evidence sustained finding that decedent, who had had agreement with other stockholder in corporation which held title, had done everything required of him to be performed under terms of agreement.

Judgment affirmed

1. Adverse Possession ⚡85(5)

In action to quiet title, wherein plaintiff asserted claim on ground that her decedent had acquired title by adverse possession, evidence supported finding that plaintiff's decedent and other stockholder in corporation which held record title had agreed upon the acreage which decedent was to acquire from corporation.

2. Evidence ⚡588

Courts and juries are not bound by mere swearing no matter how positive, unless it be credible swearing, and where testimony is inherently improbable or in some manner impeached, triers of fact are entitled to disbelieve testimony.

3. Vendor and Purchaser ⚡70

Where parties intended that purchaser should pay for property, but no definite price had been determined, court, to prevent inequitable results, could imply a reasonable price. West's Ann.Civ.Code, § 1611.

4. Contracts ⚡230

When a contract does not determine the amount of consideration, nor method by which it is to be ascertained, trier of facts must ascertain and declare reasonable value of property involved. West's Ann.Civ. Code, § 1611.

5. Trial ⚡404(1)

Findings of fact and conclusions of law are judicial writings which are subject to interpretation in accordance with substantially the same canons of interpretation as statutes, contracts, and other writings.

6. Vendor and Purchaser ⚡21, 70

Contract of sale may be valid without any stipulation as to price, and it is implied that price is reasonable value of subject matter of agreement.

7. Adverse Possession ⚡85(5)

In action to quiet title, wherein plaintiff asserted claim that her decedent had acquired title by adverse possession and defendants contended that decedent had entered under oral agreement to buy but had never paid consideration, evidence sustained finding that decedent, who had had agreement with other stockholder in corporation which held title, had done everything required of him to be performed under terms of agreement.

8. Limitation of Actions ⚡41

Where stockholder had credit in his favor in stockholder's account, and, under agreement with other stockholder, was to purchase land and have his account reduced, his credit balance and corporation's right to purchase price were "cross demands", and, even if limitations had run on stockholder's account, he could set amount off against purchase price. West's Ann.Code, Civ.Proc. § 440.

9. Judgment ⚡570(12)

That stockholder's action against corporation on stockholder's book account had been dismissed for lack of prosecution did not cancel the account or bar recovery thereon.

10. Appeal and Error ⚡173(10)

Where defendant, in trial court, did not assert two-year statute of limitations and pleaded only five-year statute of limitations on real property actions, and pleaded, relied on, and supported by evidence a certain agreement, it could not, on appeal, contend that agreement was barred by two-year statute. West's Ann.Code Civ.Proc. §§ 318, 339, subd. 1.

11. Appeal and Error ⚡173(6)

Where defendants did not present bar of statute of frauds as issue in trial court, it could not assert it for first time on appeal.

12. Frauds, Statute of ⚡144

Where plaintiff's decedent made oral agreement with other stockholder in corporation which held title to land that decedent would buy land and that his stockholder's account would be reduced by way of payment, and decedent went into possession and made extensive permanent im-

provements, with other stockholder's knowledge, but other stockholder failed to make debit entry on corporation's books, and where defeating agreement would entail loss of entire amount of decedent's credit in account, corporation and stockholder were equitably estopped from relying on statute of frauds.

13. Estoppel ⇨107

Where defendants, in action to quiet title wherein plaintiff asserted that her decedent had acquired title by adverse possession, alleged that decedent had entered permissively under oral agreement to buy, fact that plaintiff had failed to plead that defendants were equitably estopped from later claiming that agreement was barred by statute of frauds did not render equitable estoppel unavailable to plaintiff.

14. Quieting Title ⇨10(2)

Where it was defendants in quiet title action who proved agreement under which plaintiff's decedent acquired equitable title, and corporate defendant which held legal title did not claim more than bare legal title, and only contest was in respect to who held equitable title, plaintiff could maintain action, although one by holder of equitable interest against legal owner.

15. Appeal and Error ⇨882(6)

Where all facts which trial court treated as material were treated by parties as if in issue, and case was fully tried upon that theory, defendants could not object that various findings were not within issues framed by pleadings.

16. Appeal and Error ⇨1039(1)

Matter of pleading becomes unimportant when a case is fairly tried upon merits and under circumstances which indicate that nothing in pleadings misled unsuccessful litigant to his injury.

17. Quieting Title ⇨47(2)

In action to quiet title, wherein trial court found that plaintiff's decedent had acquired title under an agreement which failed to specify compensation to be paid therefor, reasonable value of land was stipulated and there was a finding that agreed value was in that amount, failure to make express finding that consideration paid

was adequate or that contract was just and reasonable was not error.

18. Trial ⇨85

Where actions, although not formally consolidated, were tried together, and, evidence went in without limitation and was treated as introduced in both actions, to extent relevant, defendants could not object that evidence introduced in one action had been considered in another.

Carlyle Miller, Aptos, for appellants.

Courtney L. Moore, San Francisco, Sans, Hudson & Perry, Watsonville, for respondent.

FRED B. WOOD, Justice.

This is an appeal in two quiet title actions involving three adjoining parcels of real property. Although the actions were not formally consolidated, they were tried together and resulted in a single set of findings of fact and conclusions of law and a single judgment in favor of the plaintiff. The defendants have appealed.

Plaintiff, administratrix of the estate of L. G. Monroe, deceased, tried the case upon the theory that she had acquired title by adverse possession; defendants, upon the theory that Monroe did not hold adversely, that he took possession under an oral agreement to buy, but never paid any consideration for the land.

The trial court found: (1) between April 1, 1938, and the date of his death, November 30, 1941, L. G. Monroe and defendant L. J. Miller were officers and directors in defendant Aptos Land and Water Company, Inc. (hereinafter called Aptos) and in defendant Peninsula Properties Company, Ltd. (hereinafter called Penproco) and were the sole stockholders in Aptos; that continuously since the death of Monroe, L. J. Miller has been and is a director and officer in Aptos and Penproco; (2) two stockholders' accounts were carried on the books of Aptos, of which account No. 205 showed a balance owing to L. G. Monroe and account No. 206 showed a balance owing to L. J. Miller by Aptos; (3) on November 30, 1941, Aptos was indebted to L.

G. Monroe in the sum of \$41,684.41 as shown by the credit balance of said account No. 205; (4) defendant Penproco was the owner of the three parcels here involved and these parcels were a part of a large tract containing many other parcels, all subject to a bond indenture mortgage; (5) on May 1, 1935, Penproco and Aptos made an agreement pursuant to which Aptos could sell land in said tract in its own name and could obtain conveyance to the purchaser by delivering to defendant Santa Cruz Land Title Company bonds of Penproco in a stipulated amount for the property sold, whereupon the title company would secure from the trustee for the bondholders a reconveyance of the property so sold, and would then convey the same to the nominee of Aptos; (6) between April 1, 1938, and November 30, 1941, L. G. Monroe and defendant L. J. Miller entered into an agreement on behalf of Aptos and as directors and the sole shareholders of Aptos by the terms of which Aptos agreed to sell to Monroe said three parcels and to convey to Monroe a clear title thereto in consideration of which Monroe's stockholder account with Aptos was to be charged with the agreed value of the property; (7) the amount of land involved in said agreement was 137 acres and the agreed value was \$225 per acre or a total of \$30,825; (8) after making the agreement Monroe did everything required of him to be performed under the terms of the agreement and with the acquiescence, knowledge and approval of Aptos and Penproco entered into and took possession of the property; (9) in performance of the agreement there was delivered to the title company the requisite amount of bonds necessary to secure reconveyances from the trustee to the title company and the title company obtained such reconveyances to it.

Pursuant to conclusions of law drawn from these findings the judgment credited \$30,825 of the balance appearing on the books of Aptos to the credit of Monroe as full payment by plaintiff of the purchase price of the property; directed the title company as escrow agent of Penproco to execute and deliver to plaintiff a deed conveying title to the property; directed Pen-

proco to execute any and all necessary documents and perform all necessary acts to accomplish the conveyance of title to plaintiff; declared that plaintiff was at the time of filing the complaint and now is the owner of the property in fee simple and entitled to the possession thereof and that the defendants have no right, title or interest in the property.

The defendants' principal challenge is their claim that the evidence does not support the findings that Monroe and Miller agreed upon the acreage (137 acres) which Monroe was to acquire and that they agreed upon the value (\$225 per acre).

[1] The evidence, both testimonial and circumstantial, which supports the 137 acre findings is substantial and adequate. It is the total acreage of the three parcels in question. In 1938 Monroe built a home on one of the parcels and took up his residence there. He improved the land by grubbing out native trees and shrubs and planting orchard trees upon all three of the parcels and progressively constructed a fence around the outside of all three, a fence which was nearly completed prior to his death in 1941. L. J. Miller testified that in 1939 Monroe told him he intended to get a larger place than he originally contemplated and Miller told Monroe it was all right with Miller and then Monroe said he wanted the other two parcels adjoining the one he had first selected. After several inquiries by Miller, Monroe told Miller he wanted to acquire all three of the parcels. There is also evidence tending to show that Monroe during his lifetime paid taxes on all three parcels, not just one or a portion of them. It appears also that reconveyances for all three of the parcels were obtained from the trustee for Penproco's bondholders. There is evidence that these reconveyances were based upon bonds of Penproco which Monroe and Miller furnished to Aptos, Aptos delivered to the title company, and the title company, presented to the trustee.

Concerning the "agreed" value, the record is not as clear. At one time L. J. Miller testified that Monroe agreed the price would be the book cost of the property

to Penproco, which was \$450 per acre. He also testified it has been his position since the death of Monroe that Monroe owed either Penproco or Aptos an undetermined amount as the purchase price of the land; that the amount of consideration for the land was to be subsequently agreed upon by him and Monroe but they never did fix it. His brother, Carlyle Miller (associated in business with L. J. Miller and an officer of Aptos since the death of Monroe, one of the attorneys of record for the defendants, and expressly authorized to speak for L. J. Miller), took the same position at conferences of the parties or their attorneys which he attended during the pendency of this litigation. At one of these conferences, Carlyle said "Our position is this: Mr. Monroe built the house on the property, there is no question about that at all, with his own funds,—there has never been any desire on the part of L. J. Miller, myself or the corporations to contest that fact. The only thing is Mr. Monroe paid no consideration for the land itself. We have tried in various conferences, starting in 1942, with Mr. O'Keefe, Mr. Holloway Jones and yourself, both orally and in writing, to adjust that matter,—certainly the title is clouded but the cloud can be removed by settling that point." At another conference Carlyle said "we" don't know what figure to place on it. He said this property upon the books was ap-

proximately \$450 an acre but that neither he nor L. J. Miller considered it worth that much at the time Monroe took it, or later. At one time Carlyle took the position that some compromise should be reached between "nothing and 450." Defendants pleaded, as to parcel one, that the consideration was subsequently to be agreed upon, has not yet been determined, should be determined by the court if the court finds that plaintiff is the owner.¹ Defendants tried the case as if these pleadings applied also to parcels two and three.

Yet, when explaining why no charge for the purchase price was entered against Monroe upon the books of Aptos, L. J. Miller said it was because Monroe delayed and never did tell Miller how much of parcels two and three he wanted, the witness adding that as soon as that were known it would have been a simple matter to compute the total, multiplying the price per acre by the number of acres. That, obviously, was predicated upon there being an "agreed" value.

A still different explanation given by L. J. Miller for the lack of a charge against Monroe on the Aptos books was that Monroe endeavored to persuade Miller to take for his own use a comparable amount of land, charging its purchase price to Miller on the books of Aptos, so that the respective accounts of Monroe and of Miller would be about the same in amount. Mil-

1. In the answer to the complaint which involves parcel one the defendants allege that Monroe entered into possession and agreed to pay Penproco "a consideration for said real property to be thereafter agreed upon" and that Monroe "did not at any time prior to his death repudiate said agreement and did not, prior to his death, as aforesaid, pay any valuable or other consideration whatsoever to the said Peninsula Properties Company, or any one on its behalf, for said real property or any part thereof."

In Penproco's cross-complaint in the suit which involves parcel one it is alleged that Monroe agreed to pay Penproco a consideration for parcel one, a consideration "to be subsequently agreed upon" and "that in the event that it should be determined by a decree of this Court that plaintiff herein is the owner

of said real property, said decree should be conditioned upon payment to said Peninsula Properties Company of a sum not less than the cost to said Peninsula Properties Company of said property, and the whole thereof."

In the cross-complaint it is also alleged that in the event of a judgment in favor of plaintiff Penproco should be awarded a lien as vendor upon the property for the amount of said cost, which amount is claimed by Penproco. One of the clauses of the prayer of the cross-complaint is that if the court should decree that plaintiff is the owner of parcel one, a judgment should be made and entered decreeing that Penproco or the title company for and on behalf of Penproco has a lien as vendor upon said property "for such sum or sums as this Court may determine."

ler considered this suggestion but ultimately decided against it. In the process, apparently, the entry of a charge against Monroe was neglected and not made.

In response to a statement by the trial court that further evidence was needed upon the question of the price to be paid for the property, the parties stipulated that the book cost to Penproco was \$450 per acre, but that the reasonable value of the land was \$225 per acre. The court then made a finding that Monroe and Miller entered into an agreement on behalf of Aptos by the terms of which Aptos "agreed to sell to * * * Monroe * * * and to convey to said Monroe a clear title to said land in consideration of which Monroe's stockholder account was to be charged with the agreed value of said property; that the amount of land involved in said agreement was 137 acres, and the agreed value was \$225.00 per acre, making a total consideration of \$30,825.00."

It is apparent that the trial court did not believe Miller's testimony that Monroe expressly agreed to pay the amount of the book cost to Penproco, \$450 per acre. It reasonably could infer that Monroe would not agree to pay double the reasonable value of the property. Also, the court was not required to believe Miller's testimony that they expressly agreed to determine the price at a later date. It could infer that they simply did not discuss the price. Monroe is dead. His lips are sealed. Miller is the only person living who is capable of testifying as to what took place between them and he is an interested witness.

[2] In this situation these principles apply: "It has always been the rule that courts and juries are not bound by mere swearing no matter how positive, unless it be credible swearing. It may bear within itself the seeds of its own destruction, as where it is inherently improbable, or its destruction may be wrought from without, as where the person swearing is in some manner impeached. In either case court and jury are entitled to disbelieve the testimony if they choose, and, if they do refuse it credence, it is of no more effect than if

it had not been given. It disappears from the case and the inference opposed to it is no longer contradicted." *Market Street Ry. Co. v. George*, 116 Cal.App. 572, 576, 3 P.2d 41, 43. See also, *Hicks v. Reis*, 21 Cal.2d 654, 659-660, 134 P.2d 788; *Blank v. Coffin*, 20 Cal.2d 457, 460-462, 126 P.2d 868; *Huth v. Katz*, 30 Cal.2d 605, 608-609, 184 P.2d 521; *Tingey v. E. F. Houghton & Co.*, 30 Cal.2d 97, 101-102, 179 P.2d 807; *Langley v. Pacific Gas & Electric Co.*, 41 Cal.2d 655, 663, 262 P.2d 846; *Perske v. Perske*, 125 Cal.App.2d 795, 801-802, 271 P.2d 528; *Lombardi v. Tranchina*, 129 Cal. App.2d 778, 780, 277 P.2d 938.

[3,4] The trial court may have believed that although the parties intended that Monroe pay for the property, no definite price had been determined, perhaps had not even been discussed. In such a case, to prevent an inequitable result, the court could imply a reasonable price. "When a contract does not determine the amount of the consideration, nor the method by which it is to be ascertained, * * * the consideration must be so much money as the object of the contract is reasonably worth." Civil Code, § 1611. In that case it is the function of the trier of the facts to ascertain and declare the reasonable value of the property involved. See *Dickerman v. Ohashi Importing Co.*, 63 Cal.App. 101, 105-107, 218 P. 458; *First Bank of Jamestown v. Gillis*, 104 Cal.App. 523 527-528, 286 P. 451; *Carney v. Hayter*, 62 Cal.App. 2d 792, 797-798, 145 P.2d 712; *Great Western, etc., v. John A. Wathen Distillery Co.*, 10 Cal.2d 442, 446, 74 P.2d 745; *Toomy v. Dunphy*, 86 Cal. 639, 643, 25 P. 130.

[5] This, we believe, is what the trial court had in mind. The use of the words "agreed value" in the findings must have had reference to the fact that the parties litigant "stipulated and agreed that the reasonable value of the land, the subject of these actions, was the sum of \$225 per acre" (emphasis added), and thus was a finding that the reasonable value of the land was \$225 per acre, not a finding that the parties to the contract (L. G. Monroe and L. J. Miller) expressly agreed that it

was worth \$225 an acre. The findings of fact and conclusions of law are, of course, judicial "writings" which are subject to interpretation in accordance with substantially the same canons of interpretation as statutes, contracts, and other "writings." *Verdier v. Verdier*, 121 Cal. App.2d 190, 193, 263 P.2d 57.

[6] Defendants argue that, in the absence of a stipulated price, the contract was too uncertain to be enforced. The mere fact that an agreement is silent as to price does not necessarily make it unenforceable. "A valid contract of sale may be made without any stipulation as to the price, the law in such a case implying that the price is the reasonable value of the thing which is the subject-matter of the agreement. This is, however, no exception to, but rather a special instance of, the foregoing rule [that a contract may not be enforced unless it is complete and certain in all material terms]; because such a contract does, in fact, by operation of the law, furnish a means of exactly ascertaining and fixing the price." *Pomeroy's Specific Performance of Contracts* (3d Ed.) p. 382, § 148; see also 12 Cal.Jur.2d 311, § 109.

[7] Defendants contend that the finding that Monroe did everything required of him to be performed under the terms of the contract, is not supported by the evidence. The only thing that remained to be done was to enter an appropriate charge against Monroe upon the books of Aptos; i. e., to charge his account with \$30,825, the purchase price of the land. The trial court may well have inferred that Monroe appropriately left the making of that entry to L. J. Miller, who testified that he handled the finances for both corporations, Aptos and Penproco. Moreover, the defendants have not suffered by the delay. Monroe's credit balance, \$41,684.41, exceeded the amount of the charge. No loss ensued from the delay in making the entry.

[8] Monroe's credit balance was not barred by the statute of limitations. His credit balance and Aptos' right to the purchase price of the land have continuously been and are "cross-demands" of the type

mentioned in section 440 of the Code of Civil Procedure and are, therefore, "deemed compensated, so far as they equal each other". Even if the statute of limitations runs against one of such demands, that demand may be set off in a suit to recover the other demand. *Jones v. Mortimer*, 28 Cal. 2d 627, 632, 170 P.2d 893; *Sunrise Produce Co. v. Malovich*, 101 Cal.App.2d 520, 522-524, 225 P.2d 973.

[9] Nor did the fact that an action which plaintiff had brought against Aptos on the book account was dismissed for lack of prosecution, cancel that account or the credit which it evidenced. A judgment of dismissal in such a case is not upon the merits and is not *res judicata*. *Gonsalves v. Bank of America Nat. Trust & Savings Ass'n*, 1940, 16 Cal.2d 169, 105 P. 2d 118; *Atchison, T. & S. F. Ry. Co. v. Rollaway Window Screen Co.*, 1951, 101 Cal.App.2d 763, 226 P.2d 763.

[10] Defendants belatedly claim the bar of section 339, subd. 1, of the Code of Civil Procedure. They did not assert that claim in the trial court. They pleaded only section 318 of the code. Moreover, they pleaded the agreement, relied on it, and introduced evidence to support and prove it. It does not lie with them now to say it was barred by the two-year statute of limitations.

[11, 12] Also belatedly, the defendants now for the first time assert the bar of the statute of frauds. They did not present that as an issue in the trial court in so far as our examination of the record discloses. Besides, they are equitably estopped from relying upon the statute of frauds. In reliance upon this oral agreement which he made with L. J. Miller, his close and intimate business associate of many years, Monroe went into possession and made extensive permanent improvements at a cost of not less than \$35,000. Miller visited the property frequently, knew of these expenditures and of Monroe's reliance upon him, yet stood by, failed to make the debit entry against Monroe in the Aptos books. To allow Miller and the corporation he acts for to use the statute of frauds as a bar to enforcement of the agreement would re-

sult in a total loss of Monroe's investment. It would, doubtless, also entail the loss of the entire amount of Monroe's credit balance against which, it would appear, the statute of limitations has run except to the extent of the offset allowed by section 440 of the Code of Civil Procedure. In contrast, the solution which the findings and judgment effectuate is just and fair and equitable to both parties. Plaintiff pays and defendants receive the reasonable value of the land.

[13] Defendants' point that this equitable estoppel is not available to plaintiff because she did not plead it is not well taken. How was plaintiff to plead it? Defendants brought the agreement into the picture by their pleadings and proof, with no mention of the statute of frauds. See 18 Cal.Jur.2d 412-413, Estoppel, § 13. Moreover, it would appear that the doctrine of part performance obtains here and renders the statute of frauds unavailable as a bar to plaintiff's actions. See 23 Cal.Jur. 465-469, Specific Performance, §§ 34-36.

[14] Defendants invoke the rule that an action to quiet title may not be maintained by the holder of an equitable interest against the legal owner. The reason for that rule does not obtain here. It is not a case of a plaintiff who under the guise of a general plea of ownership seeks to prove facts showing fraud or other grounds of constructive trust or reformation of a deed and thus take the defendant by surprise. See *Aalwyn's Law Institute v. Martin*, 173 Cal. 21, 26, 159 P. 158; *Kennedy v. Scally*, 62 Cal.App. 367, 370-371, 217 P. 96; *Bacon v. Bacon*, 21 Cal.App.2d 540, 544-545, 69 P.2d 884. Instead, it is a case in which the defendants, in their effort to show that Monroe's possession was permissive, not adverse, produced the facts which showed the agreement and proved his equitable title. That was not the case of a plaintiff taking a defendant by surprise. Besides, the defendant who holds the legal title in this case (the title company) is virtually a mere stakeholder. No one questions its legal title. It does not claim more than the bare legal title. The contest is between the plaintiff and the other defendants, concerning the equitable title: Does the title com-

pany hold for the benefit of the plaintiff or for the benefit of defendant Penproco?

[15, 16] Defendants' remaining points are to the effect, principally, that various of the findings were not within the issues framed by the pleadings. One complete answer is that all of the facts which the court treated as material, as indicated by its findings, were treated by the parties as if in issue, and the case was fully tried upon that theory. As said in *Buxbom v. Smith*, 23 Cal.2d 535, 543, 145 P.2d 305, 308, " * * * the matter of pleading becomes unimportant when a case is fairly tried upon the merits and under the circumstances which indicate that nothing in the pleadings misled the unsuccessful litigant to his injury."

[17] Defendants say there is neither pleadings, evidence, nor a finding that the consideration to be paid for the land was adequate or that the contract was just and reasonable. The absence of a pleading and the immateriality thereof, we have explained. The stipulation that the reasonable value of the land was \$225 and the finding that the "agreed value" was in that amount, spell adequacy of consideration and justness, fairness and reasonableness of the contract. Under the circumstances we see no error, certainly no prejudice to the defendants, in the lack of an express finding in that regard.

[18] Defendants further contend that evidence introduced in one action can not be considered in the other for lack of a stipulation therefor. Apparently counsel started the trial with an understanding that from time to time as evidence was offered they would identify the action in which presented and would stipulate whether it would be available in the other action if relevant thereto. But almost immediately that plan was abandoned. Nearly all the evidence went in without limitation and, as we read the record, was treated by court and counsel as introduced in both actions, to the extent relevant.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied: TRAYNOR, J., dissenting.

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

John HITE, Defendant and Appellant.
Cr. 5356.

District Court of Appeal, Second District,
Division 3, California.

July 22, 1955.

Defendant was convicted for two violations of section 288 of Penal Code. The Superior Court of Los Angeles County, Burdette J. Daniels, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Vallée, J., held that evidence sustained the convictions.

Affirmed.

1. Infants ☞20

Evidence sustained conviction for two violations of section 288 of Penal Code. Pen.Code, § 288.

2. Criminal Law ☞1030(1)

Where defendant did not object at trial to investigating officer's testimony of his conversation with defendant concerning defendant's relations with child who was not one of two prosecuting witnesses, defendant could not complain on appeal.

3. Mental Health ☞449

Where defendant appealed from order denying his request for jury trial on issue of sexual psychopathy, but did not argue point in his brief, he was deemed to have waived it. Welfare and Institutions Code, § 5501(c).

Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Marvin Gross, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant was charged in two counts with violations of section 288 of the Penal Code and with having suffered a prior conviction of the same offense. He ad-

mitted the prior conviction. In a jury trial he was found guilty as charged in each count. Pursuant to section 5501(c) of the Welfare and Institutions Code the court adjourned the proceeding and certified defendant for hearing and examination to determine whether he is a sexual psychopath. A hearing was had and an order made committing him to a hospital for observation and diagnosis. Welf. & Inst. Code, § 5512. Thereafter the court found defendant is a sexual psychopath and that he would not benefit from further treatment. Further proceedings were then had with reference to the criminal charge. Defendant moved for a new trial, which was denied. He then made "a request for a jury trial on the findings of sexual psychopathy." The request was denied. Defendant was sentenced to state prison. He appeals from 1) the judgment, 2) the order denying his motion for a new trial, and 3) the order denying his request for a jury trial on the issue of sexual psychopathy.

[1] The first specification of error is that the evidence is insufficient to sustain the verdict. Two little girls, 11 and 13, testified defendant committed acts upon them denounced by section 288 of the Penal Code. No purpose would be served in reciting the details. The record contains abundant substantial evidence which supports the verdict as to each count.

[2] An investigating officer testified he asked defendant about three girls—the two prosecuting witnesses and one other named Sharon; he asked whether Sharon had been in his truck during the last week, to which defendant replied she had not; also whether he had ever kissed her or touched her in any way, to which defendant replied he had not. Defendant claims it was prejudicial error to permit the officer to testify as to the conversation with respect to Sharon. The People do not answer the point. However, we have examined the record and find that no objection was made to the conversation. It is too late for defendant to complain.

[3] Although defendant appealed from the order denying his request for a jury trial on the issue of sexual psychopathy, he does not make the point or argue it in

his brief. He is deemed to have waived it.

The judgment and the orders appealed from are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



134 Cal.App.2d 553

F. V. TREMBLEY, Plaintiff and Respondent,
v.

Nicholas Raymond BENEDETTI, individually and doing business under the firm name and style of Pan Pacific Trading Co., etc., Defendants and Appellants,

Lloyd W. Carter, Receiver of the Estate of Nicholas Raymond Benedetti, also known as N. R. Benedetti, Bankrupt, Intervener.

Civ. 16161.

District Court of Appeal, First District,
Division 2, California.

July 26, 1955.

Action for partnership accounting. The Superior Court, Alameda County, Cecil Mosbacher, J., entered judgment adverse to accountable partner, and he appealed. The District Court of Appeal, Dooling, J., held that where evidence showed records of business for two year period were missing, trial court's refusal to allow credit for debts incurred prior to, but paid after, period when records were missing, and refusal to allow accountable partner credit for debts listed in his bankruptcy schedule was not error.

Judgment affirmed.

1. Estoppel ⚡68(2)

If parties' testimony is to be treated as judicial admission it must be accepted as true by his adversary, and if his adversary elects to contradict it by testimony of his own, he cannot at same time insist that his opponent is bound by it.

2. Partnership ⚡53

In action for partnership accounting, evidence supported trial court's finding that written contract of partnership bearing signatures of all parties was executed and was valid and subsisting.

3. Appeal and Error ⚡1012(1)

The weight and effect of evidence is for trier of fact to determine.

4. Appeal and Error ⚡901

It is incumbent upon appellant to present record which affirmatively shows that trial court committed error.

5. Partnership ⚡333

In action for partnership accounting wherein evidence showed records of business for two year period were missing, trial court's refusal to allow credit for debts incurred prior to, but paid after, period when records were missing, and refusal to allow accountable partner credit for debt listed in his bankruptcy schedule was not error.

Brown & Smith, Jacqueline Taber, Oakland, for appellants.

Edwards & Friborg, Oakland, for respondent.

DOOLING, Justice.

Defendant Benedetti appeals from a judgment in favor of plaintiff in an action for a partnership accounting. He presents his appeal on a condensed statement of only a portion of the oral proceedings. Rules 7(a) and 7(b), Rules on Appeal. Pursuant to Rule 7(a) he stated six points to be raised by him on appeal. The first four points, while stated in different forms, are all directed to the single claim that the finding that the written partnership agreement signed by the parties on March 17, 1947, was a valid and subsisting one is not supported by the evidence.

The court found that on or about March 17, 1947, the parties entered into a written partnership agreement to do business under the firm name of Pan Pacific Trading Company; that this agreement was executed by appellant Benedetti in consideration of the withdrawal of plaintiff's hus-

band from an existing partnership of the same name between Benedetti and the husband and the forbearance of the husband to demand an accounting thereof. It was further found that this partnership agreement is valid and subsisting.

The court took an accounting and gave judgment for the balance found to be due and owing from the defendant to the plaintiff.

Appellant's claim that the evidence does not support the finding that this written partnership agreement is valid and subsisting is based primarily on the following facts: Four separate actions against appellant were consolidated for trial. In the complaint upon which judgment was entered for respondent she pleaded and relied upon the written contract of partnership of March 17, 1947. In two of the other actions her husband was joined as plaintiff and in each of them it was alleged that in January, 1948, the defendant entered into an oral agreement of partnership with plaintiffs, husband and wife. In the fourth action respondent herein was the sole plaintiff and counted on a special agreement with appellant and one Beatty whereby she alleged that she was entitled to $\frac{1}{4}$ of the profits from the sale of a single lot of steel. The court entered judgment for defendant and appellant in these other three actions.

Upon the trial of the consolidated actions respondent herein and her husband both testified that after the execution of the written agreement of partnership in March of 1947 respondent became ill and for a time was unable to participate actively in the partnership business, and that in May of 1947 it was orally agreed with appellant Benedetti that respondent's husband and appellant should resume their former partnership; they further testified that in January, 1948, it was orally agreed among the three of them that respondent and her husband should both become members of the partnership, appellant Benedetti to have $\frac{1}{2}$ the profits and respondent and her husband to have $\frac{1}{4}$ each. There was also testimony in support of the last action mentioned above

which dealt with the single sale of one lot of steel. Appellant flatly contradicted this testimony. He testified that he did not enter into any partnership with either respondent or her husband at any time during 1947 or 1948.

Primarily it is appellant's position that the allegations of the other three complaints, and particularly the testimony given by respondent and corroborated by her husband in support of the allegations thereof, are quasi-judicial admissions binding on the respondent; and that, being inconsistent with the continuance of the partnership formed by the written agreement of March, 1947, the finding of the court that that partnership is valid and subsisting cannot stand.

The doctrine of quasi-judicial admissions in the jurisdictions where it has been adopted is stated in a note in 169 A.L.R. pp. 800-801 in the following language: "If a party testifies deliberately to a concrete fact, not as a matter of opinion, estimate, appearance, inference, or uncertain memory, but as a considered circumstance of the case, his adversary is entitled to hold him to it as an informal judicial admission."

Professor Wigmore in his work on Evidence, 3d Ed., Vol. IX, sec. 259a, p. 597, after discussing the principle accepted by some courts in recent years of treating the testimony of a party unfavorable to his own cause as a conclusive judicial admission, expresses the following conclusion on p. 601: "The truth of the case depends on a comparison of what all the witnesses say and all the circumstances indicate. A rule which binds a party to a particular statement uttered on the stand becomes an artificial rule. It is out of place in dealing with testimony. Let the judge test each case by itself."

Except for a dictum in the case of *Trembley v. Kolts*, 29 Cal.App.2d 699, 85 P.2d 541, no California case has been cited to us, which expresses the rule of the binding effect of a party's own testimony adverse to his own case. The court in that case did say at page 706 of 29 Cal.App.2d, at page 544 of 85 P.2d: "It is undoubtedly true that while a party is at liberty to show by

one witness what is opposed to the testimony given by another, this will not permit such party for his own advantage to say that the testimony given by himself shall be treated as false and that of an opposing witness as true." This was a dictum because the court in that case was not called upon to apply the rule so announced, since it found the testimony of the party not destructive of his cause of action. The court in that case cited *Edgecomb v. Callahan*, 132 Cal.App. 248, 22 P.2d 521. In the *Edgecomb* case after proving a contract by which he would only be entitled to a commission if a lease was signed the plaintiff testified that no such lease had been signed. The court stopped the trial and gave judgment for defendant. The rule of quasi-judicial admissions was not discussed and it does not appear that plaintiff offered to prove or could have proved by any other witness that a lease was in fact signed. In two recent cases where the rule of quasi-judicial admission by the testimony of a party was invoked the courts quoted with approval the language of *Wigmore* which we have set out above. *Richcy v. Pedersen*, 100 Cal.App.2d 512, 519, 224 P.2d 100; *Weingetz v. Cheverton*, 102 Cal.App.2d 67, 78, 226 P.2d 742. Cf. *Frost v. Los Angeles Ry. Co.*, 165 Cal. 365, 132 P. 442.

We do not find it necessary in this case to decide whether the rule treating a party's own deliberate and considered testimony as to concrete facts adverse to his cause as a judicial admission which he is not at liberty to contradict should be adopted by the courts of this state. In this case if the testimony had the effect of a judicial admission the appellant himself refused to treat it as such. Quite to the contrary he disputed its truth by flatly contradicting it as a witness on his own behalf. Not only this but by his contradictory testimony he succeeded in defeating the other causes of action since it is clear that if the trial court had believed the testimony of the respondent and her husband they would have been entitled to a judgment and accounting based on the partnership which they testified was orally formed by the three of them in 1948;

and the bulk of the recovery in the judgment appealed from was based on the sale of the single lot of steel after that date.

[1] The logical absurdity which appellant asks this court to accept in this case is obvious: Despite the fact that the court has found the facts one way in the other cases because he successfully contradicted respondent's testimony he insists that in this case the court was compelled to make an exactly contrary finding on the same evidence because it must accept respondent's testimony as true. We are satisfied that this cannot be the law. If a party's testimony is to be treated as a judicial admission it must be accepted as true by his adversary. If his adversary elects to contradict it by testimony of his own he cannot at the same time insist that his opponent is bound by it.

[2] The court had before it the written agreement of partnership. The evidence showed that respondent after her illness returned to the office where the business was conducted. Letters written in the partnership name were signed by respondent, she paid from her own funds some of the salary of an employee. The court was entitled, in the words of Professor *Wigmore*, quoted above, to arrive at the truth of the case from "a comparison of what all the witnesses say and all the circumstances indicate." The court, in view of the conflict in the testimony, could well find that the burden of proof of the alleged subsequent oral agreements was not sustained, but the fact of the execution of the written contract of partnership bearing the signatures of the parties could not be successfully contradicted. We cannot say on the whole case that the evidence, direct and circumstantial, does not support the findings of the court.

The other points made by appellant are:

1. Error in law in the Court's refusal to allow Pan Pacific Trading Company debts incurred prior to March 17, 1947, and paid thereafter in rendering the accounting.

2. Error in law in the Court's refusal to allow in rendering the accounting Pan Pacific Trading Company debts listed in Appellant N. R. Benedetti's Bankruptcy Schedules.

The settled statement contains the following recital as to these two items:

"The Court in taking the accounting disallowed all debts incurred by Pan Pacific Trading Company prior to March 17th, 1947 but paid after that date, *in the absence of sufficient evidence to support such claimed offsets.* For the same reasons the Court further disallowed all Pan Pacific Trading Company debts listed in Appellant Benedetti's bankruptcy schedules * * *." (Emphasis ours.)

Appellant says in his closing brief: "The books of the company were produced and the excluded debts were proved in exactly the same manner as the debts which were allowed by the entries in the books. The contention that the evidence was not sufficient to support them is untenable."

[3] The weight and effect of the evidence is for the trial court. The settled statement does not contain the foundation evidence with regard to these books of account. It does contain the following significant statement:

"Mrs. Trembley testified that there were two steel filing cabinets of three drawers each which were full of letters, records and correspondence and that many of said records for 1946 and 1947 were missing. Appellant did not deny this testimony."

[4, 5] It is incumbent upon appellant to present a record which affirmatively shows that the trial court committed error. *Vaughn v. Jonas*, 31 Cal.2d 586, 601, 191 P.2d 432; *Morris v. Harris*, 118 Cal.App.2d 104, 257 P.2d 93. With evidence before the court that many of the records of the business for 1946 and 1947 were missing we cannot say that the record on appeal before us affirmatively shows that the trial judge erred in her determination that the evidence before her was not sufficient to support these claimed offsets.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

Emma Loomis RUTLEDGE, Plaintiff, Respondent and Cross-Appellant,

v.

Vernon E. RUTLEDGE, Defendant, Appellant and Cross-Respondent.

Civ. 20750.

District Court of Appeal, Second District, Division 1, California.

Aug. 1, 1955.

Action for accounting and partition of certain real and personal property held jointly by divorced wife and husband. The Superior Court, Los Angeles County, Leon T. David, J., entered interlocutory decree awarding wife sum due on accounting, and ex-husband appealed. The District Court of Appeal, White, P. J., held that the trial court was not bound by holding on prior appeal which resulted in decision for partition and sale rather than money judgment where evidence on second trial relating to nature of business and sale and removal of assets by husband was different from evidence on former trial.

Judgment affirmed.

1. Appeal and Error ⇐1097(2, 3), 1195(3, 4)

Rule which requires both trial and appellate tribunals to follow rules laid down upon former appeal is inapplicable where evidence on second appeal is substantially different in material respect, and particulars in which it is different are pointed out, or when application of rule results in manifestly unjust decision.

2. Appeal and Error ⇐1195(4)

In action by former wife for accounting and partition of commercial real estate jointly owned by her and her ex-husband, trial court was not bound by holding on prior appeal which resulted in decision for partition and sale rather than money judgment where evidence on second trial relating to nature of business and sale and removal of assets by husband was different from evidence on former trial.

Tudor Gairdner, Los Angeles, for appellant.

Walter H. Young, Los Angeles, for respondent.

WHITE, Presiding Justice.

Both plaintiff and defendant have appealed from the present interlocutory judgment rendered May 12, 1954, after the second trial. The judgment after the first trial was in part that defendant pay to plaintiff \$69,487, representing one-half of the net worth of the automobile business of the parties as of September 12, 1949, the date of their divorce, with interest thereon computed at 7% per annum from said date; and "that, subject to the lien of this judgment Vernon E. Rutledge is the sole owner of the Rutledge Buick Company". That judgment was reversed on appeal. *Rutledge v. Rutledge*, 119 Cal.App.2d 114, 259 P.2d 79.

Without conflict, the record discloses that plaintiff and defendant had been husband and wife for over 35 years. In 1949 plaintiff commenced an action for divorce in the Superior Court of Los Angeles County. She was then induced by defendant to dismiss her California attorney and to go to Nevada for her decree. It failed to dispose of the community property, which consisted mainly of the business known as Rutledge Buick Company. The real property upon which said business was located was owned by plaintiff and defendant as joint tenants. Both the amended interlocutory judgment from which the first appeal was taken and the interlocutory judgment from which the instant appeals were taken appointed referees, directed them to sell the real property and to report to the court for confirmation, and each ordered that "the proceeds of the sale shall be divided according to law and the findings and judgment of the court".

The present judgment is, like the one considered on the former appeal, in part, a "money judgment". It awards to plaintiff \$91,710.95 "as the balance due * * * on the accounting * * *." It is urged by defendant that "the Court erred in awarding her a money judgment instead of ordering the business partitioned or

sold, and that such award of a money judgment was in direct contravention of the decision of the Appellate Court in *Rutledge v. Rutledge*, 119 Cal.App.2d 114 [259 P.2d 79]."

On that appeal from the former judgment in the instant action, Mr. Justice McComb speaking for the court, 119 Cal. App.2d at pages 118-119, 259 P.2d at page 82, said:

"When several persons are co-owners of real or personal property any one or more of the co-owners may file an action for partition. It then becomes the duty of the court to partition the same and if this cannot be done without great prejudice to such owners, it is the duty of the court to cause the property to be sold and to partition the proceeds among them according to their respective interests. (Code of Civil Procedure, sections 752, 752a).

"In the present case this rule was not followed. * * *

"As to this portion of the decree it must be reversed with directions to the trial court to cause the property to be sold in accordance with the applicable code provisions and to take a full and complete accounting.

"In the accounting between the parties the court will determine the proper amounts to charge defendant and to credit plaintiff on account of the net income earned by the business from the date of the divorce of the parties to the date of the filing of the present action, in the absence of any supplemental and/or amended pleadings. For example, if the evidence discloses that defendant has paid the deficiency tax assessed against him from the income of the business, he shall be charged with this amount in determining the net income of the business."

A supplemental complaint was filed November 4, 1953, in which the new matter included allegations of the interests of third parties in the real property; defendant's sole and exclusive possession and control of said business; defendant's collection of rents on the real property and the profits of the business and his refusal to account for them; defendant's statement to plaintiff that she will never get any part of her

interest in the said business or the profits therefrom or the rentals from the said real property; and an application for the appointment of receivers to protect the property pending trial.

By his answer to said supplemental complaint, filed November 17, 1953, defendant admits that he has collected said rents and profits, alleges that he is willing and ready to account for said rentals, and that he will not account for the profits unless compelled by the court to do so; and further that "this Trial Court found and so decreed that this defendant pay plaintiff as a net return on the latter's former community interest in said business seven per cent (7%) on \$69,487. As the result of the foregoing, it is unnecessary for this defendant to account to plaintiff for the profits from said business.

* * * * *

"* * * that the District Court of Appeal upheld this defendant's contention that the business should be sold in the above partition action and, since a further trial of the above matter has been set for hearing on December 1, 1953, alleges that a partition sale of said business should be promptly and orderly held and that the appointment of a receiver would seriously jeopardize the interests of all parties to the above action."

Throughout the second trial, plaintiff contended that she was entitled to a full accounting for one-half of the net profits of the business and one-half of the rentals of the real property from the time of their divorce to the date of the final judgment, in addition to one-half the proceeds of the sales of the business and the real property, respectively.

Defendant consistently contended that the court had no power to take an accounting and that its power was limited by the decision on appeal to ordering sale of the real property and the business, dividing the proceeds of such sales, and awarding plaintiff 7% per annum interest on her half of the proceeds of the sales from the date of the divorce to the date of the sales.

The court reserved its decision as to the amount to be awarded plaintiff as return

on her capital investment so withheld from her by defendant, and proceeded to take a full accounting. The court also proceeded to take evidence on the character of the assets of the business to determine whether all or a portion should be partitioned in kind, and, if not, whether the business could be sold as a going concern, or its tangible assets sold in one or more units.

The first complaint in the instant action was filed March 28, 1950. At the first trial in February, 1952, it was stipulated by the parties that the net worth of the business was, on September 12, 1949, the date of their divorce, \$138,974.01, and the court so found. No evidence was then offered or received concerning the tangible assets of the business. During the accounting, in the second trial, however, it developed without conflict that such stipulated value of the business was the then book value and included nothing for either the franchise or the goodwill, both of which were very valuable; that, since the divorce in 1949, defendant had withdrawn from the business \$549,291.45, and, after the first trial, he had withdrawn from the business in addition to his salary of \$1,000 monthly, for which admittedly no work was done by him, the sum of \$86,000 in cash, \$70,000 thereof on May 2, 1952, and \$16,000 thereof on October 16, 1952. At the time of the first trial, a large portion of the business assets was in cash and all automobiles, new and used, were fully paid for. At the time of the second trial there was practically no cash, all automobiles, new and used, were floored or mortgaged for their full value, and all contracts receivable had been discounted and sold.

Mr. Behrens, the general manager of Rutledge Buick Company, testified as follows:

"Q. And if this business were sold as a going business, would it bring more money than if it were sold piecemeal?

"Mr. Gairdner: That is objected to on the ground there is no foundation. No, I will withdraw the objection.

"The Witness: I don't know, Mr. Young. I would have to—there is nothing there to sell. I don't know. I couldn't answer that.

"Q. By Mr. Young: You say there is nothing there to sell. Do you mean by that—A. I mean that the majority of things like cars, and used cars, surely there is parts there, and there is more mechanics' tools out in back which I do not imagine have any value at all, unless somebody can use them, and if they could not use them they would be without value.

"Q. Without the \$85,000 item the debts of the business now exceed the assets, is that right? A. Oh, my, yes.

"Q. And from your knowledge of the business, the sale of those assets would not bring enough to pay the debts, is that right? A. No, I would say not."

Mr. Behrens and the office manager, under the direction of defendant, had from some time in 1952 up to the time of the second trial in December, 1953, added to the actual cash in the bank the sum of \$85,312.66 to procure the figure shown by their monthly reports to the Buick Company as the cash in bank. The defendant testified that he had spent some of the money travelling and the balance of it had been lost gambling in Nevada, Europe, and other places, that he then had only \$5 and it had been borrowed from his lawyer.

The interlocutory judgment from which this appeal was taken was filed May 12, 1954. June 10, 1954, defendant was adjudged a bankrupt by the United States District Court for the Southern District of California, Central Division. Since that time, the real property and the physical assets of the business have been sold under orders of said District Court. At the oral argument on the instant appeal it was stated that defendant had not communicated with his own attorney for a year and his whereabouts during all of that time had been and were then unknown.

The record of the first trial of the instant action is devoid of any evidence as to the nature of the assets of the business as of the date of the divorce, at the time of that trial, or at any other time. It is not disclosed by that record, as it is by the record on the appeal now engaging our attention, that the working capital of Rutledge Buick Company was turned over many

times each year, that there were frequent and complete liquidations of tangible properties (except obsolescent parts and old tools of little or no value) and usually re-investment of funds in other automobiles.

There was no showing on the first trial, as there was on the second, that practically all the salable tangible assets belonging to the business at the time of the divorce had been sold by the defendant, that the cash received therefor had been removed from the business, and that the business could not be sold for enough to pay the debts of the defendant contracted by him in connection with said business after the first trial.

Defendant's entire argument for reversal of the judgment now being considered is based upon the alleged law of the case and the only authorities cited by him are *Rutledge v. Rutledge*, supra, and Section 752 of the Code of Civil Procedure, neither of which has any application to the facts now before the court.

[1,2] We are satisfied that the doctrine of the law of the case does not apply in the instant appeal. The rule in question requiring both trial and appellate tribunals to follow the rules laid down upon a former appeal is inapplicable where the evidence on the second appeal is substantially different in a material respect and the particulars in which it is different are pointed out. *Allen v. Bryant*, 155 Cal. 256, 259, 100 P. 704; *Haase v. Central Union High School Dist.*, 27 Cal.App.2d 319, 321, 326, 80 P.2d 1044. Neither should the doctrine be adhered to when the application of its results in a manifestly unjust decision, *England v. Hospital of Good Samaritan*, 14 Cal.2d 791, 795, 97 P.2d 813.

Plaintiff, at the oral argument, because of the bankruptcy and disappearance of the defendant, abandoned her appeal. For that reason we have not considered whether or not a proper division of the profits of the business, under the circumstances here shown, has been made.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

134 Cal.App.2d 654

Ben W. WOLFE, Plaintiff and Appellant,

v.

GREEN MEARS CONSTRUCTION COMPANY, etc., Haddock Engineers, Limited, etc., Defendants and Respondents.

Civ. 20316.

District Court of Appeal, Second District,
Division 3, California.

July 29, 1955.

Personal injury action for injuries sustained when plaintiff fell into a ditch. The Superior Court, Los Angeles County, Harold B. Jeffery, J., entered judgment of nonsuit, and plaintiff appealed. The District Court of Appeal, Parker Wood, J., held that, even if it be assumed that plaintiff was an invitee and that defendants were negligent, plaintiff, who walked in impenetrable darkness in unfamiliar desert territory for distance of approximately 141 feet, was guilty of contributory negligence which would preclude his recovery.

Judgment affirmed.

Negligence $\S$ 67, 80

Even if it be assumed that plaintiff was an invitee and that defendants were negligent, plaintiff, who walked in impenetrable darkness in unfamiliar desert territory for distance of approximately 141 feet, was guilty of contributory negligence which would preclude his recovery for injuries sustained when he fell into ditch.

Betty & Campbell, Marion P. Betty and Lionel T. Campbell, Los Angeles, and Joseph F. Bender, Compton, for appellant.

Betts, Ely & Loomis and Ingall W. Bull, Jr., Los Angeles, for respondent Green Mears Const. Co.

Hulen C. Callaway, Los Angeles, for respondent Haddock Engineers Limited.

PARKER WOOD, Justice.

Appeal from a judgment of nonsuit, in an action for damages for personal injuries sustained as a result of falling into a ditch.

Defendant Haddock Engineers was general contractor for the construction of a United States Naval Ordnance Test Station in the Mojave Desert, about nine miles from Inyokern, which construction work included the excavation of a ditch for the installation of a pipeline.

Oil Field Construction Company was a subcontractor of Haddock Engineers.

Defendant Green Mears Construction Company was subcontractor of Oil Field for the excavation of the ditch, installation of the pipe, and filling the ditch after installation.

Plaintiff, an insulator-plasterer, was employed by Plant Rubber and Asbestos Works, which was a subcontractor of Green Mears. He began such employment in November, 1944. The naval station covered an area about 20 miles long and several miles wide. Within that area there were paved streets and dirt roads; and, among other things, there were barracks, mess halls, stores, a bank, a barber shop, a hospital, warehouses, recreation buildings, and a ball park. Plaintiff worked as an insulator or plasterer of buildings within the production area of the naval station or base, which area was about 10 miles from the place where the accident occurred; and he lived in barracks which were about half a mile from the place of the accident. Plaintiff had an employee's badge and he was not restricted in walking any place on the base, except in the production area and in places which were fenced with barbed wire and where there was a guard.

The ditch involved here was within the base area, was about 6 feet deep and 100 feet long, and was parallel with and about 10 feet south of "C" Street. Approximately 3,000 employees traveled on C Street daily. Usually plaintiff rode to his work in a station wagon with other employees, and they traveled on that street.

The accident occurred on September 4, 1945. During the week preceding the accident, plaintiff had been on vacation and away from the base. He worked on September 4, and returned to his barracks about 5:30 p. m. About 7:30 or 8:00 p. m. he went with two of his fellow employees in an automobile to the business center

(located southwest of his barracks). He went into a barber shop and then his fellow employees left him, stating that they were going to the recreation place (where there was a ball park). After getting his hair cut he went to a store and bought hair tonic and a carton of book matches. (Appellant asserts that the materiality of such patronizing was that it indicated that he was an invitee.) Then, between 8:00 and 8:30 p. m., he started to walk to his barracks. He walked in a northeasterly direction to the intersection of J and C Streets. C Street was paved. There was no light at that intersection, but a light (a red lantern) was there before he left for his vacation. As he turned to go west on C Street he saw a red light on a barricade, across C Street, about 300 feet west of said intersection. At the barricade there was a detour, about 500 feet long, which extended to the north and west around some construction work on C Street. North of C Street there was a pile of dirt which was 6 to 8 feet high—the detour went around it. The detour was in the sand and consisted of automobile or truck ruts. Appellant testified that when he had gone 20 or 30 feet on the detour, in the outer (north) or right-hand rut, he stepped out of the detour or rut to let an oncoming car pass; he stepped out to the north (right-hand side) a distance of approximately 2 feet; he turned around and looked at the car as it passed him; over the pile of dirt he could see the lights of the ball park, which lights were turned on while he was stepping out of the detour as the car was passing; then he decided to go to the ball game; the ball park was about 1,000 feet from him (south—in the vicinity of the business center); he started back to the game, and as he did so he “must have been in another track, forgetting” that he had stepped out of a track to let the car pass; when he stepped out of the detour he must have stepped into another truck track, because the track or rut which he then followed took him straight east instead of taking him southeast (back over the detour rut) to C Street; he followed those ruts (into which he stepped from the detour) but he could not see them—he followed them with his feet; when he had gone approximately

50 feet he ran into a roll of wire—his leg hit the wire; he wondered what was in front of him and he lighted a match, saw it was a roll of fence wire, and he knew he was about 15 feet north of C Street because the pile of dirt (near the detour) was not over 15 feet from the north side of C Street; then he walked on about 6 feet and he passed a pile of lumber about 2½ feet high—he could see the lumber by the match light; then he lighted another match and continued east until the match went out—a distance of 15 or 20 feet; then he lighted another match, and in front of him there were truck tracks or ruts; he turned and walked south in the right-hand (west) truck rut, which was about 6 inches deep; when he turned south he was about 100 feet east of the east end of the detour and 15 feet north of C Street; he kept in that rut and went south until he fell into the ditch (which was south of C Street); he did not know that he crossed C Street while he was going south—he could not feel the pavement with his feet as he went over C Street because there was dirt on the pavement; he did not see the ditch before he fell into it; the place where he fell into the ditch was about 150 feet west of the intersection of J and C Streets and about 125 feet east of the detour. (After he turned south he went 15 feet to C Street, 16 feet across C Street, and 10 feet farther to the ditch—a total of 41 feet.)

On cross-examination, appellant testified that when he bumped into the wire he was about 20 or 30 feet from the detour but he went on east 70 or 80 feet, without attempting to get on C Street, because he had to go east anyway and it did not make any difference whether he got back on C Street or went east there (where he was); from the time he stepped out of the detour, he had no visibility of the ground where he was walking except when he lighted the matches; he had a carton of matches with him; when he turned south he was searching for something that would put him on C Street, because he could not see his “hand before his face”; when he turned south he knew then, when he lighted a match, that he was approximately 15 feet north of C Street and 100 feet east of the

barricade; after he turned south the red light on the barricade was within the range of his vision, but he did not look "over [toward] the barricade" and determine the relative position of the road because it was to his back and he did not turn around and look at it; the land between C Street and the ball park, except for 150 feet west of J Street, was several acres of brush four or five feet high, and there were no roads or paths on that land; he knew that the ditch had been south of C Street for four or five weeks preceding the time he went away for a week of vacation.

Appellant contends that the court erred in granting the motions of Haddock Engineers and Green Mears for a nonsuit, for the reason that those defendants owed appellant the duty of exercising ordinary care for his protection, and that defendants breached that duty and proximately caused appellant's injuries, without any contributory negligence on the part of appellant. He argues that defendants were negligent in that they left the deep ditch, which was within 10 feet of the heavily traveled C Street, uncovered and without any warning, barricade, lights or other safety devices on or around the ditch; and that appellant was an invitee of defendants because he was employed on the naval base by a subcontractor and therefore he was rightfully on the premises with the consent of the owner and the defendants, as contractor and subcontractor. With reference to being an invitee, he also refers to evidence that he lived on the base; he entered and traveled on the base by authority of a pass or badge; he patronized business places thereon; and he was on his way to the recreation center when he was injured.

Respondents assert that appellant's status at the time and place of the accident was that of a trespasser or mere licensee.

Appellant had been employed at the base about ten months preceding the accident and he had traveled on C Street many times. He knew that several acres on the south side of C Street, in the vicinity of the scene of the accident, were undeveloped desert land covered with brush. He knew that the ditch was south of C Street for a few weeks preceding the time he went away

for a week. When he went west on C Street, approaching the detour, he was guided by looking at the red light on the barricade across C Street at the beginning of the detour. When he stepped from the detour he was 20 or 30 feet from that light. When he started to the ball game by going east, after having stepped from the detour, he did not try at that time to return to C Street, because (according to his testimony) he had to go east anyway to get to the ball game and it did not make any difference to him whether he returned to C Street and then went east on it or whether he continued east where he was then walking. After he had gone about 50 feet east and had run into the wire and had seen the lumber, he knew he was in a construction area. It was so dark he could not see his hand before his face. The area there was unfamiliar to him. He followed the rut "with his feet." He lighted matches in order to see the wire, the lumber, and the ruts; and in order to make his way in the unfamiliar construction area. After turning south and while going toward C Street and the ditch, and while he was in such darkness that he could not see his way, he did not light any of the many matches he had with him. Also during that time, he did not look toward the red light (which was on the barricade across C Street) in order to get his bearings with reference to C Street. It does not appear that he was following the rut when he crossed C Street or when he walked the 10 feet beyond C Street to the ditch. The evidence shows that after he left the detour, and preceding the accident, he walked in impenetrable darkness in unfamiliar desert territory for a distance of approximately 141 feet (about 100 feet to place where he turned south, and then about 41 feet to the ditch). Even if it be assumed that appellant was an invitee and that defendants were negligent, it appears as a matter of law that appellant was guilty of contributory negligence. In *Robinson v. King*, 113 Cal.App.2d 455, at page 457, 248 P.2d 477, at page 478, it was said: "Where an invitee on premises, being unfamiliar therewith, proceeds into a place of impenetrable darkness and falls into an aperture and is injured, as a matter of law he does not

exercise ordinary care for his own safety and hence any injury he receives is the result of his own contributory negligence for which he may not recover." See also: *Medcraft v. Merchants Exchange*, 211 Cal. 404, 406, 295 P. 822; *Cheyney v. City of Los Angeles*, 119 Cal.App.2d 75, 78, 258 P. 2d 1099; *Bruce v. Risley*, 15 Cal.App.2d 659, 663-664, 59 P.2d 847. In *Mitchell v. A. J. Bayer Co.*, 126 Cal.App.2d 501, at page 504, 272 P.2d 870, at page 872, it was said: "We are also of the opinion that plaintiff was shown to have been guilty of negligence as a matter of law. He stepped into an area with which he was unfamiliar; it was 'pitch dark' and he took no precautions for his safety. * * * In his briefs he has stated no reason for his conduct except that he was following the lead of a wire he was tracing. This may account for his falling as he passed through the opening into utter darkness but it does not acquit him of negligence."

By reason of the above conclusion, it is not necessary to discuss other questions on appeal.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



134 Cal.App.2d 796

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Lee D. TRUBSCHENK, Defendant and
Appellant.
Cr. 3101.

District Court of Appeal, First District,
Division 1, California.

Aug. 3, 1955.

Defendant was convicted of a violation of Pen.Code, § 476a, prescribing punishment for issuance of a check or draft without sufficient funds or credit with intent to defraud. The Superior Court, Santa Cruz

County, Gilbert B. Perry, J., entered judgment and an order denying defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that where defendant voluntarily failed to appear at time to which trial had been continued after selection of jury and alternate juror, continuing trial to indefinite future time in absence of defendant pursuant to stipulation of deputy district attorney and counsel for defendant did not entitle defendant to declaration of a mistrial on ground that his right to be personally present at trial had been violated.

Judgment and order affirmed.

1. Criminal Law Ⓒ636(3)

Where defendant voluntarily failed to appear at time to which his trial on a felony charge had been continued after selection of jury and alternate juror, continuing trial in absence of defendant to an indefinite future time and ordering pursuant to stipulation of deputy district attorney and counsel for defendant that, if trial should be called up at a future date, the same jury and alternate juror would be called for service did not entitle defendant to declaration of a mistrial on ground that his right to be personally present at trial had been violated. Pen.Code, §§ 1043, 1181.

2. Criminal Law Ⓒ613

Where defendant voluntarily failed to appear at time to which his trial on a felony charge had been continued after selection of jury and alternate juror, he was not entitled to declaration of a mistrial on ground that consequent continuance of case to an indefinite future time, at which same jury and alternate juror were to be called for service, would necessarily greatly inconvenience members of jury and prejudice them against defendants.

3. Criminal Law Ⓒ1035(2)

Where trial judge in discussing defendant's motion to dismiss jury indicated that orders for forfeiture of bail and issuance of bench warrant for arrest of defendant upon his failure to appear for trial after selection of jury had been made out of the presence of jury and defense counsel did not disagree with such statement, de-

defendant could not contend for the first time on appeal from conviction that such orders had been made in the presence of jury, particularly where record was ambiguous as to presence or absence of jury.

4. Criminal Law §1144(7)

Where defendant voluntarily failed to appear at time to which his trial on a felony charge had been continued after selection of jury, it would be presumed on appeal from conviction that it was within the scope of authority of defense counsel in absence of defendant to stipulate for the continuance which was then ordered, particularly where defendant did not question during trial authority of counsel to so stipulate.

5. Criminal Law §852

Where clerk's transcript showed that jury had been admonished at time two of three recesses were taken on account of voluntary absence of defendant, fact that transcript was silent as to admonition at time third recess was taken and at time jury was excused from attendance, subject to call, did not necessarily show failure to admonish on such occasions.

6. Criminal Law §1174(1)

Failure to admonish jury at a time prior to introduction of any evidence is a mere technical error and not ground for reversal.

7. Criminal Law §1174(1)

Failure to admonish jury at time recess is taken is not reversible error, unless prejudice to defendant is shown.

8. Criminal Law §1174(1)

Where defendant after selection of jury but prior to introduction of any evidence voluntarily absented himself from trial on charge of violation of statute prescribing punishment for issuance of check or draft without sufficient funds or credit with intent to defraud, even if trial court failed to admonish jury at time one of three recesses was taken on account of absence of defendant and at time jury was excused from attendance, subject to call, it was not conceivable that defendant suffered any prejudice therefrom, and such failure to admonish was not reversible error. Pen. Code, § 476a.

Leo A. Sullivan and Richard F. Scott, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Convicted of a violation of Penal Code section 476a, defendant has appealed from the judgment and from the order denying his motion for a new trial.

He contends that his right to be present at his trial was violated. Defendant, as well as his counsel, were both personally present at all proceedings up to and including the selection and swearing of the jury and an alternate juror. Thereupon, the trial was continued to May 17, 1954, at 10 o'clock a. m. Defendant's counsel appeared but defendant failed to appear at the appointed hour. The court continued the case from time to time until 1:30 p. m. of that day. Defendant had not yet appeared and his attorney informed the court he did not know the whereabouts of the defendant. The court ordered defendant's bail forfeited and that a bench warrant for the arrest of defendant as a fugitive from justice be issued forthwith. Thereupon, pursuant to stipulation of the deputy district attorney and counsel for defendant, the court ordered that if the trial of the action and of the defendant be called up at a future date, undetermined at that time, the same jury and alternate juror would be called for service and that if any should be ill or away from the county a special venire could be summoned for service to fill in the vacancy on the jury.

On August 31, 1954, defendant and his counsel were present in court and it was ordered that the trial be resumed on September 29, 1954. The court also directed the sheriff to summon the same jurors and alternate juror who had theretofore been selected.

On September 29, 1954, defendant appeared with new and different counsel and moved to dismiss the jury. The motion was denied and the taking of evidence commenced.

It is true that "[t]he defendant must be personally present at the trial * * *. If the defendant in a felony case fails to appear at any time during the course of the trial and before the jury has retired for its deliberations or the case has been finally submitted to the judge, and after the exercise of reasonable diligence his presence cannot be procured, the court shall declare a mistrial and the cause may be again tried." Penal Code, § 1043. According to section 1181 of the Penal Code when in such a case the trial has been had in the absence of the defendant and a verdict has been rendered against him the court may upon the defendant's application grant a new trial. § 1181.

[1] It is not every temporary absence that entails such consequences. Thus, it was held in *People v. O'Brien*, 88 Cal. 483, 490, 26 P. 362, 364, that the mere fact that a defendant's "trial was continued when he was not present in court" was not a showing that "the trial * * * was had in his absence". In *People v. Morrell*, 28 Cal.App. 729, at page 734, 153 P. 977, at page 979, on one day of the trial "the court convened briefly, and in the presence of counsel for the defendant, but not in defendant's presence, made an order continuing the trial until the next day". That was not deemed an infringement of defendant's right to be present at the trial, the court saying: "There were no proceedings taken other than that a formal adjournment was ordered, and the defendant was not deprived of the right to be present when any matters affecting his guilt or innocence were presented before the jury." 28 Cal.App. at page 734, 153 P. at page 979. For further discussion of the principles involved and a review of the applicable authorities see *People v. Isby*, 30 Cal.2d 879, 892-894, 186 P.2d 405.

[2,3] Defendant argues that a continuance to an indefinite time in the future, as in the instant case, would necessarily greatly inconvenience the members of the jury

and prejudice them against him. That is to indulge in speculation. If in fact the continuance had any bearing upon the outcome of the case it was the result of defendant's own voluntary conduct in failing to attend his own trial on the day in question. We observe that defendant is for the first time making the additional argument that on the 17th of May, 1954, the orders for forfeiture of bail and the issuance of a bench warrant were made in the presence of the jury. He advanced no such claim, made no such assertion in the court below. Indeed, the trial judge, when discussing the question the second time that defendant presented his motion, said among other things "a recess was taken to 11:00 o'clock. The jury was excused and retired from the courtroom while the orders and motions, and so forth, were made with respect to the matter, and they were brought back into court * * *." Defendant's counsel indicated no disagreement with the accuracy of that statement. It would seem too late for him now to do so. Moreover, the minutes of that day, as they appear in the record before us, are ambiguous.¹

[4] Under the circumstances, it is presumed that it was within the scope of the authority of defendant's counsel to stipulate for the continuance which was made. Incidentally, it appears from the record that the defendant is upon this appeal for the first time challenging the authority of his counsel to stipulate. He did not voice any such objection during the trial.

[5-8] Defendant assigns error also in the asserted failure of the court to admonish the jury when on the 17th of May, 1954, it excused the jury at 11 a. m. and indefinitely continued the case at 1:30 p. m. That was the day defendant failed to appear. Three recesses were taken that day between 10 a. m. and 1:30 p. m. The clerk's transcript shows that on two of those occasions the jury and alternate juror were "admonished." It is silent as to the third. That silence does not necessarily show that the court actually did fail to admonish them

1. They indicate that the orders in question were made in the absence of the jury during the recess from 10:00 to 11:00 a. m. Yet, they also recite that

those orders were made at 1:30 p. m. when, it would seem, the jury was present.

on that occasion. It is likewise silent on that question when at 1:30 p. m. they were excused from attendance, subject to call. That silence also does not necessarily show failure to admonish on that occasion. Moreover, it is significant that the jury had not yet received any evidence. It has been held that failure to admonish the jury at a time prior to the introduction of any evidence is a mere technical error and not a ground for reversal. *People v. Coyne*, 116 Cal. 295, 297, 48 P. 218. Also, a defendant must show prejudice from failure to admonish, to be entitled to a reversal. *People v. Jordan*, 24 Cal.App.2d 39, 56, 74 P.2d 519; *People v. Williams*, 128 Cal.App.2d 458, 464, 275 P.2d 513. Even if the court failed to admonish the jury upon the occasion of two of the four recesses taken on May 17th, it is not conceivable that defendant suffered any prejudice therefrom.

The judgment and the order are affirmed.

PETERS, P. J., and BRAY, J., concur.



Morris S. VAN METER, Plaintiff and
Appellant,
v.

BENT CONSTRUCTION COMPANY and
Daley Corporation, Joint adventurers, Daley Corporation, Bent Construction Company, a partnership, et al., Defendants and Respondents.

Civ. 4900.

District Court of Appeal, Fourth District,
California.

July 26, 1955.

Rehearing Denied Aug. 16, 1955.

Hearing Granted Sept. 21, 1955. *

Action by subcontractor for compensation for claimed extra work in clearing trees and brush from reservoir basin. From adverse judgment of the Superior Court, San Diego County, C. M. Monroe,

* Opinion vacated 297 P.2d 644.

J., the subcontractor appealed. The District Court of Appeal, Barnard, P. J., held that where subcontractor, who was to clear trees and brush on reservoir basin was negligent in ascertaining extent of area to be cleared, and general contractors for construction of dam were guilty of no intentional misrepresentations, subcontractor was not entitled to recover compensation for claimed extra work in clearing reservoir basin.

Judgment affirmed.

1. Contracts ⇨232(1)

Ordinarily, a contractor who is required by bidding instructions to determine actual conditions of proposed work by a personal examination is bound by any situation there which is, or should be, obvious to him.

2. Contracts ⇨232(1)

Where subcontractor, who was to clear trees and brush in reservoir basin was negligent in ascertaining extent of area to be cleared, and general contractors for construction of dam were guilty of no intentional misrepresentations, subcontractor was not entitled to recover compensation for claimed extra work in clearing reservoir basin. *West's Ann.Civ. Code, § 1572.*

3. Contracts ⇨350(1)

In action by subcontractor for compensation for extra work in clearing trees and brush from reservoir basin which he knew was to be cleared below a certain contour line, which was to be marked with flags, and specifications, which he had, contained a map showing perimeter line of entire basin, evidence was sufficient to support finding that subcontractor was negligent in assuming that he was to clear only that area which lay below a certain neck of land.

4. Contracts ⇨4

Where sub-contractor's loss under its contract was due to his own mistake and negligence, court could not make him whole under the guise of another implied contract.

Higgs, Fletcher & Mack, San Diego, for appellant.

Procopio, Price, Cory & Schwartz, San Diego, Hill, Farrer & Burrill, Los Angeles, for respondents.

BARNARD, Presiding Justice.

In this action the plaintiff sought compensation for claimed extra work in clearing trees and brush from a reservoir basin. The defendants, as joint adventurers, were the general contractor under a contract with the City of San Diego for the construction of Sutherland Dam. Section H-01 of the General Specifications required them to clear all of the reservoir basin up to contour elevation 2073. The plaintiff entered into a subcontract with the defendants by which he agreed to do, for a price of \$29,750 all that portion of the work which the defendants were required to do by Section H-01. That section, so far as material here, reads: "The reservoir basin shall be cleared below elevation 2073. The contour 2073 will be flagged by City forces during the bidding period and the Bidder shall make visual observation before submitting bid. The area of the basin is about one square mile." The last page of the General Specifications was a map showing the outline of the entire reservoir basin, with the outer edges marked 2073, and stating: "Contractor shall clear area below contour 2073, about one (1) sq. mile."

The reservoir basin shown on the map, and as it lies on the ground, is an extremely irregular area, with many arms, and with a narrow neck near the middle of it. This neck is about 900 feet long and from 600 to 800 feet wide. The portion of the reservoir basin between this neck and the dam site is referred to on this appeal as the "lower" basin, and the portion above the neck as the "upper" basin, although they were not so referred to in the specifications or by the parties prior to the execution of the subcontract. The area of the lower basin is about 400 acres and the area of the upper basin about 246 acres. The upper basin was more heavily wooded than was the lower.

There is some evidence, although it was contradicted, that the plaintiff was told by the defendants that he was to bid on clearing the "flagged area". He was given a

copy of the General Specifications, which he took with him, and his attention was especially called to Section H-01. He testified that he never saw the map which was a part of the specifications he had. He went out to the reservoir site, taking one of his employees who was a registered engineer with him. They spent some ten hours looking over the ground. They spent two hours in the upper basin, but found no flags there. They found seven flags placed by the city on contour line 2073, between the dam site and the neck of the basin. One of these was near the dam site, three were along the westerly side of the basin, and three were along the easterly side. Plaintiff's engineer placed the two outermost flags which they found, that is the ones farthest from the dam, as being about 600 feet below the narrow neck of the basin. He testified that he "knew that the outermost flags that (he) saw did not delineate the entire reservoir basin"; that they were some distance above the level of the stream bed; and that "the outermost flags should have been at the stream bed" in order to delineate the reservoir basin. These flags show the contour line 2073 near the dam site and on both sides of the reservoir basin, but it was fully apparent even to a layman, that they did not indicate the perimeter of the reservoir basin, or of any natural basin as it lay on the ground. If it were assumed that the flags, as placed, indicated the perimeter of an area to be cleared, about one-third of the lower basin would clearly be outside that area. The plaintiff's engineer, at least, knew that the entire reservoir basin was not flagged. Because they found no flags above the neck of the basin, the plaintiff says that he concluded that he was to bid on what is now called the lower basin, although about one-third of that area was not within any perimeter indicated by the flags he found.

Without seeking further information from the city, or elsewhere, the plaintiff then made his bid which was accepted, and the subcontract was executed. After he started his work the plaintiff claimed to have learned for the first time that he was to clear the entire basin area, rather than the portion he had taken to be the "flagged

area", and demanded that the defendants make an adjustment with the city. The city refused to make an adjustment on the ground that while the area was not completely flagged this fact should have been obvious to prospective bidders. Thereupon, plaintiff completed the work of clearing the entire basin, the parties having executed a further agreement providing that the rights of neither party should be prejudiced thereby. He claims that his actual cost of cleaning the lower basin was about \$25,000, while his actual cost of clearing the upper basin was about \$50,000.

The plaintiff then brought this action. The first cause of action was for declaratory relief seeking to have the subcontract interpreted as meaning that plaintiff was obligated to clear only so much of the area of this reservoir basin as "was flagged" at the time of his inspection and bid. A second cause of action was for reformation of the subcontract, it being claimed that that portion of the contract which states "the reservoir basin shall be cleared below elevation 2073" did not express the true intention of the parties and should have read "the reservoir basin within the area flagged by the City of San Diego during the bidding period shall be cleared below elevation 2073". A third cause of action was for the reasonable value of labor and materials furnished. At the time of trial, a fourth cause of action seeking damages for false and fraudulent representations was added.

The plaintiff having requested a jury trial, the court determined that certain issues should be submitted to the jury on special interrogatories and that the court would decide the equitable issues. It was also ordered that the issue of liability should first be determined and that the issue as to the amount of damages, if any, should be deferred. A large amount of evidence was received on the other issues, but only a prima facie showing was permitted with respect to the reasonable value of the work.

Briefly stated, the jury gave the following answers to six questions submitted to it:

1. Did the plaintiff believe that the area to be cleared was only that portion of the

basin below the flags placed by the city? Answer: Yes.

2. Did any of the defendants, prior to the execution of the subcontract, make any untrue representations to the plaintiff with regard to the extent of the area to be cleared? Answer: Yes.

3. Did any of the defendants know that said representations were false? Answer: No.

4. Did the defendants make such representations as a positive assertion in a manner not warranted by their information although believing them true? Answer: Yes.

5. Did the plaintiff believe such representations and rely on them? Answer: Yes.

6. In entering into this subcontract did the plaintiff use reasonable care to ascertain the extent of the area to be cleared? Answer: No.

The court accepted and approved the special findings of the jury, and further found that the defendants were required by their general contract, as interpreted by the court, to clear all of the reservoir basin below the elevation of 2073 feet; that the plaintiff by his subcontract undertook to perform that part of the work; and that he has performed that work. The court then found as follows:

"III

"That when plaintiff entered into said subcontract he believed in good faith that the area which was required to be cleared by the terms of said subcontract was that portion of the reservoir basin beneath the contour of elevation 2,073 marked by flags that had theretofore been placed by the employees of the City of San Diego; that the City of San Diego, pursuant to a statement made in its invitation for bids, had placed flags marking said contour, but said flags were not placed around the entire thereof.

"IV

"That prior to the execution of said subcontract, representatives of said joint venture did make untrue representations to the plaintiff with regard

to the extent of the area to be cleared under the terms of said subcontract, said representations having to do with the location of flags upon said contour of elevation 2,073.

"V

"At the time of the making of said representations the representatives of said joint venture did not know that said representations were false, and in fact believed them to be true, but did make said representations as a positive assertion in a manner not warranted by their information. The representatives of said joint venture believed that flags had been placed around the entire contour at the time of the making of such representations.

"VI

"The plaintiff Van Meter believed said representations and relied upon them in entering into said subcontract, and was thereby caused to believe that by the terms of his contract he was to clear that portion of the reservoir basin laying below the flags which were actually then on the ground.

"VII

"It is true that in and about the investigation of said reservoir site and the inspection thereof and the subsequent entry into said subcontract, the plaintiff, Van Meter, an experienced and licensed contractor, failed to use reasonable care to ascertain the extent of the area to be cleared according to the terms of said subcontract. The court further finds in this connection that a contractor of ordinary skill, training and experience, and doing business in the vicinity of San Diego County, and in the exercise of ordinary care, should have known that it was the intent and purpose and the requirement of said contract that the entire reservoir basin be cleared, and that had plaintiff made those inquiries reasonably suggested by the provisions of the agreement and specifications and by an inspection of the premises, he would have discovered that it was intended that the entire basin be cleared.

"VIII

"It having been found that plaintiff was negligent in ascertaining the extent of the work to be performed under said contract, and it having been established that there was no wilful fraud perpetrated upon him, the court finds that the findings theretofore made are determinative of all issues involved in this action and that it becomes unnecessary to make any further findings of fact."

As conclusions of law, the court found that the general contract required the defendants to clear the entire area of the reservoir basin below elevation 2073; that the marking of the contour of said elevation was for the purpose of showing the location and height of said contour and not to delineate the area to be cleared; that plaintiff's subcontract required him to perform all that portion of the general contract relating to the clearing of the reservoir basin for the contract price of \$29,750; and that the plaintiff is entitled to recover nothing from the defendants. Judgment was entered accordingly, and a motion for a new trial was denied. In denying this motion the court stated that the jury's special findings were to the effect that there was no intentional fraud, and that its findings 5 and 6 were simply to the effect that while the plaintiff relied upon the statement made to him, in relying upon it he failed to use ordinary care and prudence. He further stated:

"The sole question was whether, in view of the statements which he claimed were made to him and which the jury found were not intentionally fraudulent or misleading, he used reasonable care. The evidence amply justifies this finding. All that was said to Mr. Van Meter was that the City had placed flags around the area to be cleared. He had before him the written statement of the City that all of the reservoir basin was to be cleared beneath a certain contour. There was a statement that the contour would be marked with flags. It was marked with flags, but the flags did not extend all the way around. In other words,

the flags did not extend into the smaller thickly wooded arm of the basin. The purpose of taking the wood and brush out of a reservoir basin is well known. It would be difficult to believe that the City intended that a part only of the basin was to be cleared. Mr. Van Meter knew that this arm was a part of the basin, as evidenced by his testimony that he and his engineer spent some two hours in this portion looking for flags, and that he then concluded, not because he was so told, but because he found no flags, that he was not required to clear this portion of the basin. According to his own statement, he knew that there was a question, and it was perfectly apparent that all he had to do to determine that question was to put in a telephone call to the City Engineer's office. I feel that the jury was amply justified in making this finding."

On this appeal from the judgment, the plaintiff's main contention is that the matter of the plaintiff's negligence is absolutely immaterial in an action for reformation based upon a mutual mistake, or in any case where it appears that the defendant made such a misrepresentation as that described in subdivision 2 of Section 1572 of the Civil Code. It is argued that the findings show a mutual mistake; that the sub-contract did not express the true intention of both parties, which was that only the area "below the flags" was to be cleared; that the findings show actual fraud of the defendants, which caused the plaintiff's mistake; that in cases of mutual mistake a plaintiff's ordinary negligent mistake, induced by the defendant's actual fraud, compels a court to grant reformation; that any statements found in the cases which seem to support a contrary theory are merely dicta or are found in rescission cases where reformation was not involved; and that in many of the decided cases the courts have confused reformation with rescission, and unilateral mistake with mutual mistake.

Many cases are cited, by both parties, only a few of which need be mentioned. In *Security-First Nat. Bank v. Earp*, 19 Cal.2d 774, 122 P.2d 900, 902, it was held that the

terms of a contract were fraudulently represented to the defendant, and that his negligence in failing to read the contract would not bar his right to relief, if he was justified in relying on the representation. The court there said: "Contributory negligence is no defense to an intentional wrong." In *Hanlon v. Western Loan & Bldg. Co.*, 46 Cal. App.2d 580, 116 P.2d 465, 475, where reformation was allowed although the defendant had been negligent in not discovering the mistake in the description of the property covered by a trust deed, the court pointed out that while there are cases denying reformation where the person seeking that relief was negligent, there are other cases holding that failure to read a contract does not necessarily prevent a reformation. The court there said: "Whether the failure to discover the defective description was the result of inexcusable negligence, so as to preclude relief by way of reformation, or, whether [it] was the result of excusable neglect, is a question of fact, the determination of which rests largely in the discretion of the trial court." In *Blackman v. Howes*, 82 Cal.App.2d 275, 185 P.2d 1019, 1022, 174 A.L.R. 1004, involving a misrepresentation made with knowledge that it was false, it was pointed out that the negligence of a plaintiff is no defense to an intentional misrepresentation; that "'Every case must be judged for itself, and the circumstances which warrant or forbid relief cannot be scheduled'"; and that the fact that an imperfect examination was made would not necessarily prevent relief since the examination may have been imperfect because of the representations made. It was held that the misrepresentation there made "was not such that its falsity must have been so obvious to the appellants as to preclude any justifiable reliance thereon by them." In *Stafford v. California Canning Peach Growers*, 11 Cal.2d 212, 78 P.2d 1150, 1154, both parties believed and intended when they signed the contract that it should have a certain legal effect. It was held that such a mistake was a mistake of law; that the defendant had represented to the plaintiff what the legal effect of their acts would be, in other words they "purported

to interpret the contract"; and that when this occurs a plaintiff is not negligent in accepting the interpretation of a contract urged upon him by the defendant.

[1] In *Roller v. California Pacific Title Ins. Co.*, 92 Cal.App.2d 149, 306 P.2d 694, 697, the court states that Section 1577 of the Civil Code, in defining a mistake of fact, rules out any mistake which is "caused by the neglect of a legal duty on the part of the person making the mistake." The court there cited *Grymes v. Sanders*, 93 U. S. 55, 23 L.Ed. 798 and *Fraters Glass & Paint Co. v. Southwestern Const. Co.*, 107 Cal.App. 1, 290 P. 45, 47. In the *Grymes* case, it is said: "Mistake, to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence 'which may be fairly expected from a reasonable person.'" In the *Fraters* case, it is said: "Courts of equity will not encourage the cancellation or revision of instruments on the ground of mistake where they appear to have been executed by the complainant without the exercise of reasonable care." In the *Fraters* case it was held, in effect, that there was no wilful fraud but only a negligent misrepresentation upon which the plaintiff was not justified in relying. Ordinarily, a contractor who is required by the bidding instructions to determine the actual conditions of the proposed work by a personal examination, is bound by any situation there which is, or should be, obvious to him. *Furton v. City of Menasha, D. C.*, 71 F.Supp 568. "[T]here is a vast distinction between an untruthful statement due to negligence and one born of a fraudulent desire to cheat another." *Podlasky v. Price*, 87 Cal.App.2d 151, 196 P.2d 608, 614; *Seeger v. Odell*, 18 Cal.2d 409, 115 P.2d 977, 980, 136 A.L.R. 1291. In the *Seeger* case, the court said: "A fraudulent misrepresentation is one made with the knowledge that it is or may be untrue, and with the intention that the person to whom it is made act in reliance thereon. * * * It must appear, however, not only that the plaintiff acted in reliance on the misrepresentation but that he was justified

in his reliance. * * * Negligence on the part of the plaintiff in failing to discover the falsity of a statement is no defense when the misrepresentation was intentional rather than negligent. * * * As a general rule negligence of the plaintiff is no defense to an intentional tort." Also, "If the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, however, he will be denied a recovery. * * * 'He may not put faith in representations which are preposterous, or which are shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth * * *'"

[2] As we read these cases, and many others, they do not support the plaintiff's contention that it must be held, as a matter of law, that his negligence was no defense in this action. While the cases seem to establish the rule that the negligence of a plaintiff in such a case is no defense where the defendant is guilty of intentional fraud, they also recognize the natural factual distinction between a mere negligent misrepresentation and one which was intentional, and a further difference with respect to the conduct of the plaintiff, depending on whether his failure to discover the truth was, in fact, the result of excusable neglect or the result of inexcusable negligence. Where there is no intentional fraud, and where the evidence discloses that the plaintiff's failure to discover the truth was the result of his own unreasonable neglect, the cases support the conclusion that he will be denied recovery, and we know of no cases compelling a contrary conclusion. Insofar as material here, no good reason appears why this rule should not be as applicable in a reformation case as in one for a rescission.

The jury here found that the defendants did not know that the representations which the plaintiff claimed to rely on were false. The court found the same thing, and that the defendants believed them to be true. The clear import of the findings is that there was no intentional fraud on the part of the defendants; that the plaintiff in

making his investigation, as required by the specifications, failed to use reasonable care in ascertaining the extent of the area to be cleared; and that his conduct in the light of his own intelligence and information was manifestly unreasonable.

There being no "intent to deceive", the findings do not disclose an "actual fraud" as defined in Section 1572 of the Civil Code. There was no mutual mistake with respect to the terms of the contract itself. Both parties understood that the reservoir basin was to be cleared below elevation 2073, as required by Section H-01 of the specifications. The only mistake was as to the location of this reservoir basin on the ground, or as to how it was marked. The defendants thought the basin was "flagged", as was provided for in Section H-01. The plaintiff thought, because he found no flags above the neck, that the area to be cleared was only the portion below the neck. Section H-01 plainly stated that the contour 2073 would be flagged, and not the entire perimeter of the reservoir basin; and that the bidder should make visual observation before submitting a bid. A visual observation would naturally disclose to any one that any statement that the entire basin was marked with flags could not be correct. There was no mutual mistake as to the contract requirement that the reservoir basin should be cleared, but there were separate mistakes with respect to the existing situation. While the defendants' representation related, in a way, to the extent of the area to be cleared, the error was obvious to any one examining the actual situation as it existed.

[3] The plaintiff's further contention that the evidence is insufficient to support the finding of negligence on his part cannot be sustained. There was only one reservoir basin, as was clearly apparent on the ground, and it was unreasonable for the plaintiff to take the flags, which he knew represented the contour line 2073, as indicating that the "reservoir basin" was confined to the portion below the neck when the contour line, as marked, plainly showed that the basin would extend through the neck and well beyond it. In spite of what

he was told he was still required to make visual observation and to locate the area which was to be cleared as it lay on the ground, and he had the specifications to assist him in performing that duty. In attempting to do this, he not only misapplied what he had been told but disregarded the clear information contained in the specifications, namely, that the entire reservoir basin was to be cleared below contour 2073, and that it was the contour line only which was to be marked with flags. He proceeded to assume, in the face of the strongest kind of visual warning which was fully apparent on the ground, that he was to bid on clearing only the so-called lower basin which had never been mentioned. Water seeks its level and it should have been obvious, even to a layman, that the basin to be covered with water could not end abruptly at a point at or near the line of the last two flags. Moreover, the last page of the specifications he had was a map showing the perimeter line of the entire basin, including the upper basin, this perimeter line being marked 2073, both above and below the neck, and extending across the dam at or very near its top. While he testified that he did not see this map it could well be inferred that he should have seen it. Another contractor who bid on this same work testified that after looking at H-01 he turned to the contour map which was in the specifications; and that this is the accepted practice followed in the ordinary course of business in that trade. The plaintiff, who was an experienced contractor, testified that he had done a lot of clearing in dam site areas; and he had a registered engineer, who was in his employ, to assist him in the visual observation he was required to make. From the evidence as a whole it is difficult to see how the plaintiff, after going on the ground, could have assumed that he was to bid on clearing only the lower basin. The evidence amply supports the findings that the plaintiff was negligent and fully warrants the conclusion that he was not justified in relying on the representations which were made to him, or the location of the flags on the contour

line, as indicating that only the lower basin was to be cleared.

[4] The plaintiff next contends that defendants' unjust enrichment demands that he be awarded the relief prayed for in the third cause of action. It is argued that both parties understood that the plaintiff was contracting solely with reference to the lower basin; that the defendants received the benefit of work which neither party intended that the plaintiff should perform, which work was of large value; and that under the modern "law of restitution" he was entitled to recover the reasonable value of his services even if he was negligent, as found by the court. Under the facts as shown by the evidence and as found by the court, this contention cannot be sustained. Both parties did not so understand, and if his other contentions are without merit the plaintiff was bound by his contract. Where his loss was due to his own mistake and negligence, a court cannot make him whole under the guise of another implied contract.

The final contention is that the court failed to make findings on material issues. It is argued that the court failed to find on the issue of declaratory relief; and on the issue of restitution for unjust enrichment as raised by the third cause of action, which was for the reasonable value of materials and labor furnished. The court sufficiently found on the issue of declaratory relief by finding that the general contract and the plaintiff's subcontract were interpreted by the court as requiring that the plaintiff clear all of said reservoir basin. Under the findings as a whole, the plaintiff was not entitled to recover the reasonable value of his additional services, and no further findings on the issue raised by the third cause of action were necessary.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

The PEOPLE of the State of California,
Plaintiff and Respondent.

v.

Lester Crawford CURTIS, Defendant and
Appellant.

Cr. 5336.

District Court of Appeal, Second District,
Division 2, California.

July 28, 1955.

Defendant was convicted of incest. The Superior Court of Los Angeles County, Burdette J. Daniels, J., entered judgment accordingly, and defendant appealed. The District Court of Appeal, McComb, J., held that the evidence sustained conviction.

Judgment affirmed.

1. Incest $\Rightarrow$ 14

Evidence sustained incest conviction. Penal Code, § 285.

2. Criminal Law $\Rightarrow$ 785(8)

Instruction, in incest prosecution, that jury could determine chastity of prosecuting witness as bearing on her credibility was not subject to claimed infirmity of conveying impression that court believed prosecuting witness of unchaste character and more likely to have committed offense. Penal Code, § 285.

3. Criminal Law $\Rightarrow$ 438

Trial court did not commit error in admitting into evidence tape recording of defendant's conversations with investigating officers, even though certain portions of recording were difficult to understand, where trial court had instructed jury to disregard only portion of recording which was prejudicial to defendant.

4. Criminal Law $\Rightarrow$ 417(1)

Witness may testify to part of conversation, if that is all he heard and it appears intelligible.

Ward Sullivan, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and James D. Loeb, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of incest in violating section 285 of the Penal Code, after trial before a jury, defendant appeals. There are also appeals from (1) the order granting probation, and (2) the order denying his motion for a new trial.

[1] *Questions: First: Was there substantial evidence to support the judgment that defendant was guilty of incest?*

Yes. The complaining witness, defendant's 15 year old daughter, testified that on May 6, 1954, defendant had placed his private parts in her private parts.

Clearly this evidence sustained the finding of the trial jury, and no useful purpose would be served by setting forth additional testimony in support of this revolting offense. We therefore refrain from further discussion of the evidence.

[2] *Second: Did the trial court commit prejudicial error in instructing the jury as follows?*

"Evidence was introduced in this case for the purpose of showing that Imogene Curtis, upon whom it is charged the defendant committed the act of incest, was a girl of unchaste character. Such evidence was received and may be considered by you solely for such bearing as it may have on the question whether or not she gave her consent to the sexual act, if it took place as alleged. If defendant did commit the act upon her as alleged, and if she then bore relationship to him as alleged, even if she consented to the act, that consent is no defense, and if she was of unchaste character, that unchastity is not a defense. If you should find that the evidence establishes the existence of unchastity prior to the alleged event in question, you have a right to infer, if your reason so directs, that there is more likelihood of an unchaste girl consenting to incestuous intercourse than there is of a girl, previously chaste, doing so. And if you should draw that inference and apply it in this case, you may consider it in judging the credibility of said Imogene Curtis as a witness and in weighing her testimony."

No. Defendant contends that this instruction was error because it conveyed to

the jury the belief that the court was of the opinion that the prosecuting witness was of unchaste character and for that reason there was more likelihood that the offense was committed.

This contention is erroneous. From a reading of the instruction it is clear that the court instructed the jury (1) that both consent and/or unchastity were not defenses, and (2) that if the jury determined from the evidence that the complaining witness was unchaste they could infer that there was more likelihood of her consenting to this relationship than if she were previously chaste, and that if they drew this inference they could consider it in judging the credibility of her testimony. The instruction was merely the pointing out of another ground upon which the jury could find that the testimony of the prosecutrix was impeached. As such, it could not be detrimental or prejudicial to defendant.

There is no merit in defendant's contention that there was no evidence in the record that the prosecutrix had previously been unchaste. Defendant himself introduced such evidence when he testified that she stayed out late at night and he was afraid she had had sexual intercourse.

[3,4] *Third: Did the trial court commit prejudicial error in admitting into evidence tape recordings of defendant's conversation with investigating officers on May 8, 1954?*

No. Certain portions of the tape recording were difficult to understand. However, the court reporter was not asked to transcribe any of the tape recording and there was no evidence to show that anything which was unintelligible was prejudicial to defendant, with the exception of an admission by defendant in which he stated that he had been previously arrested several times for being drunk and disturbing the peace. The trial court instructed the jury that this portion of the tape recording was stricken and admonished them to disregard it.

Having failed to show in the record that there was anything in the tape recording prejudicial to defendant, he has not sus-

tained the burden resting upon him of showing *prejudicial error* occurring in the trial court.

People v. Stephens, 117 Cal.App.2d 653, 256 P.2d 1033, relied on by defendant, is not here applicable for the reason that in such case a transcription of the tape recordings was before the appellate court, and in many instances the official reporter had noted them as being unintelligible and had therefore been unable to transcribe the testimony.

The rule applicable to the facts of the present case was well stated in *People v. Jackson*, 125 Cal.App.2d 776, at page 779 [4a], 271 P.2d 196, at page 198, by Mr. Justice Fox, as follows:

"Appellants' contention that the tape recordings were not admissible in evidence is based on the assertion that they were inaudible and unintelligible. There seems to have been some difficulty in playing the recordings loud enough for all interested parties to hear. Specifically, counsel for appellants claimed he could not hear a word. Just what his vantage point was as compared with that of the jury, or the condition of his hearing, does not appear. There was no complaint from any member of the jury that they could not hear and understand the playing of the recordings. When the playing was completed the prosecutor asked whether the jury heard the last portion. There was no negative response. We may assume the machine and the loud speaker were placed so as to give the jury the best possible opportunity to hear and understand the recordings—a better opportunity than counsel had. Since there was no complaint from the members of the jury it is a fair inference that they heard and understood the recordings. The fact that a recording may not be clear in its entirety does not of itself require its exclusion from evidence 'since a witness may testify to part of a conversation if that is all he heard and it appears to be intelligible.' (*People v. Porter*, 105 Cal.App.2d 324, 331, 233 P.2d 102, 107.)"

The judgment and orders are, and each is, affirmed.

MOORE, P. J., and FOX, J., concur.

A. R. FILANTE, doing business under the fictitious firm name and style of **Filante Realty Associates**, Plaintiff and Respondent,

v.

Ralph E. KIKENDALL, Defendant and Appellant.

Civ. 20628.

District Court of Appeal, Second District,
Division 3, California.

Aug. 1, 1955.

Broker's action for real estate sale commission. From judgment of Superior Court, Los Angeles County, Walter R. Evans, Judge assigned, in favor of the broker, the defendant owner appealed. The District Court of Appeal, Parker Wood, J., held that evidence sustained the trial court's findings that a co-owner was a partner of the defendant owner and had been authorized to act for defendant for the purpose of waiving terms of the broker's listing agreement and agreeing upon extensions thereof and that the defendant owner had orally waived any time limit in the listing agreement.

Affirmed.

1. Brokers ⇨50

Provision in real estate listing agreement limiting time for performance by agent may be waived orally by principal, and whether or not there has been a waiver depends upon facts and circumstances of particular case.

2. Brokers ⇨86(1)

Partnership ⇨55, 217(3)

In broker's action for real estate sale commission, evidence supported trial court's findings that co-owner who, after expiration of time limit in the listing agreement, requested broker's associate to hurry and sign up prospective purchasers, was partner of defendant owner and was authorized to act for defendant for purpose of waiving terms of listing agreement and agreeing upon extensions thereof, and that defendant orally waived any time limit in the agreement.

3. Brokers ⇨56(3)

Where owners in written listing agreement authorized broker to sell motel at certain price, they could not deprive broker of commission by conducting final negotiations themselves and selling at lower figure, where broker was procuring cause of sale.

4. Brokers ⇨86(1)

In broker's action for real estate sale commission, testimony by broker's associate that latter was real estate broker during year 1952 was sufficient evidence to support finding that latter was duly licensed real estate broker during such year. West's Ann.Bus. & Prof.Code, § 10015.

5. Brokers ⇨50

Owner could orally waive time limitation in listing agreement between owner and broker, and owner's agent could be authorized orally to waive such time limitation in owner's behalf.

6. Brokers ⇨82(1)

In broker's action for real estate sale commission, complaint which alleged that owners waived any time limit contained in the listing was sufficient to state cause of action without allegation that purchaser was procured within time limit.

7. Brokers ⇨82(1)

In broker's action for real estate sale commission, complaint was sufficient to state cause of action though it did not allege that broker procured purchaser ready, willing and able to purchase under terms of listing.

Samuel J. Silverman, Los Angeles, for appellant.

Boller, Suttner & Boller, Arcadia, for respondent.

PARKER WOOD, Justice.

Action to recover \$3,700 allegedly due as real estate broker's commission. Judgment was in favor of plaintiff, and defendant appeals therefrom.

On March 4, 1952, defendant and his wife owned a one-half interest, as joint tenants, in a motel in Monterey Park. Their son, Ralph E. Kikendall, Jr. (hereinafter re-

ferred to as Ralph), and his wife owned a one-half interest therein, as joint tenants. On said date defendant signed a "listing" which provided, in part, that plaintiff had the right, for the period from March 4, 1952, to May 4, 1952, to sell said motel for \$110,000; that the down payment was to be \$35,000; and that if a sale "is effected" by plaintiff during the agency, defendant agreed to pay plaintiff as commission 5 per cent on \$50,000 of the selling price and 2 per cent on the balance of the selling price. At the bottom of said listing plaintiff wrote the following words: "No sale after May 1, 1952." Plaintiff testified that he wrote those words at the request of defendant who told him, after he had given him the listing, that he wanted the motel sold by the first of May, and that if it was not sold by that time he was going to keep it.

About April 1, 1952, defendant went to Illinois and did not return until April 26, 1952. Plaintiff advertised the property for sale. Jacob Tenenbaum (erroneously referred to as Tannebaum) read the advertisement, went to plaintiff's office and talked with an associate of plaintiff, Homer Smith (who testified that he was a real estate broker during the year 1952). According to the testimony of Tenenbaum and plaintiff, Tenenbaum went to plaintiff's office about the middle of April. According to the testimony of Smith, Tenenbaum went to plaintiff's office on April 23. On the day Tenenbaum went to plaintiff's office, Smith took Mr. and Mrs. Tenenbaum to the motel, and a caretaker at the motel "showed" them around. Tenenbaum told the caretaker that he wanted to see the books. The caretaker telephoned Ralph who said that he would show the books to Tenenbaum. That afternoon Ralph met Tenenbaum in the motel office and showed the books to him. Tenenbaum testified that he "offered" Ralph \$100,000 for the motel and everything that was in it; that Ralph said he could not make the deal without defendant's consent; that Ralph in his (Tenenbaum's) presence, telephoned defendant (who was in Illinois), and then told Tenenbaum that it was "O.K." Defendant testified that said telephone conversation was on April 17, 1952; that in the conversation he and Ralph

"agreed" that Tenenbaum could have the motel for \$100,000 if defendant could keep "certain things"; and that he told Ralph to convey that message to Tenenbaum. The following day Ralph called Smith and told him that Tenenbaum had offered \$100,000 for the motel. While returning from the motel to his home, Tenenbaum saw that a freeway was under construction in the vicinity of the motel. The next day he went to plaintiff's office and told Smith that he was "scared of that freeway," and didn't think he would buy the motel. About two days later Tenenbaum went to Detroit. About 18 days later he returned to California. He apparently did not tell Smith or defendant that he was going away, but he gave Smith the address of the apartment house in Los Angeles where he resided.

Defendant testified that on April 28 he telephoned plaintiff, at his home, and asked what had happened to the Tenenbaums; plaintiff replied that he had been sick and that he would have Smith work on it.

Mrs. Filante, wife of plaintiff, testified that on May 4 defendant telephoned her home and asked to speak to plaintiff; she replied that plaintiff was ill; defendant said that he was anxious to sell the motel, that plaintiff had a prospect who was very interested in it, and that he (defendant) wished that plaintiff would get Smith "to work on that."

Smith testified that on May 3, 1952, Ralph telephoned him, asked him what had happened to Tenenbaum, and stated that he thought Tenenbaum was a hot prospect; he also told Smith to "Get busy on him" and "We want to close this deal and get it over with"; Smith went to Tenenbaum's apartment in Los Angeles and the manager told Smith that Tenenbaum was out of town and might not be back for two weeks; Smith left a note, with the manager, for Tenenbaum in which he asked Tenenbaum to come to his office; on May 22, 1952, Mr. and Mrs. Tenenbaum went to plaintiff's office where Smith had a conversation with them about the motel; they talked about the freeway and whether it would hurt the business; Tenenbaum "wanted to investigate" the matter; Smith told them that he thought that the freeway would not hurt the busi-

ness because Garvey Boulevard (on which the motel was located) would always carry a heavy load of traffic; Tenenbaum said that he was not convinced; on May 22 he (Smith) went to the motel and told defendant that he and plaintiff had worked hard on the motel and were still working to make a deal with Tenenbaum; he asked defendant for another listing; defendant replied that he would have to see his son, "But in the meantime you go ahead and work on it"; thereafter, Smith went to see Tenenbaum, and Tenenbaum told him that he liked the motel and that he was going to buy it.

Tenenbaum went to the motel and offered \$98,000 for it. On May 23 defendant and his wife, and Ralph and his wife, as sellers, and Tenenbaum and his wife, as buyers, executed escrow instructions for the sale and purchase of the motel for \$98,000. The buyers paid \$30,000 into escrow at that time. The escrow was completed on June 9, 1952.

The findings were, in part, as follows: Plaintiff and Smith were licensed real estate brokers. Defendant and his wife were owners as joint tenants of an undivided one-half of the motel; and Ralph and his wife were owners as joint tenants of one-half of the motel. On March 4, 1952, defendant made and delivered to plaintiff an agreement in writing whereby defendant employed plaintiff to obtain a purchaser for the motel during the period from March 4 to May 4, 1952, and thereafter in respect to parties with whom plaintiff negotiated during said period, provided plaintiff notified defendant in writing of said negotiations. Said agreement contained the words "No sale after May 1," which were inserted at the request of defendant. Between March 4 and May 1 plaintiff advertised the motel and showed it to the Tenenbaums. As the result thereof the Tenenbaums during April, 1952, orally offered to purchase the motel for \$100,000, and defendant orally agreed to accept it. Thereafter in April the Tenenbaums became concerned about the possible effect that a proposed freeway might have upon the motel business. About May 3, Ralph requested Smith to hurry and sign up the Tenenbaums. On May 4 defendant requested plaintiff to keep working on the

Tenenbaums. On May 21 defendant told Smith that he would not sign a new listing but to keep working on the Tenenbaums. On May 22 plaintiff discussed the proposed freeway with the Tenenbaums and assured them that it would not harm the business. On May 23 an escrow was opened between said owners, as sellers, and the Tenenbaums, as buyers, for the sum of \$98,000,—\$30,000 cash and the balance by note and trust deed. On May 29 Tenenbaum demanded and received from defendant a written agreement whereby defendant agreed to protect Tenenbaum in case any broker demanded a commission. Ralph was the partner of defendant and was authorized to act, and did act, between March 4 and May 29, 1952, as the agent of defendant for the purpose of negotiating with plaintiff and with prospective buyers and for the purpose of waiving terms and agreeing upon extensions of plaintiff's listing agreement. Defendant orally waived any time limit expressed in plaintiff's written listing agreement during which plaintiff could obtain the Tenenbaums as purchasers of the motel. Said listing agreement by its own terms covered any sale made to persons who had seen the motel prior to May 1, provided plaintiff had notified defendant in writing of their names; on May 23, 1952, plaintiff notified defendant in writing that he had negotiated with the Tenenbaums between March 4 and May 1, 1952.

[1-3] Appellant contends that the evidence was insufficient to support the judgment. He argues that no purchaser was procured by plaintiff during the term of the listing at the price asked by appellant, and therefore plaintiff cannot recover a commission. He also argues that plaintiff was not the procuring cause of Tenenbaum buying the property—that Tenenbaum prevailed upon appellant to accept \$98,000 for the motel, after plaintiff's listing had expired. A provision in a real estate listing agreement limiting the time for performance by the agent may be waived orally by the principal; and whether or not there has been a waiver depends upon the facts and circumstances of the particular case. *Baker v. Curtis*, 105 Cal.App.2d 663, 669, 234 P.2d 153; see *Augustine v. Trucco*, 124 Cal.App.

2d 229, 239, 268 P.2d 780. In the *Baker* case just cited, it was said, 105 Cal.App.2d at page 669, 234 P.2d at page 157: "[T]he time limitation stated in such a contract [real estate listing] may be waived and where, as here, the owner, after the time limit provided in the contract had expired, urged and encouraged the broker to continue his efforts to find a purchaser for the property, and the broker did so continue with the knowledge, approval and encouragement of the owner, and, as a result of the broker's efforts, a purchaser to whom the owner sold the property was produced, under such circumstances the time limit in the written contract must be considered as having been waived and the broker is entitled to his commission." In the present case, as above stated, the court found that on May 4 and May 21 defendant told Smith to keep working on the Tenenbaums; that on May 3 Ralph requested Smith to hurry and sign up the Tenenbaums; that Ralph was a partner of defendant and was authorized to act for defendant for the purpose of waiving terms and agreeing upon extensions of plaintiff's listing agreement; that defendant orally waived any time limit in the listing agreement during which plaintiff could obtain the Tenenbaums as purchasers. The evidence with respect to the subject matter of those findings having been stated above in some detail, it is not necessary to review that evidence here. The evidence supports said findings. Also, the evidence shows that plaintiff and Smith performed services, as requested by defendant, after the expiration of the time limit provided in the listing, and that such services continued until approximately the time the escrow was opened. In April, before the time limit expired, plaintiff procured the Tenenbaums as prospective purchasers who orally offered \$100,000 for the motel; and also in April defendant orally accepted the offer. Later in April, however, the Tenenbaums became concerned as to whether the proposed freeway would affect the motel business, and they did not then proceed further with the transaction. After the expiration of the time limit, Smith discussed the freeway matter, and other matters pertaining to the motel, with the Tenenbaums.

Plaintiff was the procuring cause of the sale to the Tenenbaums. It is true that the motel was not sold for \$110,000, the price stated in the listing agreement; however, the owner by accepting \$98,000 could not thereby deprive plaintiff of a commission. In *Palmtag v. Danielson*, 30 Cal.2d 517, at page 521, 183 P.2d 265, at page 267, it was said: "Ordinarily, the price at which a broker is authorized to sell property is considered merely an asking price to guide the broker in his negotiations with prospective purchasers. * * * If the broker procures a purchaser willing to pay a lower price, the owner cannot deprive the broker of his commission by conducting the final negotiations himself and selling at a lower figure to the purchaser procured by the broker." The evidence supports the judgment.

[4] Appellant also contends that the finding that Smith was a duly licensed real estate broker is not supported by the evidence. He argues that the only evidence is that Smith was a real estate broker during 1952; and that there was no evidence that he was licensed. This contention is without merit. Section 10015 of the Business and Professions Code states: "'Real estate broker' refers to a person licensed as a broker under Chapter 3 of this part." Smith testified that he was a real estate broker during the year 1952. It was alleged in the fourth amended complaint that Smith was a duly licensed real estate agent at all times therein mentioned. At the trial, appellant did not make a point of the failure of Smith to use the word "licensed" in stating his occupation.

[5] Appellant also contends that the finding to the effect that Ralph was authorized to act as defendant's agent in waiving the time limitation was not supported by the evidence. He argues that since land was involved, such an authorization must be in writing, and there was no evidence that he had such a writing. As above stated, defendant could waive such time orally. It was not necessary that Ralph, his agent, have a written authorization to represent defendant in doing that which the defendant could do orally. In any event, the evidence shows that defendant,

personally, waived the provision as to the time limit.

[6, 7] Appellant also contends that the fourth amended complaint did not state a cause of action, and that the court erred in overruling his demurrer. His principal argument with respect to this contention is that said complaint does not allege that plaintiff procured a purchaser within the time specified in the listing. That complaint alleged that "defendants waived any time limit contained in" the listing. Of course, in view of such an allegation, it would be inappropriate to also allege that a purchaser was procured within the time limit. His other argument with respect to said complaint is to the effect that it is not alleged that plaintiff procured a purchaser ready, willing, and able to purchase under the terms of the listing. The matter of the owner selling for an amount less than that stated in the listing has been discussed above. The demurrer was properly overruled.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



134 Cal.App.2d 586

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Elmer W. BROWN, Defendant and
Appellant.

Cr. 889.

District Court of Appeal, Fourth District,
California.

July 26, 1955.

Petition for writ of error coram nobis to vacate judgment of conviction for murder. The Superior Court of Kings County, Clark Clement, J., entered an order denying the petition, and petitioner appealed. The District Court of Appeal, Barnard, P. J.,

held, inter alia, that since petitioner had pleaded guilty to murder charge, allegations that there was no trial with a jury and witnesses and no evidence to support verdict did not state grounds for writ of error coram nobis.

Order affirmed.

1. Criminal Law $\S$ 997(4)

Where defendant entered plea of guilty to charge of murder, allegations that there was no trial with a jury and witnesses and no evidence to support verdict did not state grounds for writ of error coram nobis.

2. Criminal Law $\S$ 997(15)

On petition for writ of error coram nobis to vacate judgment of conviction for murder, contentions that petitioner had not been allowed to see an attorney, that his attorney had refused to present any facts in his behalf and that a conspiracy had existed between his attorney and district attorney were without support in the record.

3. Criminal Law $\S$ 997(15)

On petition for writ of error coram nobis to vacate judgment of conviction for murder, contentions that petitioner's constitutional rights had been violated, that he had been denied due process of law, that courts had been prejudiced, and that the facts did not warrant anything but an acquittal were without support in the record.

4. Criminal Law $\S$ 997(2)

Matters which could have been brought to attention of trial court before judgment was pronounced or raised on appeal did not constitute grounds for vacation of judgment of conviction for murder on writ of error coram nobis.

5. Criminal Law $\S$ 997(12)

Petition for writ of error coram nobis to vacate judgment of conviction for murder was properly denied, where nothing was suggested that was not known to defendant or which could not, with exercise of any diligence, have been discovered by him years before filing of petition.

6. Criminal Law $\S$ 997(15)

Record of proceedings resulting in conviction for murder and record of proceed-

ings resulting in denial of petition for writ of error coram nobis to vacate judgment of conviction failed to show any fraud or coercion in connection with entry of plea of guilty to murder charge.

Elmer W. Brown, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

An information was filed on December 20, 1945, charging the defendant with the crime of murder alleged to have been committed on November 21, 1945. The defendant was represented by an attorney at all stages, including the preliminary hearing. He pleaded not guilty and not guilty by reason of insanity, and three alienists were appointed to examine him with respect to his sanity. After their report he was allowed, at his own request, to withdraw his pleas of not guilty and not guilty by reason of insanity. He then entered a plea of guilty. The court found the offense to be that of murder in the first degree. A judgment with sentence of life imprisonment was entered on March 4, 1946. No appeal was taken from that judgment.

Some 8½ years later, on September 20, 1954, the defendant filed a petition for writ of error coram nobis. After a hearing on October 18, 1954, the court entered an order denying the petition. The defendant has appealed from that order.

The defendant relies on 20 grounds as stated in his petition. Briefly stated, these are: that he was not allowed to present a defense; that his constitutional rights were violated; that he was held 23 days in jail without the issuance of a complaint; that he was denied a jury trial and the right to call witnesses; that the "verdict" is contrary to law; that no evidence for the "verdict" was allowed; that he was denied an "open court" trial; that he was "excluded from all means of self defense"; that his attorney exhibited "stupidity, embelicity"; that his attorney refused to present any facts in his behalf; that the denial of a trial denied him due process; that the court

was prejudiced; that there was an "infamatory conspiracy" between his attorney and the district attorney; that he was not allowed to see an attorney during the 23 days he was held in jail; that the judgment was "unwarranted" and "unorthodox"; that because of all the grounds stated he was denied due process of law; that the unwarranted imposition of sentence denied him due process of law; that all legal principles are "aimed dedly against such swift reckless pretended trial"; that the judgment is repugnant to the 14th amendment to the federal constitution; and that the facts of the case do not warrant anything but an acquittal.

[1-3] Six of these contentions, to the effect that there was no trial with a jury and witnesses, and no evidence to support the verdict, are sufficiently answered by the defendant's plea of guilty. *People v. Ward*, 118 Cal.App.2d 604, 258 P.2d 86. Four of these contentions, to the effect that the defendant was not allowed to see an attorney, that his attorney refused to present any facts in his behalf, and that there was a conspiracy between his attorney and the district attorney, are not supported by the record and even defendant's unsupported conclusions were denied by affidavits. The defendant was represented throughout the entire proceedings by one of the most experienced and able attorneys in that county, and the record strongly indicates that the result obtained was as favorable to the defendant as was possible under the circumstances. There is nothing in the record which would support the eight contentions to the effect that defendant's constitutional rights were violated and that he was denied due process of law; the contention that the court was prejudiced; and the contention that the facts do not warrant anything but an acquittal. As was said in *People v. Genaitte*, 127 Cal.App.2d 544, 274 P.2d 169, 171, these contentions "are mere general assertions unsupported by any statement of specific facts and are wholly insufficient as grounds for vacating the judgment. To make broad and vague assertions which amount only to legal or factual conclusions is insufficient."

[4-6] None of these contentions are supported by the record; all relate to matters which could have been brought to the attention of the court before judgment was pronounced, or could have been raised on an appeal from the judgment, *People v. Martinez*, 88 Cal.App.2d 767, 199 P.2d 375; and nothing is even suggested which was not known to the defendant or which could not, with the exercise of any diligence, have been discovered by him years before the filing of the application for this writ. *People v. Shorts*, 32 Cal.2d 502, 197 P.2d 330. The record is unusually complete, with full clerk's and reporter's transcripts of all of the proceedings in the superior court, both the original proceedings and those on the hearing of the application for this writ; and nothing appears which would show that there was any fraud or coercion in connection with the entry of defendant's plea of guilty.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



135 Cal.App.2d 95

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Preston Lavern HOWARD, Defendant and
Appellant.

Cr. 1036.

District Court of Appeal, Fourth District,
California.

Aug. 15, 1955.

Rehearing Denied Aug. 25, 1955.

Prosecution for robbery by one armed with deadly weapon and for possession of firearm by one previously convicted of felony, wherein defendant was charged with two prior convictions. The Superior Court of San Diego County, John A. Hewicker, J., entered judgment of conviction

and defendant appealed. The District Court of Appeal, Barnard, P. J., held where defendant, who refused court's offers to appoint attorney, hired his own attorney, who was present and ready to act at all stages after arraignment, but defendant later without good reason requested court to compel attorney to return \$200 retainer fee so that defendant could hire another attorney and court refused, defendant was not deprived of right to be represented by counsel.

Affirmed.

1. Criminal Law §641(1)

Where defendant declined to accept court's offer at arraignment to appoint attorney, and hired his own attorney who was present and ready to act at all stages after arraignment, court refused to compel attorney to give back to defendant retainer fee of \$200 so that he could hire another attorney and defendant gave no good reason for terminating services of his counsel, defendant was not deprived of right to be represented by counsel.

2. Criminal Law §573

Where defendant was arrested January 12 and arraigned on January 14, when he was informed of his right to counsel, case went to trial on Friday, March 11, the date set, and trial was completed on Tuesday, March 15, defendant was not denied right of speedy trial.

3. Criminal Law §1104(3), 1119(3)

In prosecution for robbery by one armed with deadly weapon and possession of firearm by one previously convicted of felony, record did not sustain defendant's contentions that trial judge was biased against him or that reporter's transcript did not correctly set forth all of evidence received. Pen.Code, § 12021.

4. Criminal Law §1119(1)

In prosecution for robbery by one armed with deadly weapon and possession of firearm by one previously convicted of felony, where defendant failed to support his contention that he was handcuffed at some time during trial and record disclosed only possibility that he might have been

handcuffed when he created disturbance at trial and was subdued by officers, defendant was not prejudiced. Pen.Code, § 12021.

Preston Lavern Howard, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with robbery alleged to have been committed on January 1, 1955, it being also alleged that he was at that time armed with a deadly weapon, a .38 caliber nickel-plated revolver. In a second count he was charged with the crime of possession of a firearm by one previously convicted of a felony, in violation of section 12021 of the Penal Code. He was also charged with two prior convictions. He pleaded not guilty as to both counts of the information. He first admitted the prior convictions, but on the advice of the court that he first consult a lawyer he denied them. A jury found him guilty on both counts, and also found that the allegations of the two prior convictions were true. With respect to the first count, the jury fixed the degree as robbery in the first degree, and also found that at the time that crime was committed the defendant was armed with a deadly weapon. The defendant has appealed from the judgment and "from the order denying defendant's motion for a new trial." From the record, it appears that no such motion was made.

A service station attendant testified that in the early morning hours of January 1, 1955, the defendant came into the station, "put a gun" on him, and demanded that he open the till; that the pistol was cocked and he could see the bullets in it; that the defendant reached over and took the money out of the till; and that the defendant then made him lay down saying "Give me a chance to get away." There was evidence that about \$160 was taken on this occasion.

Early on the morning of January 12, 1955, two police officers saw the defendant walking on the street in San Diego. They questioned him and a search revealed a nickel-plated revolver, which was introduced in

evidence. It was found in the defendant's pants pocket and was fully loaded. They took the defendant over to this service station, and the attendant there identified the defendant as the man who had robbed him on January 1, and identified the gun as the one that had been used on that occasion. He also identified a suede jacket then worn by the defendant as similar to the one the defendant was wearing on the other occasion. At the trial the service station attendant again identified the defendant, the gun, and the jacket, in similar manner. Testimony was also received, including certified copies, concerning the prior convictions. The defendant took the stand and admitted the prior convictions. He also admitted the possession of the weapon, as charged in Count II, but claimed that he would not have had it if he "knew there was a law governing it." While on the stand he said nothing of the charge of robbery contained in Count I, and did not deny any of the evidence in that connection.

[1] The evidence of defendant's guilt was overwhelming, and he does not question the sufficiency of the evidence as such. He contends, however, that he was not given a fair trial. It is first contended that he was deprived of his right to be represented by counsel. At the time he was arraigned, the court asked the defendant if he had counsel and the defendant replied "Not at the present". The court asked him if he wanted an attorney and he replied "No", and then told the court the case could be set for trial and he would have a lawyer by that time. When the court offered to appoint a lawyer for him, he replied "No, I don't want you to appoint me a lawyer. I will have a lawyer." The court then set the trial for March 11, 1955, and the defendant responded "O.K.". The defendant then hired a lawyer named Whittinghill, and paid him \$200. The defendant was brought into court on March 9, Whittinghill being present. The court then told the defendant that he was brought in to see whether he had an attorney, and that a continuance would not be granted. The defendant stated that he had paid Whittinghill \$200, but that he did not want him to represent him and wanted to get a Mr. Fitzgerald as his attorney,

saying that he had told Fitzgerald he would give him the money when he got it back from Whittinghill. The court told the defendant to be ready for trial on the date set, that he would have Whittinghill there, and that Whittinghill would be ready, able and willing to represent him. Whittinghill was present at all stages of the trial but the defendant insisted on conducting his own case. He now contends that he was deprived of the right to be represented by counsel because of the court's failure to compel Whittinghill to give him back his \$200, so he could hire another lawyer. So far as the record discloses, the court had no authority to order Whittinghill to return the money. No good reason was given by the defendant for terminating the services of his counsel, who was present and ready to act at all stages after the arraignment, and no prejudicial error appears. In *re Connor*, 16 Cal.2d 701, 108 P.2d 10; *People v. O'Neill*, 78 Cal.App.2d 888, 179 P.2d 10; *People v. Brickert*, 3 Cal.App.2d 474, 39 P.2d 450; *People v. Adamson*, 34 Cal.2d 320, 210 P.2d 13; *People v. Simeone*, 132 Cal.App.2d 593, 282 P.2d 971.

[2] The defendant also contends that he did not have a fair trial because he was denied a speedy trial. At other places he complains that he was rushed to trial too soon, depriving him of the opportunity of getting another lawyer, which he intended to do as soon as he got the money back from Whittinghill. It is difficult to understand these contentions in view of the record. The defendant was told on February 17, that the trial was set for March 11, and he expressed satisfaction with that date. He was told on March 9, that a continuance would not be granted. When the case was called for trial on March 11, his counsel, Whittinghill, stated that the defendant was ready, and the defendant made no objection. No continuance was asked for, and while the court several times offered to appoint an attorney for the defendant such offers were refused. While the defendant stated that he wanted other counsel, it did not appear that he was presently able to get other counsel, and the only suggestion made was to the effect that he hoped to be able to do so at some time in the future. More-

over, the record, including the transcript at the preliminary examination which the defendant has lodged with the court and asked us to consider, shows the following facts: The defendant was arrested on January 12. He was taken to municipal court on January 14, at which time he was informed of his rights, including the right to counsel at all stages. When the court offered to appoint an attorney he advised the court he would have his own attorney, and he did not want the court to appoint an attorney for him. His preliminary hearing was then set for February 2, and was held on that date. The information was filed on February 11. The case went to trial on Friday, March 11, the date set, and the court proceeded to empanel a jury. At 4:25 p. m., while a prospective juror was being examined the defendant created a disturbance, and was subdued and removed from the court room by four bailiffs and policemen. The court then adjourned to Monday, March 14. The trial then proceeded and at 4:24 p. m. an adjournment was taken until the next morning to allow the defendant to procure a witness who was not then present. The trial was completed and the verdict returned on March 15. No error appears in this connection.

[3] The defendant's contentions that the judge was biased against him, and that the reporter's transcript does not correctly set forth all of the evidence received, are not sustained by the record. The record discloses that the judge was extremely lenient toward the defendant and allowed him great leeway in presenting his case, and this in the face of his many outbursts and abuse of counsel and witnesses. The judge displayed a commendable degree of patience throughout the trial, under very trying circumstances which were unnecessarily created by the conduct of the defendant. The defendant's criticism of the reporter's transcript is not supported by the record, and there is nothing to indicate that this transcript is not more reliable than the defendant's memory. Moreover, if the facts suggested by his criticisms of the transcript were assumed to be correct these matters could not conceivably have had any effect upon the result.

[4] The defendant states that he was handcuffed at some time during the trial, but points to nothing in the record in support thereof. The only thing we have found in the record which might indicate that such a thing occurred is the incident above referred to, where the defendant created a disturbance during the trial and was subdued by the officers. No prejudicial error appears. *People v. Marcias*, 130 Cal.App.2d 860, 279 P.2d 987.

The judgment is affirmed, and the purported appeal from an order denying a new trial is dismissed.

MUSSELL, J., and SHELL, Justice pro tem., concur.



134 Cal.App.2d 804

Ludwig E. GLUSKIN, Plaintiff, Cross-Defendant and Appellant,

v.

Alfred LEHRFELD and Jeane Lehrfeld, Defendants, Cross-Complainants and Respondents.

Civ. 4974.

District Court of Appeal, Fourth District, California.

Aug. 3, 1955.

Action to cancel a note and trust deed, enjoin defendants from disposing thereof, and recover damages for alleged fraudulent misrepresentations inducing plaintiff to purchase defendants' half interest in certain ranch property and execute the note and trust deed for part of the purchase price. Defendants filed a cross-complaint to recover the amount of the note and foreclose the trust deed. From a judgment of the Superior Court of Tulare County, Frederick E. Stone, J., for defendants in the amount of the note, with interest, costs and attorneys' fees, less an offset of the amount of plaintiff's damages, plaintiff appealed. The Dis-

strict Court of Appeal, Mussell, J., held that the trial court did not err in awarding plaintiff damages, measured by "loss of bargain", rather than statutory "out of pocket" rule, in amount of difference between sum paid by plaintiff for both such property and personal property included in sale and value of property received.

Judgment affirmed.

1. Appeal and Error ⚡671(3)

In absence of reporter's transcript on plaintiff's appeal from judgment for defendants, District Court of Appeal is limited to determination of whether pleadings state cause of action, whether trial court's findings are within issues and support judgment, and whether reversible error appears on face of record.

2. Appeal and Error ⚡907(3)

On appeal on judgment roll alone in action tried without jury, trial court's findings should receive liberal construction to uphold rather than defeat judgment, and when, from facts found, other facts supporting judgment may be inferred, such inference will be deemed to have been made.

3. Fraud ⚡59(2)

In action to recover damages for defendants' alleged fraudulent misrepresentations, inducing plaintiff to purchase defendants' half interest in ranch property, as to number of acres of olive trees thereon, trial court did not err in awarding plaintiff damages measured by "loss of bargain", rather than statutory "out of pocket", rule in amount of difference between sum paid by plaintiff for such interest and personal property included in sale and value of property received by him, where plaintiff did not plead any damages except with respect to real property nor prove that value of half interest in both real and personal property was less than price paid therefor. West's Ann.Civ.Code, § 3343.

4. Trial ⚡71

In action to recover damages for alleged fraudulent misrepresentations, inducing plaintiff to purchase defendants' half interest in ranch property, that there were stated number of acres of olive trees there-

on, ruling on plaintiff's motion, after judgment for defendants, to allow plaintiff to present evidence of value of personal property included in sale and further evidence of value of olive acreage was largely matter of trial court's discretion.

5. Trial ⚡71

A trial court may properly refuse to reopen case after judgment for introduction of additional evidence when there is no showing of any excuse for failure to produce such evidence at trial or due diligence to do so, evidence could not produce different result, as where it is merely cumulative, or no issue to which offered evidence is relevant was raised by pleadings.

6. Trial ⚡71

A trial court may refuse to reopen case after judgment to admit additional evidence which court believes will not justify change of his decision, when failure to produce such evidence at trial was due to counsel's mistake in law in that he did not deem evidence material or necessary.

7. Trial ⚡71

In action to recover damages for alleged fraudulent misrepresentations, inducing plaintiff to purchase defendants' half interest in ranch property, as to acreage of olive trees thereon, where plaintiff did not plead value of personal property included in sale, request leave to amend complaint so as to allege character of sale established by evidence, or state in his motion to reopen case for presentation of evidence of value of personal property and further evidence of value of olive acreage that value of half interest in both real and personal property was less than price paid therefor, denial of motion was not abuse of trial court's discretion.

8. Mortgages ⚡581(2)

Pleading ⚡148

In suit to cancel plaintiff's note for price of real and personal property purchased from defendant and trust deed securing note, defendants were entitled to cross-complain for foreclosure of trust deed and trial court did not err in awarding defendants counsel fees for which note and trust deed provided.

9. Vendor and Purchaser ⇨43(1)

One affirming his contract to purchase defendants' half interest in ranch property, with knowledge of defendants' intentional fraud in misrepresenting number of acres of olive trees thereon, consented to be bound by terms of agreement, so as to entitle defendants to foreclosure of trust deed securing plaintiff's purchase money note.

Haden, Haden & Curry, Dinuba, for appellant.

Crowe, Mitchell & Hurlbutt, Visalia, for respondents.

MUSSELL, Justice.

This is an action in which plaintiff seeks cancellation of a promissory note and deed of trust, and damages.

In the amended complaint it is alleged that in the month of September, 1951, plaintiff owned an undivided one-half interest in certain ranch property in Tulare County and that defendants were the owners of the remaining interest in said property; that during said month and prior thereto defendants, intending to deceive plaintiff and to induce him to purchase the one-half interest in the property owned by the defendants, represented that there were 43.7 acres of growing olive trees on said property; that these representations were false and known by said defendants to be false, and were also made to one George Hutchinson, an appraiser; that defendants intended that said representations would be communicated to plaintiff by said Hutchinson; that plaintiff, relying upon said representations, was thereby induced to and did purchase defendants' one-half interest in the property; that plaintiff paid \$10,000 on account of said purchase price and executed a negotiable promissory note for \$13,000 as part of the balance thereof, which note was secured by purchase money deed of trust on said property; that the actual value of the property so purchased by plaintiff was \$20,000 less than the purchase price thereof and that plaintiff was damaged in said sum; that plaintiff fears that defendants will transfer said note and deed of trust before maturity; that plaintiff and defendants operated said

ranch as a common enterprise from April to September, 1951, defendants being the resident managers; that during said time and when the said representations were made defendants occupied a position and relationship of trust and that while defendants were acting as managers they made said representations, intending to induce plaintiff to purchase their interest in the property. The prayer of the complaint was that defendants be enjoined from disposing of the note and deed of trust; that the note and trust deed be canceled, and for damages.

In their answer defendants denied the allegations concerning the representations alleged to have been made by them, denied the allegation that plaintiff did not know the true acreage of said olive trees, denied that plaintiff believed or relied upon the representations made by the defendants and denied that plaintiff was thereby induced to purchase defendants' interest in said property, denied that the actual value of the property purchased by the plaintiff was \$20,000 less than the purchase price thereof, and denied that plaintiff was damaged as alleged in the complaint in the sum of \$20,000, or in any other sum, or at all.

Defendants also filed a cross-complaint in which it was alleged that they were the owners of the deed of trust described in the complaint; that no part of the principal sum of the indebtedness evidenced by said note had been paid; and that they elected to exercise their option to declare all of the principal sum evidenced by said note immediately due and payable. In the prayer of said cross-complaint defendants asked for judgment for the principal sum of \$13,000, together with interest, costs and attorney's fees, and for foreclosure and sale under the terms of said deed of trust.

The action was tried by the court without a jury and the court found, among other things, that on or about September 13, 1951, plaintiff was the owner of an undivided one-half interest in the real property involved, together with certain described personal property; that in the month of September, 1951, and prior thereto, defendants represented to plaintiff that there were 43.7 acres of growing olive trees on said property; that these representations were also made to

one George Hutchinson, an appraiser, and that defendants intended that said representations would be communicated to plaintiff by Hutchinson; that said representations were made by defendants for the purpose of deceiving plaintiff and inducing him to purchase defendants' remaining one-half interest in said real and personal property; that the representation that there were 43.7 acres of growing olive trees on said property was false and known to be false by the defendants; that plaintiff was induced by said false representation to purchase defendants' remaining interest in said real and personal property for the sum of \$43,511.88; that plaintiff paid \$10,000 cash, executed the promissory note for \$13,000 payable to defendants and secured by a deed of trust and agreed to assume certain indebtedness against the property; that only 15 acres of said property were planted to olives and that plaintiff received 28.7 acres less of olive trees than defendants had represented the property to contain; that the acreage planted to olives was purchased at a value of \$400 per acre; that 28.7 acres of land which was not planted to olives, as represented, was worth \$300 per acre; that the difference between the value of the land which plaintiff received and the value it would have been if planted to olives, as represented by the defendants was \$2,870, or \$1,435 for the one-half interest therein purchased by plaintiff and that plaintiff was therefore damaged in the sum of \$1,435; that in connection with the sale of defendants' one-half interest plaintiff became indebted to defendants in the sum of \$13,000, for which plaintiff executed a promissory note for that sum, secured by a trust deed; that said note had not been paid; that said trust deed provided for the allowance of a reasonable attorney's fee in any action to collect the indebtedness secured or to foreclose the deed and that the sum of \$750 was a reasonable sum to be allowed as such fee.

The court rendered judgment that plaintiff recover from the defendants the said sum of \$1,435 as damages, to be allowed as an offset to the amount due on said promissory note; that defendants recover the sum of \$15,128.43 on the note and deed of trust,

including interest and costs and attorney fees, less the said offset in the sum of \$1,435, and that the sum of \$13,693.43 was the amount of defendants' lien on the premises. It was further ordered that the property be sold to satisfy said lien.

[1] There is no reporter's transcript in this matter and we are therefore limited to a determination whether the pleadings state a cause of action and the findings are within the issues, whether the judgment is supported by the findings and whether reversible error appears on the face of the record. *Chenoweth v. Office of City Clerk*, 131 Cal. App.2d 498, 280 P.2d 858; *Montaldo v. Hires Bottling Co.*, 59 Cal.App.2d 642, 646, 139 P.2d 666. It is conceded that a cause of action is stated in the amended complaint.

[2] Where an appeal has been taken on the judgment roll alone the findings of the trial court are to receive such a construction as will uphold rather than defeat its judgment thereon, and whenever, from the facts found by it, other facts may be inferred which will support the judgment, such inference will be deemed to have been made. *Goldberg v. List*, 11 Cal.2d 389, 394, 79 P.2d 1087, 116 A.L.R. 900. The findings should receive a liberal construction to uphold rather than to defeat the judgment. *Montaldo v. Hires Bottling Co.*, supra, 59 Cal.App.2d 646, 139 P.2d 666.

[3] Appellant does not dispute the truth of the facts found by the court but argues that the measure of damages announced and used by the trial court was erroneous because the measure used in determining the damages as to the portion of the property considered severally by the court was "loss of bargain" rather than "out of pocket" rule. In this connection he cites section 3343 of the Civil Code, which provides that:

"One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction.

"Nothing herein contained shall be deemed to deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled."

In *Bagdasarian v. Gragnon*, 31 Cal.2d 744, 762, 192 P.2d 935 (cited by appellant), the court, in construing said section of the code, held that the statute was enacted to provide the uniform rule for all fraud cases, and the rule stated therein (the out-of-pocket rule) is the exclusive measure of damages. However, in the instant case the trial court stated in his opinion, contained in the clerk's transcript, that while plaintiff introduced evidence by George Murphy, an appraiser, as to the value of the ranch in its entirety, and then claimed the difference between that appraised value for one-half interest and the amount paid therefor, no such yardstick could be used to measure damages because the sale price included personal property which was not appraised by Murphy, and further because the said appraisal made no mention of the bare land. In this connection it appears that appellant did not plead any damages except with respect to the real property involved in the sale and the trial court found that said sale not only included said real property but very substantial quantities of personal property. It is also apparent that appellant did not prove that the value of the one-half interest in and to both the real and personal property which he acquired from the defendants was any less than the price paid therefor. Under the rule stated in *Goldberg v. List*, supra, it must be inferred that the value of the one-half interest of the respondents in and to all of the real and personal property involved in the sale, except the olive acreage, was worth at least what the appellant paid for it, and that the only item included in said sale which was not worth what the appellant paid for it was said olive acreage and that the difference between what plaintiff paid for all of the property purchased and the value of that which he received was the amount of \$1,435 awarded as damages by the trial court.

[4-7] It is next contended that it was error for the trial court to refuse appellant's motion to reopen the case to allow

him to present evidence of the value of the personal property he received in the sale and further evidence of the value of the olive acreage. The trial of the action was concluded on July 24, 1953, and the motion was not made until May 26, 1954. Plaintiff did not plead the value of the personal property in his complaint and no request was made to amend it to allege the character of the sale established by the evidence. Furthermore, plaintiff did not state in his motion or affidavit supporting it that the value of the one-half interest in both the real and personal property included in the sale was anything less than the price paid therefor by appellant. There was nothing in the testimony suggested in the affidavit that would compel a different decision by the trial court. The ruling on the motion was largely a matter of discretion of the trial court. *Weber v. Marine Cooks' & Stewards' Ass'n*, 93 Cal.App.2d 327, 340, 209 P.2d 1009; *Vangel v. Vangel*, 116 Cal.App.2d 615, 627, 254 P.2d 919. A trial court may properly refuse to reopen a case for the introduction of additional evidence when there is no showing of any excuse for not having produced it at the trial or of due diligence; where the evidence, if received, cannot produce a different result, as where the proposed evidence is merely cumulative; or where no issue was raised by the pleadings to which the offered evidence is relevant. It is proper to refuse to reopen a case to admit evidence which the court believes will not justify changing the decision, when the failure to produce the evidence at the trial was due to counsel's mistake in law in that he did not deem it material or necessary. 24 Cal.Jur. sec. 50, p. 770. No abuse of discretion appears in the denial of plaintiff's motion.

[8] Appellant contends that the award of counsel fees to respondents constitutes reversible error. This argument is not meritorious and apparently is based on the grounds that there was no need to bring the cross-complaint and that the power of sale recited in the trust deed provided a means of recovering the value of the security without necessity of a case in equity. However, appellant in his complaint sought cancellation of the promissory note and trust

deed and under such circumstances respondents were entitled to cross-complain for the foreclosure of the deed and since the note and trust deed provided for recovery of attorney's fees, the trial court was not in error in awarding them. 18 Cal.Jur. sec. 738, p. 507.

[9] Appellant further contends that it was error for the trial court to adjudge the foreclosure of the trust deed since respondents were guilty of intentional fraud in connection with the sale of the property. This contention is likewise without merit. Plaintiff affirmed the contract of purchase with knowledge of the fraud and therefore consented to be bound by the terms of the agreement. Under such circumstances respondents were entitled to a foreclosure of the deed. *Williamson v. Clapper*, 88 Cal. App.2d 645, 653, 199 P.2d 337.

The judgment is affirmed.

BARNARD, P. J., concurs.



134 Cal.App.2d 541

**Vivian OBERGFELL, Plaintiff and
Appellant,
v.**

Ivan C. OBERGFELL, a/k/a I. C. Obergfell; E. P. Obergfell and R. S. Obergfell, as executors of the Last Will and Testament of Ruby I. Baker, Deceased, Defendants and Respondents.

**Marjorie O'Bryan, Intervener and
Respondent.
Civ. 5106.**

**District Court of Appeal, Fourth District,
California.
July 22, 1955.**

Action to quiet title to realty and set aside deeds by which plaintiff's husband had conveyed such realty to codefendant sister, wherein executors of the will of defendant sister were substituted as defendants upon her death and one claim-

ing to be legatee under will of deceased defendant filed a complaint in intervention. The Superior Court, Imperial County, Elmer W. Heald, J., entered orders dismissing the action, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that where action was not tried and there were no appearances by the parties on date set for trial pursuant to written stipulation by which counsel for defendant executors, more than five years after filing of complaint, had waived benefit of statute providing for dismissal of action unless brought to trial within five years, on motion thereafter made, action was properly dismissed as to defendant executors.

Orders affirmed.

1. Dismissal and Nonsuit ☞60(6)

Where action was not tried and there were no appearances by the parties on date set for trial pursuant to written stipulation, by which counsel for defendants more than five years after filing of complaint had waived benefit of statute providing for dismissal of action unless brought to trial within five years and had extended time for trial, on motion thereafter made by defendants, action was properly dismissed for failure to bring it to trial within five years, in absence of showing that parties had stipulated to a trial of action at a date subsequent to that set for trial pursuant to stipulation or had waived right to dismissal when case was not brought to trial on such date. *West's Ann.Code Civ. Proc.* § 583.

2. Appeal and Error ☞78(4)

Order denying defendants' motion to dismiss action for failure of plaintiff to bring it to trial within time prescribed by statute was interlocutory and therefore not appealable. *West's Ann.Code Civ.Proc.* § 583.

3. Dismissal and Nonsuit ☞51

Trial court retained jurisdiction of action after entry of interlocutory order denying motion to dismiss for failure to bring action to trial within time prescribed by statute and could thereafter entertain another motion to dismiss on the same ground made after force of prior stipula-

tion extending time of trial beyond statutory five-year period was exhausted. West's Ann.Code Civ.Proc. § 583.

4. Dismissal and Nonsuit Ⓒ73

On motion to dismiss action as to one of several defendants on ground that summons had not been served on such defendant within three years after commencement of action, whether such defendant was within or without the state and failure to serve him was due to absence from the state and whether defendant had secreted himself within the state to avoid service of summons were questions of fact for trial court. West's Ann.Code Civ.Proc. § 581a.

5. Appeal and Error Ⓒ931(1, 3), 1011(1)

On appeal, those affidavits favoring the contention of prevailing party are taken as establishing not only the facts stated therein, but also all facts which reasonably may be inferred therefrom, and where there is a substantial conflict in the facts stated, a determination of the controverted facts by trial court will not be disturbed.

6. Appeal and Error Ⓒ1011(1)

Where record disclosed substantial conflict in the facts shown by affidavits and testimony as to whether defendant had been absent from state or had secreted himself within the state in order to avoid service of summons, trial court's determination could not be disturbed on appeal from order dismissing action as to such defendant for failure to serve summons on him within three years after commencement of action. West's Ann.Code Civ.Proc. § 581a.

7. Witnesses Ⓒ276

Record on appeal from order dismissing action as to one of several defendants for failure to serve summons on him within three years showed that examination of codefendant, called as a witness by plaintiff, had not been limited by trial court insofar as such examination was in opposition to affidavits filed by the parties, and no error in limiting examination of such witness appeared. West's Ann.Code Civ. Proc. § § 581a, 2055.

Don C. Bitler and David M. McGahey, Palm Springs, for appellant.

George R. Kirk, El Centro, for respondents.

David L. O'Bryan, Northridge, for intervenor and respondent.

MUSSELL, Justice.

This is an action to quiet title and to set aside two deeds executed by plaintiff's husband (defendant Ivan C. Obergfell) conveying the property involved to his sister (defendant Ruby I. Baker).

It is alleged in the complaint that the land conveyed was the community property of plaintiff and Ivan C. Obergfell and that the conveyances were made without the consent or knowledge of plaintiff. The action was filed on January 8, 1948. Summons was issued on that date and delivered to the sheriff of Imperial county for service on the defendants. Service of the summons and complaint was never effected on defendant Ivan C. Obergfell and he has not appeared in the action. On February 13, 1948, defendant Ruby I. Baker filed an answer and cross-complaint. Discussions thereafter took place between plaintiff's attorney and counsel for Ruby I. Baker relating to amending her cross-complaint to clearly describe the property involved and concerning the taking of her deposition. However, in 1951 counsel for Ruby I. Baker died and the matter had not then been set for trial. On October 17, 1952, Ruby Baker died and thereafter R. S. Obergfell and E. P. Obergfell were appointed as executors of her will and were substituted as defendants in the action in her place and stead. Thereafter, during the summer of 1953, it was orally agreed between counsel for plaintiff and counsel for said executors that the cause should be brought to trial during the winter season, in El Centro. On September 25, 1953, counsel for the executors wrote to plaintiff's attorney stating that if it were agreeable, he would ask the court to put the case on the setting calendar for October 2nd. Plaintiff's counsel, in his reply to this letter on September 28th, agreed to the placing of the cause on the setting cal-

endar for October 2nd, and on October 2, 1953, the attorney for the executors informed plaintiff's attorney that the trial had been set for January 19, 1954.

On January 7, 1954, the executors filed a notice of motion stating that on January 15, 1954, they would move the court to dismiss the action on the ground that it had not been brought to trial within five years as provided for by section 583 of the Code of Civil Procedure. On January 15, 1954, this motion was argued before the court and the matter was continued to January 29th to permit counsel for defendants to file counter affidavits.

On January 18, 1954, Marjorie O'Bryan, claiming to be a party in interest in the action and legatee under the will of Ruby Baker, deceased, filed a complaint in intervention alleging, among other things, that the action was barred by section 583 of the Code of Civil Procedure since it had not been brought to trial within the five-year period prescribed. On January 25, 1954, the intervener filed an amended notice of motion to dismiss the action under the provisions of said section 583 on the ground that the action had not been brought to trial within five years from the date of the filing of the complaint. This motion was noticed for hearing on January 29, 1954. The minutes of the trial court show that on January 19th (the then trial date) there were no appearances and the cause was removed to the master calendar to be reset for trial and on January 22, 1954, the cause was set for trial on March 17, 1954. The motions to dismiss were heard by the court on February 26, 1954, and submitted. On March 11, 1954, by order of the court, the motion to dismiss as to the said executors was denied and the motion as to defendant Ivan C. Obergfell was granted under the provisions of section 581a of the Code of Civil Procedure.

On March 13, 1954, the executors filed a notice of motion to set aside the order of March 11th denying their first motion to dismiss and again moved for a dismissal on the ground that the action had not been brought to trial within the five-year period as provided by section 583 of the Code of Civil Procedure. This motion was noticed

for hearing on March 17, 1954, and on that date the court continued the trial date and the hearing on the motion to March 19, 1954. On that date the court heard the arguments on the motion and ordered it submitted, and further ordered that the case be removed to the master calendar to be set for trial. On April 2nd the action was again set for trial on November 1, 1954. On April 16, 1954, the trial court granted the motion to dismiss the cause as to defendant executors. Plaintiff then appealed from this order and that portion of the order entered March 11, 1954, dismissing the action as to the defendant Ivan C. Obergfell under the provisions of section 581a of the Code of Civil Procedure.

[1] Appellant first contends that it was prejudicial error for the court to dismiss the case against the executors after entering a finding that there was a stipulation in writing waiving the benefits of section 583 of the Code of Civil Procedure and extending the time for trial beyond the statutory period. We find no error in this order of dismissal.

The trial court in its order of March 11, 1954, denying the motion to dismiss as to the executors, found that the correspondence between plaintiff's attorney and the attorney for said executors (the letters of September 25 and 28, 1953, agreeing that the cause be placed on the setting calendar for October 2, 1953, and the letter of October 2, 1953, advising plaintiff's attorney that the case had been set for trial on January 19, 1954) constituted a valid stipulation waiving the provisions of section 583 of the Code of Civil Procedure and setting the cause for trial beyond the five-year period. However, the action was not tried on January 19, 1954, the date agreed upon in the stipulation and on that date there were no appearances by the parties. The court then removed the cause to the master calendar to be reset for trial. There is nothing in the record to indicate that the parties stipulated to a trial of the action at a date subsequent to January 19, 1954, or that the executors waived their right to a dismissal when the matter was not brought to trial on that date. Therefore, on March 13, 1954, the motion

to dismiss made by the executors was not subject to the objection that they had waived their right to a dismissal by written stipulation, or otherwise.

In *Hunt v. United Artists Studio*, 79 Cal. App.2d 619, 180 P.2d 460, 463, the question for decision was whether the court abused its discretion in dismissing the action pursuant to section 583 of the Code of Civil Procedure after its pendency for six years and nine months by reason of settings and continuances of the cause with the respondent's consent, both before and after the expiration of the five-year period, and finally in permitting the case to go off calendar. The action was filed May 10, 1939, and the only stipulation for a continuance was filed August 17, 1944. That stipulation authorized a continuance to "such time as suits the court." The court held that:

"The order fixing January 3, 1945, as the day of trial exhausted the force and function of that stipulation. Consequently such stipulation may not supplement subsequent oral agreements or consents to further continuances so as to avoid the mandatory effect of the statute. *Mercantile Investment Co. v. Superior Court*, 218 Cal. 770, 773; 25 P.2d 12. Nor does one stipulation extending the statutory period operate as a waiver for all future time. *Miller & Lux v. Superior Court*, *supra*, 192 Cal. at page 337, 219 P. 1006."

The court further held that inasmuch as there was no stipulation extant on January 29, 1946, granting appellant further time, respondent was within his rights to move for a dismissal.

[2, 3] Appellant argues that the trial court did not have the power to reverse the order denying defendant executors' motion to dismiss the action under section 583 of the Code of Civil Procedure. This argument apparently is based on the assumption that the order was a final judgment. However, the order was clearly interlocutory and therefore not appealable. 3 Cal. Jur. 2d, Agreed Case, sec. 50; *Parker v. Owen*, 83 Cal. App.2d 474, 189 P.2d 81. Since the order was interlocutory, the trial court

retained jurisdiction of the action and properly entertained the second motion of the executors to dismiss it when the function and force of the stipulation was exhausted.

Appellant's next contention is that the dismissal as to defendant Ivan C. Obergfell was an abuse of judicial discretion. This contention is likewise without merit. This dismissal was granted under the provisions of section 581a of the Code of Civil Procedure, which provides, among other things, for the dismissal of an action unless the summons shall have been served and return made thereon within three years after the commencement of the action. In *Cahn v. Jones*, 101 Cal. App.2d 345, 225 P. 2d 570, it was held that under the provisions of section 581a of the Code of Civil Procedure, as amended in 1949, it was mandatory for the court to dismiss an action in which the summons was not served within three years, despite an oral stipulation entered into by the defendant after the expiration of the time extending the time for trial. Section 581a of the Code of Civil Procedure provides that no dismissal shall be had thereunder as to any defendant because of the failure to serve summons on him during his absence from the state or while he has secreted himself within the state to prevent the service of summons upon him. In this connection appellant takes the position that she made a *prima facie* showing that the defendant was out of the state and/or evading service and that this showing was not rebutted. The alleged showing in this connection was by affidavits stating that plaintiff had attempted to have service of summons effected upon defendant Ivan C. Obergfell from the date the complaint was filed; that the sheriff's office was unable to locate him in more than six months; that she had investigation made by both public officials and private individuals from that date until January 12, 1954, in an effort to locate said defendant but was unable to find him; that he was either outside of the state of California for several years prior to January 12, 1954, or was concealing himself within the state to avoid service of process;

that his whereabouts were unknown and not discoverable by the exercise of due diligence.

In opposition to these affidavits the intervenor's affidavit states that she had seen the defendant in the state of California on the following dates and at the following places: February 10, 1950, Long Beach, California; December, 1950, Long Beach; November, 1951, Long Beach; October, 1952, 2310 Broadway Street, Long Beach; and October, 1952, Glendale.

[4-6] The question of whether defendant Ivan C. Obergfell was within or without the state of California and the failure to serve him was due to that fact and whether he secreted himself within the state to prevent the service of summons upon him were questions of fact for the trial court. These issues were heard principally upon affidavits. The rule on appeal is that those affidavits favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and where there is substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed. *Griffith Co. v. San Diego College for Women*, 286 P.2d 3. Furthermore, in the instant case, at the hearing on the motion plaintiff called R. S. Obergfell as a witness and he testified that he saw the defendant Ivan C. Obergfell in Long Beach on Christmas Day, 1953; that he had seen him "all over the state of California"; that he saw him at least three times a year; that he saw him in El Centro a month or so before the date of the hearing; and that Ivan stopped in to see him regularly. The record shows that there was substantial conflict in the facts stated in the affidavits and testimony and the trial court's determination cannot be here disturbed.

Appellant argues that the decision places a premium on the wilful wrongdoing of Ivan C. Obergfell and was against public policy. This argument apparently is based upon the assumption that Ivan Obergfell secreted himself to avoid service of summons and then persuaded the intervenor to move to dismiss the action. The record

does not support this contention and there was no showing that the material issues raised by the pleadings could not have been tried within the five-year period as against the defendant executors and the intervenor.

[7] Finally, appellant complains that her examination of the witness R. S. Obergfell under section 2055 of the Code of Civil Procedure was unduly limited. However, in that connection the record shows that the court did not limit the examination in so far as it was in opposition to the affidavits filed by the parties and no error in this respect appears.

The orders are affirmed.

BARNARD, P. J., and GRIFFIN, J.,
concur.



134 Cal.App.2d 758

**Phillp Moses POCOCK, Plaintiff and
Appellant,**

v.

**Joe Anthony DENIZ, Joe V. Deniz, Mervyn
C. Hoover, and State of California,
Defendants and Respondents.**

Civ. 8550.

**District Court of Appeal, Third District,
California.**

Aug. 2, 1955.

Action for injuries sustained in automobile collision. The Superior Court, Sacramento County, Grover W. Bedeau, J., entered judgment on a verdict for defendants, and plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held, *inter alia*, that denial of motion for new trial on ground of newly discovered evidence because of failure to exercise due diligence to produce such evidence at trial was not abuse of discretion.

Judgment affirmed.

1. Evidence ⇨317(1)

Testimony as to what a stranger to action, who did not testify, had told witness concerning automobile collision was inadmissible.

2. Appeal and Error ⇨970(4)

Trial ⇨68(1)

Whether a motion to reopen case after close of the evidence should be granted rests in the sound discretion of trial court, and it is seldom that record will justify a reversal of judgment on ground that error was committed in denying a motion to reopen.

3. Trial ⇨68(1)

Motion to reopen case after close of the evidence is properly denied unless court is satisfied that there is good cause shown why the evidence sought to be introduced after reopening could not have been produced before the close of evidence.

4. Appeal and Error ⇨1047(4)

In action for injuries sustained in automobile collision, refusal to reopen case after close of the evidence to permit plaintiff to introduce testimony of additional witness to show that last witness who testified for defendants was not an eyewitness of collision, as he had testified, was not reversible error.

5. Trial ⇨33

Each case should be fully tried and all relevant testimony which can be produced should be presented to the triers of fact.

6. New Trial ⇨99

Motion for new trial on ground of newly discovered evidence is addressed to the sound judicial discretion of trial judge.

7. Appeal and Error ⇨981

Ruling of trial judge on motion for new trial on ground of newly discovered evidence will not be reversed unless abuse of discretion is made to appear.

8. New Trial ⇨102(5)

In action to recover damages for injuries sustained in automobile collision, denial of plaintiff's motion for new trial on ground of newly discovered evidence because of failure to exercise due diligence to ascertain before trial whether two persons, whose identity was known, were eye-

witnesses of and could give material testimony concerning occurrence of collision, was not abuse of discretion.

9. Trial ⇨142, 143

Where the evidence is conflicting, jury must determine the facts and therefrom draw their inferences and arrive at their conclusions.

10. Evidence ⇨553(1)

Hypothetical question, which required expert witness to assume that conflicting versions of the facts, relied on by plaintiff and defendants respectively, were both true and then state which of the two versions was most likely the true version, was objectionable on ground that witness was being asked to invade the province of jury and pass upon the credibility of witnesses.

Pease & Lally, Sacramento, for appellant.
Desmond, McLaughlin & Russell, Sacramento, for respondents Deniz.

McDougall & Fitzwilliam, Sacramento, for respondents Hoover and State of California.

VAN DYKE, Presiding Justice.

Plaintiff-appellant brought action against respondents to recover damages for injuries suffered in a collision between a car driven by him and a car driven by respondent Joe Anthony Deniz. Judgment went for defendants and plaintiff appeals, asserting as grounds for the reversal of the judgment alleged error committed by the trial court in rejecting evidence, in denying a motion to reopen the case after the close of evidence, and, after judgment, error in denying plaintiff's motion for a new trial. The new trial motion was based upon surprise, and newly discovered evidence.

At the time in question appellant was driving a light Crosley sedan northerly on Highway 99W near the town of Dunnigan in Yolo County. Respondent Joe Anthony Deniz, hereinafter called "Deniz", was driving an automobile southerly on the same road. The accident happened at a point where an unimproved dirt road intersected the highway from the west. At that point the highway is a two-lane road

with pavement flanked by oiled shoulders. The focal issue was as to which car crossed the center line and collided with the other. The evidence was sharply in conflict and no contention is made on appeal that the jury verdict was not substantially supported.

[1-5] Stated as briefly as may be in order to afford a proper foundation for discussion of the alleged errors, the evidence was as follows: Appellant testified that he was alone in his car; that he intended to cross the western lane of the highway and enter the dirt road and go thence to a motor court which he managed and which bordered on the highway at its intersection with the dirt road; that when he arrived at the place of his intended turn he stopped in the easterly lane to allow the Deniz car to pass; that at that time he observed that a car driven by an employee of the respondent State of California had been nosed out from the intersecting road in the westerly half of the pavement; that he saw the Deniz car swerve to its left as though to avoid a collision with the State car; that it crossed the white center line and struck his car; that he was rendered unconscious for some time and when he recovered was standing in his car, his head and shoulders through the right-hand window, the car being on its left side; that a doctor gave him a shot by inserting a needle in one of his arms and also gave him a white pill to take; that thereafter an ambulance and another doctor arrived and he was taken to the hospital. The occupants of the Deniz car, Joe Anthony Deniz, driver, J. F. Deniz, his father, and Hazel Deniz, his wife, all testified that as their car approached the scene of the accident none of them saw the State car; that their car proceeded in its travel lane until appellant's car came well over into that lane and was struck. A traffic officer who arrived about 20 minutes after the accident testified that, from the physical evidence upon the highway left by the colliding cars, he fixed the place of collision as entirely within the west lane; that 6 feet west of the center line there was a gouge mark in the highway surface which he determined was made by an axle of the Deniz car when the colli-

sion knocked the wheels from under the Deniz car, letting the body down on the frame and the axle onto the ground. From this and from other evidence, the officer gave it as his opinion that the impact had occurred in the Deniz travel lane. At the close of respondents' testimony a Mr. Denny took the stand and testified as a witness for respondents. He said he was driving northerly, back behind appellant's car; that his car was being driven by his daughter; that he and his wife were in the front seat with her; that they were following another automobile at a distance of about 100 feet which was following appellant; that he saw the red stop lights of that car go on; that he saw the Crosley sedan ahead of it; that he saw the Crosley angle across the highway in front of the oncoming Deniz car at an angle which he estimated at from 15 to 35 degrees; that the Crosley was across the white line on impact by about 6 feet. Denny's wife and daughter were not called by either side, although present in court. Counsel for the appellants asserted that they were completely surprised by the production of Denny as an eye witness to the collision as his presence at the scene had been unknown to them, despite their investigation; that though they distrusted him as a truthful witness they had no way at the moment of directly rebutting his testimony that he was an eye witness. The evidence was closed after a short rebuttal on other matters and counsel for the appellant proceeded to argue about an hour before court adjourned for the day. In the meantime they contacted and, when the court convened the next morning, they produced in court a witness whose testimony they asked the court to receive. Counsel for the respondents opposed the reopening of the evidence under those conditions. It was made to appear that if this witness could be heard he would testify that he had been driving a truck northerly on the highway; that ahead of him there had been the Crosley car and only one car intervening, thus controverting Denny's testimony that there was one car between himself and the Crosley; that he did not actually see the collision since he was engaged in lighting a cigarette, but he heard

the crash and looked up to see the Crosley spinning. In further support of the motion to reopen, counsel made it appear to the court that a witness was present who could testify that Mr. Denny's daughter had told her that while they had seen a wreck on the road and had heard that Mr. Pocock was injured they did not stop, but passed by and as they passed by Mr. Pocock was being put on a litter. Obviously, since the Denny girl had not testified, this witness could not be permitted to give the testimony it was stated she could give. As to why the truck driver had not been produced as a direct witness in support of appellant's case, counsel explained that, although they had briefly interviewed him to determine if he was an eye witness, they had not then appreciated that, though not an eye witness, his testimony might still be material in rebuttal of the testimony of other witnesses that might be produced at the trial for respondents; that during the time intervening between adjournment and the convening of the court on the following morning they had secured his presence at the trial. They asserted that they had had no knowledge of the presence of the Denny family at the scene of the collision. The motion to reopen was opposed upon various grounds, such as that plaintiff's counsel should have been prepared to rebut Denny's testimony or that of any witness who might have seen things differently than did the truck driver, that counsel had already argued for an hour and that this would be over-emphasizing or, as they put it, "spot-lighting" the truck driver's testimony if given, and that if he was permitted to testify they would be compelled to ask a further continuance in order that they might investigate further to determine whether or not his testimony, in turn, could be rebutted. The trial court, after a full argument, denied the motion to reopen and this is assigned as prejudicial error. Whether or not a motion to reopen should be granted is committed in all cases to the sound discretion of the trial court and it is seldom, indeed, that a record will justify a reversal of a judgment upon the ground that error was committed in denying a motion to reopen. Thus, in *Castro v. Singh*, 131 Cal.

App. 106, 115, 21 P.2d 169, denial of a motion to reopen was upheld where the matter sought to be elicited would merely produce further conflict in the evidence; in *Crawford v. Senegram*, 7 Cal.App.2d 449, 450, 46 P.2d 173, a like ruling on appeal was made where the motion to reopen was sought in order to permit a witness to testify as to matter impeaching a preceding witness; and numerous cases have held that such a motion is properly denied, unless the court is satisfied that there is good excuse shown why the evidence sought to be introduced after reopening could not have been produced before the close of the evidence. *Engstrom v. Auburn Automobile Sale Corporation*, 11 Cal.2d 64, 72, 77 P.2d 1059. We think this clearly a case where an appellate court ought not to substitute its judgment based on a record on appeal for that of the trial judge who presided at the trial, and we say this notwithstanding the basic rule in all trials that cases ought to be fully tried and that there should be presented to the triers of fact all relevant testimony which can be produced before them.

[6, 7] Appellant moved for a new trial and in support thereof he urged the following: He asserted that the denial of the motion to reopen constituted an error for which the court ought to grant a new trial because the effect of that error had been to deny to appellant a full and fair trial. The same considerations which we stated as grounds for refusing to hold it was not error to deny the motion to reopen compel us to reject appellant's assertions of the same error on motion for a new trial. A more serious matter, however, is presented with respect to newly discovered evidence. It appears that after the trial, and before the making of the motion for a new trial, appellant's counsel had located Dr. LeRoi Kegebein who was the doctor that had given appellant first aid treatment. It further appeared that Doctor Kegebein, with his wife, had been driving a car, as they were prepared to testify, immediately behind the Crosley; that they were eye witnesses to the entire occurrence and would testify that they saw the Deniz car leave the westerly lane and turn directly in front of the Crosley and that the collision was entirely in the

Crosley lane. The materiality of this proposed testimony, notwithstanding the serious conflict which it would have presented to the testimony that the collision occurred in the west lane, cannot be minimized. But immediately the question arose as to why these witnesses had not been produced at the trial. The trial judge refused to grant the new trial on the ground of newly discovered evidence, stating in a memorandum opinion which is in the record, that he deemed the showing of diligence was insufficient. Once again, we are discussing a matter which in the first instance is committed to the judicial discretion of the judge who presided at the trial and we cannot reverse his ruling unless it is made to appear that he abused that discretion.

[8] It appears that appellant and his counsel knew that a doctor had given first aid treatment to appellant and knew his name and the area in which he practiced. When appellant's deposition was taken the following occurred: Questions by counsel on behalf of respondents:

"Q. You told me before that you were knocked unconscious; is that correct? A. [By appellant] That is right.

"Q. When you regained consciousness where were you? A. I was standing up in my car being taken care of by a doctor from up north.
* * *

"Q. And the doctor was treating you? A. Yes, sir.

"Q. Do you know what he was doing to you? A. He shot me in the shoulder and give me a white pill.

"Q. Do you know the doctor's name? A. No, I don't, but I believe the lady in there does. I don't know him at all. He has been in the restaurant. I never contacted him.

"Q. Did you tell me where he was from? A. He was from Redding. [Counsel for appellant, interjecting] Do you want the name? [Counsel for respondents] Yes, I would, please. [Counsel for appellant] The doctor is from Central Valley as best I know. I think his name is Leroy Kegebind."

Counsel for appellant, in support of his motion for new trial, gave affidavits concerning the charge that due diligence had not been shown in locating Doctor Kegebein and his wife and producing them as eye witnesses. From this it appears that counsel had gained the impression that some doctor had arrived at the scene of the accident shortly thereafter and had given emergency treatment to appellant; that appellant did not know the name of the doctor, but thought him to be from Central Valley, California; that counsel later learned the doctor's name, but there was no such doctor listed with a telephone in Central Valley; that counsel believed Doctor Kegebein was an arriving witness and had not seen the accident and believed, until Denny took the stand, that testimony from an arriving witness was not apparently necessary; that, therefore, no further steps were taken before or during trial to locate the Kegebeins; that post-trial investigation revealed the likelihood that the Kegebeins had seen the accident, whereupon counsel went to Central Valley and located them, learning then, for the first time, that they were, as counsel's affidavit puts it, "actual independent, impartial and unimpeachable eye witnesses to the actual collision" and also to "position of the State" car and would completely verify plaintiff's testimony in every important detail. A trial judge presented with a situation such as this has to make a difficult decision. As we have said, trials ought to be full and fair and although they must be held and concluded, nevertheless the misfortune of not being able at the time to present material testimony because of lack of knowledge of its existence urges the granting of a new trial whenever the omitted evidence would probably cause a different outcome. This statement in part illustrates the difficulty of a trial judge's decision. If he grants a new trial it may be that the other side, through lapse of time, would lose the personal appearance and may even lose the testimony of witnesses most material for them. Without going further, it is enough to say that the trial judge must balance many considerations pro and con, must declare his decision on the side of justice as best he can ascertain it, and must do

so with an abiding uncertainty as to whether or not he ought to have acted otherwise. As for an appellate court, it cannot truly take the position of the trial judge and look through his eyes. Such a court is confined to the cold record and once again it is only for an abuse of judicial discretion appearing from the record that the order denying a new trial can be reversed. We have read the entire record of the trial and the entire record of the proceedings on motion for new trial and think an abuse of judicial discretion has not been shown.

[9, 10] Appellant presented as an expert witness the traffic engineer of the City of Sacramento, whom it is not disputed has had wide experience in traffic matters, including determinations as to how, from residual physical evidence, automobile collisions have occurred. He was asked a hypothetical question, objections to which were sustained by the trial court, and this action is assigned as error. Having qualified to give opinion evidence, he was asked a lengthy hypothetical question which we think it unnecessary to quote in full. He was asked to assume recited facts. There was then stated to him the versions of the various witnesses who had testified as to the way in which the accident had occurred. Both the version contended for by the plaintiff and that contended for by the defendants was stated and the physical facts testified to were given the witness. The question concluded in this way: "and in view of these assumed facts, gives you one version of the point of impact here where plaintiff says it was, and one version of the point of impact is here, where the defendant says it was. Which of those two points of impact are the most probable?" To this the court sustained an objection that the witness was being asked to invade the province of the jury and to pass upon the credibility of the witnesses. The jury was excused and the issue argued. The vice of the question is apparent. The witness was asked to assume one set of facts to be true, which counsel called the "Deniz version", and then to assume a second set of facts squarely in conflict with the first, which counsel termed the "plaintiff's version", and then to tell the jury which of the two versions was most

likely the true version. This is one of the fundamental functions exclusively entrusted to the triers of fact. They must determine the facts through the use of all the facilities open to them, including such intangibles as the interest, the apparent bias, the appearance and demeanor of witnesses; they must draw upon their own wide experience in the affairs of life, and from all that is said and by the witnesses revealed the triers of fact must ascertain the truth. Having ascertained the truth, they must draw their inferences therefrom and come to their conclusions. To permit an expert to answer a question such as was posed here would be to permit him to take over the task of the jury. The ruling of the trial court was proper.

For the reasons given, the judgment appealed from is affirmed.

SCHOTTKY, J., and FINLEY, J. pro tem., concur.



134 Cal.App.2d 532

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Henry Garcia SEGURA, Defendant and
Appellant.**

Cr. 5347.

**District Court of Appeal, Second District,
Division 3, California.**

July 22, 1955.

Defendant's motion to vacate judgment of conviction for escape from custody was denied by the Superior Court of Los Angeles County, Burdette J. Daniels, J. Defendant appealed. The District Court of Appeal, Shinn, P. J., held that defendant who failed to object to dismissal of charge of grand theft was not entitled to have court vacate judgment entered on conviction ordering imprisonment in State Prison for escape from custody while

charged with a felony on the theory that if he had been convicted of grand theft and a sentence of imprisonment in the county jail imposed, his escape, if accomplished without force or violence would have been a misdemeanor only.

Order affirmed.

1. Criminal Law ⚖️27

An escape by one charged with a felony is also a felony. Pen.Code, § 4532.

2. Criminal Law ⚖️27

Grand theft of an automobile, being punishable by imprisonment in the state prison, can be reduced to a misdemeanor only by judgment prescribing punishment other than imprisonment in the state prison. Pen.Code, §§ 17, 489.

3. Criminal Law ⚖️998

Defendant who failed to object to dismissal of charge of grand theft was not entitled to have court vacate judgment entered on conviction ordering imprisonment in state prison for escape from custody while charged with a felony on the theory that if defendant had been convicted of grand theft and a sentence of imprisonment in the county jail imposed, his escape if accomplished without force or violence would have been a misdemeanor only. Pen.Code, §§ 17, 489.

4. Criminal Law ⚖️998

The factual basis upon which a judgment of conviction necessarily rested may be shown to have been unsound by proof of a fact or facts wholly irreconcilable therewith, the existence of which if it had been known, would have prevented rendition of judgment, but the right to advance such ground of attack is strictly limited.

5. Criminal Law ⚖️997(6)

To entitle a defendant in a criminal prosecution to relief by way of the writ of error coram nobis he must show that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits and which if presented would have prevented the rendition of judgment of conviction.

Henry Garcia Segura, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

On information No. 158835 appellant was accused of grand theft consisting of the wilful, unlawful and felonious taking of a 1951 Oldsmobile 88 club coupe automobile, the personal property of Eleanor Fisher. It was alleged that he had previously been convicted of and served a term of imprisonment for robbery, a felony, and another felony, namely, violation of Dangerous Weapons Control Law. He was arraigned, pleaded not guilty and denied the prior convictions. Thereafter information No. 160606 was filed, accusing appellant of escape from custody of a deputy sheriff of the County of Los Angeles in violation of section 4532 of the Penal Code, a felony, in that while charged with a felony, to wit, violation of section 487.3 Penal Code (theft of an automobile) appellant escaped from custody. The former convictions and service of terms of imprisonment were alleged as in information No. 158835. A deputy public defender was appointed to represent appellant at the trial. On motion of the People the two informations were consolidated, information No. 160606 being incorporated as count II of the consolidated information. Appellant withdrew his plea of not guilty as charged in count I (escape) and admitted the two prior convictions as alleged. He was sentenced to state prison upon his plea of guilty and count II of the information was dismissed.

Judgment ordering imprisonment in state prison was issued February 9, 1954. October 14, 1954, appellant made a motion to annul, vacate and set aside the judgment of conviction. The ground of the motion was "The punishment for escape, section 4532, P.C., is imprisonment in the County Jail, not prison." The motion was denied and this appeal followed.

[1] Appellant argues that escape from lawful custody by a person charged with a misdemeanor is a misdemeanor unless the

escape is by force or violence, in which case it is a felony. He realizes that if the escape is by one charged with a felony, the escape is a felony under section 4532. He also realizes that the theft of an automobile is grand theft, but he argues that under section 489 Penal Code, which prescribes punishment for grand theft, imprisonment may be in the county jail for not more than one year or in the state prison for not less than one year nor more than ten years. Appellant cites section 17 of the Penal Code which provides that every crime is a misdemeanor unless it is punishable with death or by imprisonment in the state prison and he relies upon the language of that section: "When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment other than imprisonment in the state prison, unless the court commits the defendant to the California Youth Authority". He contends that since no judgment was rendered upon the information charging him with grand theft, the offense must be deemed to have been a misdemeanor and therefore his escape, if accomplished without force or violence, was a misdemeanor only. He says in his briefs that he walked away from the deputy sheriff with the latter's consent when he was mistaken for another person, but it is too late for inquiry into the truth of that assertion.

[2, 3] Grand theft of an automobile being punishable by imprisonment in the state prison, it can be reduced to a misdemeanor only by judgment prescribing punishment other than imprisonment in the state prison. Appellant, represented by counsel, pleaded guilty to an offense which was charged as a felony. At that time he could have raised the point that if he had been convicted of grand theft and a sentence of imprisonment in the county jail imposed, his escape (if accomplished without force or violence) would have been a misdemeanor only. He did not object to a dismissal of the charge of grand theft and he thereby cast aside any chance he may have had that in the event of his conviction

of grand theft the court would prescribe imprisonment in the county jail. He also cast aside any opportunity he may have had to prove to the court the additional fact for which he now contends, namely, that his escape from custody was without force or violence. Some eight months after judgment was pronounced appellant made his motion that it be vacated. No reason was advanced for the delay.

There were no irregularities in the procedure which resulted in appellant's imprisonment. There is no showing whatever of the existence of a fact which was unknown to appellant and to the court at the time the plea of guilty was entered and judgment was imposed. Appellant seeks his release from custody upon the supposition that if he has been convicted of grand theft he would have been sentenced to imprisonment in the county jail and would have been able to convince the court that his escape was accomplished without force or violence. Dismissal of the charge of grand theft rendered it impossible for facts to be established upon which the trial court could determine that the offense of escape was merely a misdemeanor, and it is pure supposition upon appellant's part that such facts would have been established if he had objected to the dismissal of the charge of grand theft and had insisted upon being tried upon that charge. Having voluntarily accepted the benefit of the dismissal appellant must abide by the consequences. He may be better off for having pleaded guilty to the charge of escape which enabled him to avoid the additional prosecution for grand theft.

[4-6] No facts were developed which would have justified the trial court in setting aside the judgment. It was said in *People v. Reid*, 195 Cal. 249, 256, 232 P. 457, 460, 36 A.L.R. 1435: "All of the cases which have come to our attention concur in the conclusion that the writ will not issue for any cause for which the statute provides a remedy, and that its functions are strictly limited to an error of fact for which the statute provides no other remedy." And at page 259 of 195 Cal., at page 461 of 232 P.: "It appears that in each

case where the writ of error *coram nobis* has issued to vacate a judgment, it has been upon the ground that such judgment was predicated upon the assumed existence of a fact or a condition which did not in truth exist, and the nonexistence of which would have prevented the rendition of the judgment if it had been known." Accordingly the factual basis upon which the judgment necessarily rested may be shown to have been unsound by proof of a fact or facts wholly irreconcilable therewith, the existence of which if it had been known, would have prevented rendition of the judgment. But the right to advance this ground of attack is strictly limited. As said in *People v. Mendez*, 28 Cal.2d 686, 688, 171 P.2d 425: "To entitle the defendant to relief by way of the writ of error *coram nobis* he must show that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment." Appellant has shown no reason for issuance of the writ and his petition was properly denied.

The order is affirmed.

WOOD, and VALLÉE, JJ., concur.



134 Cal.App.2d 628

Dorothy GUILLORY and Preston R. Guillory, Plaintiffs and Respondents,
v.

Mildred GODFREY, Froy J. Tristany, Froy J. Tristany, doing business under the fictitious firm name of Duke's Liquor Stores, Defendants and Appellants.

Civ. 20725.

District Court of Appeal, Second District,
Division 3, California.

July 28, 1955.

Action against liquor store proprietor and one of his employees for compensatory and punitive damages for malicious inter-

ference with plaintiffs' restaurant business by intimidation of prospective customers based on plaintiffs' employment of Negro cook. The Superior Court of Los Angeles County, Jesse J. Frampton, J., denied judgment notwithstanding verdict and new trial, and rendered judgment on verdict awarding \$2,250 compensatory damages and \$2,000 punitive damages, and defendants appealed. The District Court of Appeal, Ashburn, J. pro tem., held, inter alia, that evidence supported finding of malicious disruption of plaintiffs' business by defendants and damage proximately flowing therefrom.

Judgment and order denying judgment notwithstanding verdict, affirmed, and appeal from order denying new trial dismissed.

1. Appeal and Error ⇨930(1)

On appeal, evidence is to be viewed in light most favorable to respondents, with every legitimate inference drawn in their favor.

2. Torts ⇨10(1), 12

Wrongful or malicious interference with formation of contract or right to pursue lawful business, calling, trade, or occupation constitutes a tort.

3. Damages ⇨184

Torts ⇨27

In action against liquor store proprietor and one of his employees for malicious interference with plaintiffs' restaurant business by intimidation of prospective customers based on plaintiffs' employment of Negro cook, evidence supported finding of malicious disruption of plaintiffs' business by defendants and damages proximately flowing therefrom. West's Ann.Civ.Code, § 43.

4. Torts ⇨27

In action against liquor store proprietor and one of his employees for malicious interference with plaintiffs' restaurant business by intimidation of prospective customers based on plaintiffs' employment of Negro cook, evidence supported implied finding that proprietor personally acted in concert with employee in committing the tort.

5. Appeal and Error ⇨1039(13)

In action against liquor store proprietor and one of his employees for malicious interference with plaintiffs' restaurant business by intimidation of prospective customers based on plaintiffs' employment of Negro cook, wherein complaint alleged that employee acted as proprietor's agent, and also that both proprietor and employee committed the wrongful acts, and proof sought to hold proprietor as actor, variance, if any, worked no prejudice. West's Ann.Code Civ.Proc. §§ 469, 470.

6. Damages ⇨33

In action against liquor store proprietor and one of his employees for malicious interference with plaintiffs' restaurant business by intimidation of prospective customers based on plaintiffs' employment of Negro cook, fact that one of plaintiffs was nervous and afflicted with gall bladder trouble and other ailments before tort was committed did not preclude recovery for aggravation of gall bladder trouble and complete nervous breakdown.

7. Damages ⇨33, 208(1)

Tort-feasor must take his victim as he finds him, and when his wrong aggravates existing disability he is liable for that exacerbation, and task of measuring it in dollars is that of trial judge or jury.

8. Damages ⇨48

Damages may be awarded for mental suffering caused by intentional and outrageous conduct.

9. Torts ⇨22

In action against liquor store proprietor and one of his employees for malicious interference with plaintiffs' restaurant business by intimidation of prospective customer based on plaintiffs' employment of Negro cook, wherein evidence showed that proprietor and employee were acting in concert, and that proprietor was active participant in some of employee's acts, proprietor was liable for full amount of damage.

10. Damages ⇨130(3)

In action for compensatory and punitive damages for malicious interference with plaintiffs' restaurant business and for resulting illness of one of plaintiffs and loss

of business and profits, evidence of aggravation of existing gall bladder trouble of one of plaintiffs and her complete nervous breakdown sustained verdict for \$2,250 general damages, regardless of what showing may have been as to business losses.

11. Damages ⇨91(1)

In action for malicious interference with business, actual malice is basis for award of punitive damages.

12. Damages ⇨185(1)

In action against liquor store proprietor and one of his employees for compensatory and punitive damages for malicious interference with plaintiffs' restaurant business by intimidation of prospective customers based on plaintiffs' employment of Negro cook, evidence showed actual malice sufficient to render proprietor and employee equally liable for punitive award.

13. Damages ⇨208(8)

In action for malicious interference with business, it was for jury to determine proper proportion which compensatory damages should bear to punitive award.

14. Damages ⇨94

In action against liquor store proprietor and one of his employees for compensatory and punitive damages for malicious interference with plaintiffs' restaurant business by intimidation of prospective customers based on plaintiffs' employment of Negro cook, wherein jury awarded \$2,250 general damages, punitive award of \$2,000 was not excessive as to either defendant.

15. Pleading ⇨236(6)

In action for malicious interference with business, permission to amend complaint at trial to add claim for medical expense was not abuse of discretion.

16. Witnesses ⇨276

In action for malicious interference with plaintiffs' business, refusal to permit statutory examination of certain person requested on grounds of desire was not abuse of discretion. West's Ann. Code Civ.Proc. § 2055.

17. Pleading ⇨418(1)

Where general demurrer to complaint had been overruled with leave to defendants

to answer, and defendants had served special demurrer, which was sustained, and had then answered original complaint, which plaintiffs did not amend, defendants waived all objections except general ground of no cause of action.

18. Appeal and Error ☞1078(1)

Points stated in appellants' brief without discussion or citation of supporting authority were deemed to have been abandoned.

19. Appeal and Error ☞110

Order denying motion for new trial is not appealable.

Cletus J. Hanifin, El Monte, for appellants.

Lawrence J. Yanover, Los Angeles, for respondents.

ASHBURN, Justice pro tem.

In this action for recovery of damages for malicious interference with plaintiffs' restaurant business, a jury awarded plaintiffs Dorothy Guillory and Preston R. Guillory compensatory damages in the sum of \$2,250 and punitive damages of \$2,000. From the judgment entered on the verdict defendants Mildred Godfrey and Froy J. Tristany have taken this appeal. The action was dismissed as to defendant Edward Godfrey.

The complaint alleges that plaintiffs were owners and operators of a cafe located at 715½ South Main Street in Los Angeles; that defendant Froy J. Tristany was doing business under the name of Duke's Liquor Stores; that defendant Mildred Godfrey was an agent and employee of Tristany and acted within the scope of her employment and under the directions of Tristany; that on and after March 17, 1952 "defendants and each of them", with intention to destroy plaintiffs' business, maliciously and wantonly intimidated their customers in that, whenever customers were about to enter the cafe, defendants would ask them if they were "Nigger Lovers" and make other intimidating remarks; that Mildred Godfrey on March 24, 1952 entered the cafe and forcibly evicted a customer, causing a

large crowd of people to collect; that the customers were actually intimidated; that this course of conduct started when plaintiffs employed a colored cook in the cafe; that as a proximate result of defendants' malicious acts business dropped off more than 50 per cent; that regular customers withdrew their patronage; that plaintiffs became nervous and upset, and plaintiff Dorothy became ill and required medical care, all to the damage of plaintiffs in the sum of \$10,000; that plaintiffs lost money in the business and profits amounting to \$1,000; that, by reason of the malicious and wanton acts of defendants, the plaintiffs demand exemplary damages of \$20,000.

[1] The evidence is to be viewed in the light most favorable to respondents, with every legitimate inference drawn in their favor. *Murphy v. Ablow*, 123 Cal.App.2d 853, 858, 268 P.2d 80. Thus arrayed it discloses the following situation. Plaintiffs owned and operated a cafe on Main Street in Los Angeles and defendant Tristany conducted a liquor store next door under the name Duke's Liquor Stores. Defendant Mildred Godfrey was Tristany's sister and active in the conduct of the store. On March 17, 1952 plaintiffs hired a Negro cook, William Murrell, who then started to work. From that day until plaintiffs closed the cafe, about April 28, 1952, defendants engaged in a course of conduct calculated and intended to intimidate plaintiffs' customers and drive away their trade. As patrons would enter defendants would ask if they were "Nigger Lovers", make disparaging remarks about the cafe and the food "cooked by a nigger", perform antics in front of the place, make gestures, some of them obscene, yell at customers such things as "Don't go in there. The place isn't fit to eat in. She has this nigger in there. Don't go in there." Most of these things were done by the sister Mildred, but Froy himself stood on the sidewalk joining in the gestures, laughing at Mildred's antics, made disparaging remarks and fully supported his sister's activities. She called plaintiffs "dirty Mexicans",—"don't go into the restaurant, can't you see this dirty Mexican people, can't you see that lady, the lady's hands, can't you see the lady don't

—go away from here.” On March 24th Mildred had a fight in the cafe with a man called Frenchie, calling him names that one witness, Miss Moreno, would not repeat. According to Murrell: “She came in, says, ‘Get out of here, you nigger lover. You know I told you not to eat in here.’ She drug him out by the ear, pulled him out, beat him up. He began to bleed at the mouth.” On another occasion Tristany told plaintiff in the presence of customers “you have no business having that god-damn nigger working in here.” When Mrs. Guillory protested to Mildred Godfrey about her conduct she replied: “I’m just not going to go for that,” and “I’m not only going to let you operate, but I’m not even going to let you sell.” Tristany told Mr. Guillory “I know my sister did wrong, but, * * * I’m for it 100 per cent. I feel exactly the way she does.” “So he said, ‘Whatever my sister done,’ he said, ‘I’m her brother and I’ll back her a hundred per cent. You can go right now,’ he says, ‘load your gun,’ he says, ‘and fire, but make sure you don’t miss.’” This was a continuous course of conduct. The business of the cafe dropped off to nothing and plaintiffs were unable to sell or to operate. The mental perturbation which this caused to plaintiff Dorothy Guillory aggravated an existing gall bladder trouble and brought on a complete nervous breakdown.

[2, 3] Appellants’ brief does not comply with the rules in numerous respects but counsel has made his points sufficiently for us to be able to dispose of them. He argues first that no cause of action was alleged or proved. He quotes section 43, Civil Code as follows: “Besides the personal rights mentioned or recognized in the Political Code, every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations.” Then argues that there was no false imprisonment, assault and battery, interference with right of privacy, defamation, or interference with contract between plaintiffs and Murrell. But counsel says nothing about the right of protection “from personal insult” and, more important, ig-

nores the real theory of the complaint and the proof, which is wrongful and malicious interference with plaintiffs’ going business. It is said that “wrongful or malicious interference with the formation of a contract or the right to pursue a lawful business, calling, trade, or occupation has been generally held to constitute a tort, * * *.” 86 C.J.S., Torts, § 43, page 956. This rule prevails in California. *Finney v. Lockhart*, 35 Cal.2d 161, 217 P.2d 19; *Masoni v. Board of Trade of San Francisco*, 119 Cal. App.2d 738, 741-742, 260 P.2d 205; *Remillard-Dandini Co. v. Dandini*, 46 Cal.App.2d 678, 680, 116 P.2d 641; *California Grape Control Board v. California Produce Corp.*, 4 Cal.App.2d 242, 244, 40 P.2d 846; See, also, *Restatement of Torts*, § 766, p. 49; 62 C.J. § 53, p. 1137. The evidence amply supports a finding of malicious disruption of plaintiffs’ business by defendants and damage proximately flowing therefrom.

[4, 5] Appellants’ counsel also argues that no cause of action was stated or proved against defendant Tristany, first, because “there is no allegation that this liquor store of Tristany has committed any act at all” (a unique and refreshing argument) and, secondly, that Mildred was alleged to have acted as Tristany’s agent and no proof to that effect was made; that plaintiffs forsook the agency theory during the trial and sought (successfully) to hold Tristany as an actor. The complaint not only alleged such agency, but it also averred that defendants and each of them committed the wrongful acts. At best the shifting of ground by plaintiffs could amount to a variance, sections 469-470, Code of Civil Procedure. The evidence supports the implied finding that Tristany did personally act in concert with his co-defendant in committing the tort, and the variance, if one there be, worked no prejudice.

[6-8] The next contention is that any damage suffered personally by plaintiff Dorothy was not proximately caused by the defendants’ wrongful acts. This is based upon the fact that she was nervous, afflicted with gall bladder trouble and other ailments before the tort was committed. It overlooks the principle that a tort-feasor

must take his victim as he finds him. And when his wrong aggravates an existing disability he is liable for that exacerbation and the task of measuring it in dollars is that of trial judge or jury. *Harris v. Los Angeles Transit Co.*, 111 Cal.App.2d 593, 599, 245 P.2d 35. It is now well settled in this state that damages may be awarded for mental suffering caused by intentional and outrageous conduct. *Emden v. Vitz*, 88 Cal. App.2d 313, 318, 198 P.2d 696; *Bowden v. Spiegel, Inc.*, 96 Cal.App.2d 793, 794-795, 216 P.2d 571; *Richardson v. Pridmore*, 97 Cal.App.2d 124, 130, 217 P.2d 113, 17 A.L.R.2d 929; *State Rubbish, etc., Ass'n v. Siliznoff*, 38 Cal.2d 330, 336, 240 P.2d 282; See, also, *Restatement of Torts* (1948 Supp.) § 46, p. 612; 15 A.L.R.2d 111, annotation.

[9] The further argument that Tristany is not liable for damages caused by Mildred Godfrey's misconduct is misplaced because the evidence shows they were acting in concert, and he was an active participant in some of her acts. This makes him liable for the full amount of the damage. *Mariott v. Williams*, 152 Cal. 705, 711, 93 P. 875; *Finnegan v. Royal Realty Co.*, 35 Cal.2d 409, 433, 218 P.2d 17; 11 Cal.Jur.2d § 49, p. 275.

[10] The claim that the damages are excessive because of failure of proof as to loss of profits from the business cannot be sustained for the verdict for \$2,250 general damages is sufficiently supported by the evidence of the injury inflicted upon Dorothy Guillory, regardless of what the showing may have been as to business losses.

[11-14] Counsel argues that no punitive damages should have been awarded against either defendant. Of course, actual malice is the basis for such an award in a case of this kind. 14 Cal.Jur.2d § 176, p. 810. That kind of malice was plainly proved here. Tristany's active participation in the tort and his wholehearted endorsement of his sister's conduct and objectives, as shown by above quotations, render him equally liable for a punitive award. Those things show actual malice on his part. And it was for the jury to determine the proper proportion which the compensatory damages should

bear to the punitive award. *Finney v. Lockhart*, 35 Cal.2d 161, 163, 217 P.2d 19. It cannot be said, upon this record, that the punitive award is excessive as to either defendant.

[15] Appellants say there was error in permitting an amendment at the trial to add a claim for \$1,333, medical expense to the complaint. The matter was within the discretion of the court, *McDougald v. Hulet*, 132 Cal. 154, 162, 64 P. 278; *Hanna v. Hirschhorn*, 112 Cal.App. 438, 441, 296 P. 891, and, as no real showing of surprise was then made and no prejudice now appears to have resulted, the ruling cannot be held erroneous.

[16] Counsel for appellants urges error in refusal to permit examination of William Murrell under section 2055, Code of Civil Procedure. No transcript reference guides us to the ruling but it has been found at page 596. No explanation other than desire was offered. And it appears that Murrell was the first witness in the case and fully cross-examined. Counsel says the ruling was prejudicial but does not suggest any basis for that claim. It was a discretionary ruling, *Wulferdinger v. Pickwick Stages System*, 105 Cal.App. 509, 511, 288 P. 93; *Litt v. Litt*, 75 Cal.App.2d 242, 244, 170 P.2d 684, in which there was no error.

[17] Appellants further say that no cause of action was stated because the case was not at issue at the time of trial. It seems that a general demurrer to the complaint had been overruled with leave to defendants to answer, but they served a special demurrer instead, and same was sustained; thereupon defendants answered the original complaint and plaintiffs did not amend. At the trial defendants' counsel claimed the cause was not at issue and the court ruled to the contrary. Thereupon the trial proceeded upon the complaint and answer thereto and no one suffered any prejudice. By answering the complaint after the ruling upon the special demurrer defendants waived all objections except the general ground of no cause of action. *Lynch v. Gagnon*, 96 Cal.App. 512, 516, 274 P. 584; *Hughes v. Heffner*, 29 Cal.App.2d 382, 383, 84 P.2d 540.

[18] Other points are stated in appellants' brief without discussion or citation of supporting authority. They are entitled to no further comment for they are deemed to have been abandoned. In *re Estate of Scott*, 90th Cal.App.2d 21, 24, 202 P.2d 357; *Utz v. Aureguy*, 109 Cal.App.2d 803, 807, 241 P.2d 639.

[19] The appeal from order denying a judgment notwithstanding the verdict is without merit, as shown by the foregoing discussion. The order denying motion for new trial is not appealable and must be dismissed.

The judgment and order denying judgment notwithstanding the verdict are affirmed; the appeal from order denying new trial is dismissed.

SHINN, P. J., and VALLÉE, J., concur.



134 Cal.App.2d 800

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Charles William CROFT, Defendant and
Appellant.

Cr. 3112.

District Court of Appeal, First District,
Division 2, California.

Aug. 3, 1955.

Proceeding on petition by state prisoner for Writ of Error Coram Nobis attacking his conviction. The Superior Court, County of Contra Costa, Harold Jacoby, J., denied petition and petitioner appealed. The District Court of Appeal, Nourse, P. J., held that petition which contained only general allegations of fraud but which did not state what acts or representations constituted his attorney's contended wrongful persuasion, deception, or collusion with prosecution, was properly denied.

Order affirmed.

1. Criminal Law §997(11)

Petition by state prisoner for writ of error coram nobis attacking his conviction, which contained only general allegations of fraud but which did not state what acts or representations constituted his attorney's contended wrongful persuasion, deception, or collusion with prosecution, was properly denied.

2. Fraud §41

In civil actions for fraud, such fraud must be pleaded in specific language descriptive of acts which are relied upon to constitute fraud, and it is not sufficient to allege it in general terms, or in terms which amount to mere conclusions.

3. Criminal Law §997(11)

Rule that fraud must be pleaded in specific language applies in an attack in coram nobis proceedings upon judgment which has become final, in favor of which there are strong presumptions of regularity and where court has duty to scrutinize defendant's claim with critical eye.

4. Criminal Law §273

Bad advice, persuasion, or even wilfully false statements of fact by an attorney selected by defendant himself, will not suffice to vitiate his plea of guilty.

5. Criminal Law §1128(2, 4)

No facts outside the record and no affidavits which were not before trial court can be considered on appeal.

6. Criminal Law §1088(1)

Statements in briefs are not part of record on appeal.

Louis S. Katz, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen. of California, Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an appeal from an order denying defendant's petition for a Writ of Error Coram Nobis. The petition was made and the appeal briefed in propria persona. At appellant's request we appointed counsel to

represent him at the oral argument. Counsel diligently urged that the facts of the case entitled appellant to relief under the rule of *People v. Gilbert*, 25 Cal.2d 422, 443, 154 P.2d 657. However, said argument cannot avail appellant in these proceedings as the facts on which it was based were not sufficiently alleged or proved in the first instance.

Appellant's petition, verified but not accompanied by any affidavit, and the clerk's transcript of his original prosecution show in substance the following:

In an information in two counts appellant and George D. Croft, Jr. were accused of (1) burglary, (2) assault with a deadly weapon with intent to commit murder, both committed in Contra Costa County on December 18, 1953 and connected in their commission. Appellant was arrested on that same date. On arraignment on February 18, 1954 both pleaded not guilty. At the trial on April 13, 1954 appellant withdrew his plea of not guilty of the burglary (count 1) and pleaded guilty to that offense. Upon motion of the district attorney count 2 of the information was amended to read "Assault with a deadly weapon, an included offense." Appellant then pleaded guilty to this count as amended after having withdrawn his plea of not guilty to the offense as originally charged. The matter was referred to the probation officer for investigation and in the meantime appellant remanded to custody. Upon motion of the district attorney the information as to George D. Croft, Jr. was dismissed. On April 26, 1954 the court denied probation, found the burglary to be of the first degree and on each count sentenced appellant to San Quentin, the sentences to run concurrently. Appellant was remanded to custody and the next day delivered to San Quentin.

In his petition he contends that his conviction and imprisonment violated the 1st, 4th, 5th, 6th, 8th and 14th amendments of the United States Constitution, Article 1, Section 13 of the California Constitution and Section 1382 of the California Penal Code in that he was deprived of his right to a jury trial within 60 days of all trial on the merits and possibility of defense, because he was induced to plead guilty by "wrongful

persuasions" and "deceptions" of his attorney, "selling him out to the prosecution," and who "worked hand in hand" with it instead of defending him, which allegations are said to constitute extrinsic fraud (citing among other cases *People v. Butterfield*, 37 Cal.App.2d 140, 99 P.2d 310) and because his attorney blundered through ignorance and mismanaged his defense. It is further stated that the Writ of Error Coram Nobis is his sole remedy because the lower courts had refused him the right to appeal: "* * * as the trial judge sentenced him, and rushed him back to the County jail * * * he immediately wrote out his written notice of appeal, addressed it in an envelope with the United States Postage thereon prepaid to the Superior Court and the trial Judge who had sentenced him, and they would not allow him to have his records on appeal * * *" *People v. Slobodion*, 30 Cal.2d 362, 181 P.2d 868 is cited in this respect.

Hearing of this motion was ordered for January 31, 1955 and the district attorney was given notice of said hearing by the County Clerk but no notice to appellant appears. At the time set for the hearing the motion was denied without any further proceedings.

[1-4] The denial without a hearing on the merits was justified because the petition did not state facts sufficient to form the basis for the issuance of the writ. The allegations of fraud, which do not state what acts or representations constituted the attorney's contended wrongful persuasion, deception, or collusion with the prosecution, are not sufficiently specific. In civil actions for fraud "It is a cardinal rule of pleading that fraud must be pleaded in specific language descriptive of the acts which are relied upon to constitute fraud. It is not sufficient to allege it in general terms, or in terms which amount to mere conclusions." *Hannon v. Madden*, 214 Cal. 251, 267, 5 P.2d 4, 11. The same rule must apply a fortiori in an attack in "coram nobis" upon a judgment which has become final, in favor of which there are strong presumptions of regularity and where the court has the duty to scrutinize the defendant's claim with a critical eye. *People v. Adamson*, 34 Cal.2d 320, 330, 210 P.2d 13. The allegations of the

petition in this case did not enable the court to decide for itself whether the conduct of the attorney, if proved, would amount to extrinsic fraud which vitiated defendant's guilty plea. Such will rarely be the case. Bad advice, persuasion, or even wilfully false statements of fact by an attorney selected by the defendant himself, will not suffice to vitiate the plea. *People v. Gilbert*, 25 Cal.2d 422, 443, 154 P.2d 657, 668. That case notes an exception "if the representation of the private attorney presents a purported commitment by a responsible state officer which if actually made would vitiate the plea and if the acts or statements of such state officer, although innocently done or made, apparently corroborate the representation, are in good faith and without negligence relied upon by the defendant," but said exception could not be considered by the trial court in relation to this petition, as it did not allege any statement of the attorney as to such commitment, or any act of an officer apparently corroborating such statement on which defendant relied. Because of the above insufficiency of appellant's allegations we need not decide whether other remedies were available to him and his failure to exercise them justified the denial of his petition; or that such failure, if any, was excusable. The facts alleged do not bring this case under the rule of *People v. Slobodion*, *supra*, which case moreover does not relate to "coram nobis" but upholds an appeal belated because of negligence of prison authorities.

Appellant in his brief on appeal states additional facts outside the record and introduces several affidavits not shown to have been before the trial court, which tend to show that before appellant changed his plea to guilty his attorney told him that the deputy district attorney had proposed that all charges against his brother and codefendant would be dropped, the "with intent to kill" part of the assault count against appellant would also be dropped and appellant would be given probation and county jail if he pleaded guilty; that defendant asked the attorney to make sure that he was eligible for parole; that the attorney went back and allegedly conferred with the deputy district attorney in the judge's presence in his cham-

bers in which conference the deputy district attorney allegedly concluded from a law book that appellant would be eligible for parole and that his attorney told appellant so and advised him to plead guilty, but that after he had done so he proved not to be so eligible as guilty of first degree burglary, Section 1203 Penal Code, and that his request to be allowed to change his plea was denied.

[5, 6] No facts outside the record and no affidavits which were not before the trial court can be considered on appeal. *People v. Levine*, 114 Cal.App.2d 616, 617, 250 P.2d 645; *Estate of Tubbs*, 82 Cal.App.2d 305, 307, 186 P.2d 7; *People v. Agnew*, 16 Cal. 2d 655, 660, 107 P.2d 601; *Solomon v. Solomon*, 118 Cal.App.2d 149, 152, 257 P.2d 760. Statements in briefs are not part of the record on appeal, *Gantner v. Gantner*, 39 Cal. 2d 272, 278, 246 P.2d 923. The above additional facts and affidavits can therefore not be considered by us.

Other points raised by appellant are so obviously without merit that they do not require express treatment.

The order is affirmed.

DOOLING and KAUFMAN, JJ., concur.



Montie HAWK, and David Hawk, by and through his guardian ad litem Montie Hawk, Appellants and Cross-Respondents,

v.

CITY OF NEWPORT BEACH, a Municipal Corporation, Respondent and Cross-Appellant.

Civ. 5044.

District Court of Appeal, Fourth District, California.

Aug. 11, 1955.

Rehearing Denied Aug. 30, 1955.

Hearing Granted Oct. 5, 1955. *

Action, under Public Liability Act, against city to recover for injury sustained by minor in diving off rock in supervised
* Opinion vacated 293 P.2d 48.

public bathing area. The Superior Court of Orange County, Kenneth E. Morrison, J., entered judgment on jury verdict for plaintiff, denied defendant's motion for judgment notwithstanding verdict but granted defendant's motion for new trial. All parties appealed. The District Court of Appeal, Barnard, P. J., held that record failed to sustain plaintiff's contention that trial judge had granted new trial not as result of weighing evidence with reasonable inference therefrom but as result of concluding as matter of law that plaintiffs were not entitled to recover.

Orders affirmed.

1. Municipal Corporations ⇨857

In minor's action against city for injuries received when diving off rock in supervised municipal swimming area, evidence on issue of whether dangerous condition existed within meaning of Public Liability Act was one of fact. West's Ann. Gov.Code, § 53050 et seq.

2. Municipal Corporations ⇨847

Fact that natural conditions involved have not been changed by local agency is not controlling as to whether local agency is liable for injury to persons or property resulting from dangerous or defective conditions of public property, under provisions of Public Liability Act. West's Ann. Gov. Code, § 53050 et seq.

3. Municipal Corporations ⇨857

In action under Public Liability Act against city to recover for injuries sustained by 17 year old boy when diving off rock in supervised public bathing area, evidence on issue of boy's contributory negligence was one of fact. West's Ann. Gov. Code, § 53050 et seq.

4. New Trial ⇨72

In passing on motion for new trial, judge must weigh evidence and pass upon any existing conflict and he may draw conclusions from evidence which are contrary to those drawn by jury.

5. Appeal and Error ⇨979(2)

It is only in rare instances where there is showing of abuse of discretion that Appellate Court will interfere with action of

trial court in granting motion for new trial for insufficiency of evidence.

6. New Trial ⇨71

It cannot be held that the trial court has abused discretion in awarding new trial on grounds of insufficiency of evidence where there is a conflict in evidence or where there is any evidence which would support judgment in favor of movant.

7. Appeal and Error ⇨979(2)

Record, on appeal of action under Public Liability Act against municipality to recover for injuries to 17 year old boy sustained while diving off rock in supervised bathing area, failed to support contention of plaintiff, who had received verdict, that trial court had granted defendant a new trial not as result of weighing evidence with reasonable inferences therefrom but as result of concluding as matter of law that plaintiffs were entitled to recover. West's Ann. Gov. Code, § 53050 et seq.

Paul T. Erskine, Alhambra, W. J. Schall, San Diego, for appellants and cross-respondents.

Z. B. West, Santa Ana, Belcher, Kearney & Fargo, Los Angeles, for respondent and cross-appellant.

BARNARD, Presiding Justice.

This is an action for damages based upon the provisions of the Public Liability Act, Gov. Code, Secs. 53050 et seq. The defendant city owned, maintained and operated an area known as a "Beach Park", to which the public was invited for various forms of amusement, including bathing purposes. Because the exhibits were not brought to this court it is difficult to understand the detailed description of this area contained in one brief, with its many references to aerial photographs and maps which were used at the trial. It sufficiently appears, however, that within this area there was a large sandy beach fronting on the Pacific Ocean, and also a semi-circular cove separated from the main beach by a large "camel-back" rock. Several paths led from the main beach over the camel-back rock to the cove. A large rock stood out in the waters

of the cove some 180 to 200 feet from the shore, with a series of smaller rocks standing out between it and the shore. The top of this large rock was about eight feet above the surface of the water. The minor plaintiff was injured when he dove off this large rock into water which was only about four feet deep.

The accident happened about noon on September 1, 1952. This was Labor Day and there were about 4000 people on the main beach and from 150 to 200 in the cove area, some of whom were engaged in swimming. The minor plaintiff had been swimming in the main beach area, and he and a friend crossed the camel-back rock to the cove area. His friend remained on the shore while he waded out to the large rock, through water which came about to his waist at the deepest point. He saw another boy, 18 or 19 years old, walking out through the water to this rock and followed him. He climbed up on the rock and, standing beside him, watched the other boy dive into the water. The other boy rose to the surface and swam away. The minor plaintiff then dove in and, apparently, struck the bottom. He received the severe injuries here in question. There was no material conflict in the evidence, and no witnesses were called by the defendant. There was nothing in the way of signs or barriers, or warning devices of any kind, to warn against the use of this rock for diving purposes, and there were no lifeguards in that vicinity. There were lifeguards on the main beach, but they could not see what was going on in the cove area because of the intervening obstruction.

Among other things, the captain of the lifeguards, employed by the defendant, testified that on that day he had two lifeguards assigned to the main beach area, and three "roving lifeguards" who patrolled certain areas by truck; that he knew that patrons of the beach sometimes used this rock for diving purposes; that he himself had used it for diving purposes quite frequently during his teen-age years; that conditions had changed since he had used the rock for diving purposes, because part of the sandy bottom around the rock had shallowed quite considerably; that his lifeguards had reported to him about once a week over sev-

eral years that patrons at the beach were diving from this rock; that in June, 1952, he instructed his roving lifeguards, while making their rounds, to stop and walk over to where they could see this rock, and if they observed anyone about to use that rock for diving purposes to warn that person against such use; that these roving lifeguards would be there only from two to four times a day, and would spend about five minutes each time; and that outside of that possible 20 minutes a day no one was assigned to warn patrons against the use of that rock for diving purposes.

The minor plaintiff testified that he lived in Rosemead and was 17 years old at the time; that he had never been at this beach before but had seen it from across the channel, and on two occasions had seen young people diving off the cove rocks; that on this occasion he drove around until he saw the signs directing him to the beach park; that after parking his automobile in the parking area, for which he paid 50¢, he got in his bathing suit and went swimming on the main beach side; that while he and his friend were walking along he saw "all the kids over there swimming and diving" over on the cove side and saw the rocks there, "so I thought that would be a good place to try my diving"; that when he got to the cove area he saw another boy about 18 or 19 years old walking through the water out to this rock and followed him; that this rock was out in open water and the farthest one out; that he climbed up this rock behind the other boy and stood behind him while that boy dived; that the other boy came up right away and started to swim away from the rock; that after the other boy started to swim he dove, and was going to follow the other boy; that he dove into the water in a direction which would take him across the open or water side of the cove; that he dove into the water at a point about two feet from where the other boy had dived into it; that the next thing he could remember was when his friend was pulling him to the shore; that he did not ask anyone how deep the water was where he made his dive; that except for what he learned from wading out and watching the other boy dive he did not know how deep

the water was at that place; and that the water was not clear and he could not see the bottom when he dived.

At the conclusion of plaintiffs' case the defendant moved for a directed verdict, which was denied. A jury returned a verdict for \$97,000 in favor of the minor plaintiff, and for \$2,303.26 in favor of his father, who sought recovery for medical expenses. The defendant then moved for a judgment notwithstanding the verdict, which was denied. A judgment was entered and the defendant moved for a new trial on several grounds, including the insufficiency of the evidence to justify the verdict. The court granted the motion for a new trial "upon the grounds set forth in the Notice of Motion and particularly upon the insufficiency of the evidence to justify the verdict." The plaintiffs have appealed from the order granting a new trial to defendant, and the defendant has appealed from the judgment and from the order denying its motion for judgment notwithstanding the verdict.

The plaintiffs contend that the question as to whether the circumstances of this case disclose a dangerous or defective condition of public property within the meaning of the Public Liability Act, and the question as to whether the minor plaintiff was guilty of contributory negligence, were questions of fact for the jury and not of law for the court; and that the court abused its discretion in ordering a new trial. While conceding that the granting of a new trial will not be disturbed on appeal where the evidence is conflicting, it is argued that the power of a court to grant a new trial is limited, by the right of litigants to have questions of fact determined by a jury to cases where an appreciable conflict exists in the evidence; that there was no conflict in the evidence here; and that the record demonstrates that the trial court, in granting a new trial, was not weighing the evidence but was holding, as a matter of law, that no dangerous condition existed within the meaning of the Public Liability Act and that the minor plaintiff was guilty of contributory negligence.

The defendant contends that it appears, as a matter of law, that the city is not liable under the Public Liability Act; that the

evidence discloses as a matter of law that the minor plaintiff was guilty of contributory negligence; and that the granting of a new trial was within the discretion of the trial court, since it was free to draw a different conclusion from the evidence than that drawn by the jury, and had the duty to do so if convinced that the verdict was contrary to his view of the evidence. On its own appeal, the defendant contends that the evidence establishes as a matter of law that no cause of action was presented against the city under the Public Liability Act, and that the minor plaintiff was guilty of contributory negligence and assumed such risk of injury as was necessarily involved in his activity. It is, therefore, argued that the order denying the motion notwithstanding the verdict should be reversed and judgment ordered in favor of the defendant. In support of the first point, that there was no liability under the Public Liability Act, it is argued that no natural condition had been changed by the city; that while natural conditions may impose liability on a city under some circumstances, these must be such as to contain an unreasonable risk to one making an ordinary and proper use of such natural condition; that no such unreasonable risk here appears; and that the natural condition existing here was one which the city was not required to warn or guard against since there are countless places in a state of nature on the lakes, rivers and coast line of this state where venturesome persons may dive into the water, and which any public authority would be powerless to warn against or prevent.

[1,2] On the appeal from the order granting a new trial, we are in accord with the plaintiffs' contention that the issue as to whether there here existed a dangerous condition of public property within the meaning of the Public Liability Act, and the issue of contributory negligence, were questions of fact and not of law. With respect to the first of these issues, the evidence would support the conclusion that a dangerous condition existed in an area owned and maintained by the city for beach park purposes, and to which large numbers of people were encouraged to come for swimming purposes; that this dangerous

condition was well known to the city and its agents; that after knowing of the danger the city's agents recognized the need for warning its patrons in that regard; that the means adopted to that end were entirely inadequate, in view of the condition known to exist; and that this condition was one involving an unreasonable risk to anyone attempting to make an ordinary and proper use of it, who was without knowledge of the actual danger. The fact that the natural conditions involved had not been changed by the city is not controlling. In *Smith v. County of San Mateo*, 62 Cal.App. 2d 122, 144 P.2d 33, 38, the court said: "[T]he liability imposed by our statute is not limited to conditions 'artificially made by the hand of man.'" In *Bauman v. San Francisco*, 42 Cal.App.2d 144, 108 P.2d 989, 995, involving the use and manner of operation of a public playground, the court said: "There can be no doubt that a dangerous or defective condition can be created by the use or general plan of operation of government operated property, as well as by a structural defect." And, also, "It is also well-settled that as a general rule it is a question of fact for the jury to determine whether a given set of facts or circumstances creates a dangerous or defective condition." Similar principles were applied in *Wexler v. City of Los Angeles*, 110 Cal. App.2d 740, 243 P.2d 868. In our opinion, the question as to whether the circumstances of this case disclosed a dangerous or defective condition of public property, within the meaning of the Public Liability Act, was clearly one of fact and not one of law.

[3-6] With respect to the issue of contributory negligence, the minor plaintiff, a youth of 17 years, was in a supervised recreational area where he had never been before; he had previously, from across the channel, seen persons diving off this rock; he entered the water at the shoreline and waded gradually into deepening water, which was up to his waist before he reached the large rock; he saw other swimmers in the cove closer to the shore than was the rock; he followed an older youth onto the rock and watched him as he dove safely; and he then tried to do the same thing

in the same place. The facts that he was accustomed to swimming and diving, that he knew of the presence of the rock and its height from the surface of the water, and that he made no inquiry as to the exact depth of the water at the point where he intended to dive, merely present conflicts in the evidence and are not controlling as a matter of law. The question of contributory negligence was one of fact for the court and jury. The fact that there was no material conflict in the evidence is not controlling. In passing upon a motion for a new trial a judge must weigh the evidence and pass upon any existing conflict, and he may also draw conclusions from the evidence which are contrary to those drawn by the jury. *Estate of Green*, 25 Cal.2d 535, 154 P.2d 692, 696. As was said in that case, quoting from *Hames v. Rust*, 14 Cal.2d 119, 92 P.2d 1010:

"When the motion is granted, as here, for insufficiency of the evidence, it is only in rare cases showing abuse of discretion that an appellate court will interfere because the trial judge must weigh all the evidence and determine the just conclusion to be drawn therefrom. [Citing cases.] It cannot be held that a trial court has abused its discretion where there is a conflict in the evidence *or where there is any evidence which would support a judgment in favor of the moving party.*" (Emphasis ours.)

[7] The record does not support the plaintiffs' final contention that, although the evidence discloses that these two main issues presented questions of fact which the court was empowered to pass upon, the court granted a new trial not as a result of weighing the evidence with the reasonable inferences therefrom, but as a result of concluding, as a matter of law, that the plaintiffs were not entitled to recover. The court granted the motion for a new trial "particularly" upon the insufficiency of the evidence, and shortly prior thereto it had twice refused to sustain the contention that the main issues presented questions of law rather than of fact, by denying the motions for a directed verdict and for a judgment notwithstanding the verdict.

In view of our holding on the two controlling issues, as to liability and as to contributory negligence, the defendant's appeal from the order denying a judgment notwithstanding the verdict cannot be upheld. The defendant's appeal from the judgment, which was set aside by the order granting a new trial, was apparently taken as a precautionary measure and should be dismissed.

The orders appealed from are affirmed. The appeal from the judgment is dismissed.

MUSSELL, J., and SHELL, J. pro tem,
concur.



134 Cal.App.2d 783

**James J. McBRIDE, Plaintiff and Appellant,
v.**

**Zeona P. PAOLI, Charles H. Kendig, and
James H. Rudden, Executors of the Last
Will and Testament of Ray Paoli, De-
ceased, Substituted for Ray Paoli, De-
ceased, and Zeona Paoli, Defendants and
Respondents.**

Civ. 16374.

**District Court of Appeal, First District,
Division 1, California.**

Aug. 3, 1955.

Action to recover a specified percentage of proceeds of sale of all of a corporation's stock in exercise of plaintiff's alleged oral option to purchase stock from defendant, on whose death the executors under his will were substituted as defendants. From a judgment of the Superior Court, City and County of San Francisco, William F. Traverso, J., for defendants, plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that the evidence supported the trial court's fact findings that there was no meeting of parties' minds as to price of stock and no consideration for alleged option, that plaintiff failed to perform express material condition of parties' alleged oral agreement that

he contribute his personal services and help make parties' business a success, that such percentage of stock was worth specified sums on certain dates, on one of which plaintiff sought to exercise option, and that plaintiff did not offer to pay more than book value of stock when he undertook to exercise option.

Judgment affirmed.

1. Corporations ⇨121(5)

In action to recover specified percentage of proceeds of sale of corporation's stock in exercise of plaintiff's alleged oral option to purchase such percentage thereof from defendant, evidence supported trial court's finding that there was no meeting of parties' minds as to price of stock.

2. Corporations ⇨121(5)

In action for specified percentage of proceeds of sale of corporation's stock, evidence supported trial court's finding that there was no consideration for plaintiff's alleged option to purchase stock from defendant.

3. Corporations ⇨121(5)

In action to recover percentage of proceeds of sale of corporation's stock in exercise of plaintiff's alleged oral option to purchase such percentage thereof from defendant, evidence supported trial court's finding that plaintiff failed to perform express material condition of alleged option agreement that he contribute his personal services and help make parties' business a success.

4. Corporations ⇨121(5)

In action to recover ten per cent of proceeds of sale of corporation's stock in exercise of plaintiff's alleged oral option to purchase stock from defendant, evidence supported trial court's finding that such percentage thereof was worth specified amounts on two dates on one or the other of which plaintiff sought to exercise option.

5. Corporations ⇨121(5)

In action to recover certain percentage of proceeds of sale of corporation's stock in exercise of plaintiff's alleged oral option to purchase stock from defendant, burden was on plaintiff to prove fair value of such percentage of stock.

6. Corporations ¶121(5)

In action to recover specified percentage of proceeds of corporation's stock in exercise of plaintiff's alleged oral option to purchase stock from defendant, evidence supported trial court's finding that plaintiff did not offer to pay more than book value of stock when he undertook to exercise asserted option.

7. Appeal and Error ¶843(4)

Where second count of complaint in action to recover certain percentage of proceeds of sale of corporation's stock in exercise of plaintiff's alleged oral option to purchase stock from defendant incorporated by reference all allegations of first count, alleging joint venture between parties and another, and merely added that plaintiff imposed greatest trust and confidence independent and hence fully believed defendant's promise until he refused to perform it, District Court of Appeal need not decide, on appeal from judgment for substituted defendants, whether trial court erred in sustaining demurrer to second count, as plaintiff sustained no prejudice therefrom.

Pedder, Ferguson & Pedder, San Francisco, George A. Andrews, Jr., San Francisco, of counsel, for appellant.

Forrest A. Cobb, James W. Harvey, Morrison, Hohfeld, Foerster, Shuman & Clark, San Francisco, for respondents.

FRED B. WOOD, Justice.

Plaintiff brought this action for 10 per cent of the proceeds of the sale of all the capital stock of Ray Oil Burner Co., a California corporation, predicated upon the asserted exercise by plaintiff of an alleged oral option to purchase from defendant Ray Paoli¹ 10 per cent (25,000 shares) of the capital stock of that company.

He pleaded his cause in two counts: In the first count, as a part of a joint adven-

ture between these parties and R. C. Westover; in the second count, the same with additional allegations designed to show a constructive trust in plaintiff's favor. A general demurrer to the second count was sustained and the case was tried upon the issues framed by the first count and the answer thereto. The trial court found against the plaintiff and he has appealed. He claims the evidence does not support the findings of fact and that the court erred in sustaining the demurrer to his second count.

Concerning the alleged oral agreement the court found as follows: In March, 1949, the entire capital stock of Ray Oil Burner Co., a Delaware corporation, was for sale at the price of \$1,900,000. Plaintiff, defendant, R. C. Westover, E. E. Austin and B. L. Haviside discussed forming a California corporation which might purchase the Delaware corporation stock and that each of them might take \$50,000 worth of the stock of the new corporation which might borrow the balance of the purchase price upon its note and their individual proportionate guarantees and pledges, and that each of the five might receive and own 20 per cent of the shares of the capital stock of the new corporation. In April, 1949, Austin withdrew and defendant discussed purchasing the \$50,000 worth of stock which Austin had considered acquiring. Thereafter and before the new corporation was formed Haviside withdrew. Thereafter on April 18, 1949, plaintiff, defendant and Westover had a conversation in San Francisco and further discussed the situation. Plaintiff and Westover indicated their desire to acquire the 20 per cent of stock which Haviside had considered acquiring but said they did not have the money. Defendant stated in substance that in order that the proposed purchase not be lost he would be willing to purchase the Haviside 20 per cent. The three orally agreed they would take steps to bring about the incorporation and would purchase the capital stock of Rayco, Inc.,² a California corporation, which they anticipated would

1. Ray Paoli died pending this appeal and his executors have been substituted for him. However, for the sake of convenience, we refer to him as the defendant.

2. Under that name it was formed, later changed to Ray Oil Burner Company.

purchase the capital stock of the Delaware corporation, and that each would personally guarantee, in proportion to the percentage of shares in Rayco to be purchased and held by him, any indebtedness incurred by Rayco in making the purchase and would pledge their respective shares as security for their individual proportionate guarantees.

In said conversation on April 18, 1949, there was discussed the subject whether plaintiff and Westover might purchase from defendant one half of the Rayco stock which Haviside had considered purchasing and defendant said to plaintiff and Westover that they might each purchase 10 per cent of the stock of Rayco, Inc. within five years upon the condition that Westover give up his law practice and become president of the corporation and upon the further condition that plaintiff contribute his personal services and pitch in and help make the business a success. Thereupon Westover said that for each 10 per cent the price should be \$25,000, together with a sum of money equal to the reasonable appreciation in the value of the stock, but defendant did not hear said statement by Westover with reference to the price to be paid and he did not in any manner assent to said statement and there was never at any time any meeting of the minds of the parties or any agreement between them on the subject of the price to be paid for 10 per cent of the stock if either plaintiff or Westover should desire to purchase 10 per cent of the stock within five years. In said conversation on April 18, 1949, defendant orally agreed to pay \$150,000 for 60 per cent of the stock of the new corporation, plaintiff agreed to pay \$50,000 for 20 per cent of the stock, and Westover agreed to pay \$50,000 for 20 per cent of the stock. The conversation in which plaintiff claims defendant agreed to sell him 25,000 shares of Rayco stock took place after the parties had previously agreed to each and every term and provision of the entire project, by reason of which there was no consideration to defendant for anything that was said on the subject of plaintiff having the right to buy 25,000 shares of Rayco at any time within five years.

They incorporated Rayco. Each of the three paid the amount of his subscription and received one share for each dollar paid and became and continued the sole owner of the particular shares received by him, free and clear of all right, claim or interest of the others, except that each orally agreed not to sell his shares to any other person without first offering such shares to the others at the same price.

Rayco purchased the stock of the Delaware corporation, paying \$565,000 in cash (realized from the sale of its stock to its incorporators and from the liquidation of the Delaware corporation) and its promissory note for the balance, payable \$935,000 on January 1, 1950, and \$100,000 a year starting on January 1, 1956. Rayco effected an arrangement with a bank whereby it borrowed \$350,000 toward its January 1, 1950, payment, which loan was guaranteed by the individual and proportionate guarantees of plaintiff, defendant and Westover and by the individual pledge by each of his shares of Rayco stock.

Of these findings, plaintiff challenges two as not supported by the evidence: The finding that there was no agreement as to price and that there was no consideration for the asserted option.

[1] In support of the finding that there was no meeting of the minds as to price is defendant's testimony that plaintiff and Westover were mistaken in regard to there having been a discussion between the three regarding price; that there was no discussion as to price. In disallowing that testimony plaintiff invokes certain changes which defendant made in his deposition, as typed, before he signed it. As corrected, it is consistent with his testimony on the stand. The portions which he corrected did not necessarily reflect his answers as originally given or if some of them did they may have resulted from a misunderstanding by the witness of the meaning of certain questions. That conceivably could happen in view of the fact that he understood and spoke English imperfectly. The reporter who took and transcribed the deposition was not called by plaintiff to testify concerning the accuracy of his notes or of the

transcription. Also, in at least one instance the unchanged answer to one of the questions was "no price was discussed." There is no basis for a reviewing court to overrule the appraisal which the trier of the facts made of the testimony of this witness.

It is apparent that the court believed Westover's testimony that Westover proposed certain terms as to price and reconciled that testimony with defendant's testimony that price was not discussed, by inferring that defendant did not hear Westover's proposal, which came at the end of a brief and hurried discussion. Plaintiff, asked upon deposition if defendant had anything to say about what the price would be, replied "No, no, he didn't say 'Yes' or 'No.' I mean, we were in a hurry, getting things put together." Again asked, he said "I don't think he replied. If he did, I don't know. I mean, we were in a rush to get things put together and it was acceptable to him." Here again it was a question of fact, not of law, and the evidence supports the finding.

[2] Plaintiff challenges the finding that there was no consideration for the alleged option, claiming it was an integral part of the whole undertaking and a material inducement to him in subscribing and paying for the 25,000 shares which he acquired at the inception of the enterprise. But there is evidence that plaintiff, Westover and defendant had already agreed to take 20 per cent, 20 per cent, and 60 per cent, respectively, of the stock of the new corporation, and to pay therefor \$50,000, \$50,000, and \$150,000, respectively, and all that remained was for defendant to arrange with his banker for the \$15,000, which he did and thereupon went to Westover's office to

complete the transaction. While there, the conversation concerning the granting of the alleged option developed. Plaintiff testified that nothing was said at that conversation as to whether he would or would not be interested in making the arrangements without the 10 per cent agreement on behalf of defendant and that prior thereto they had many discussions involving other aspects of the operation of this company, if and when they acquired it. Support for the finding appears also in the testimony of Westover.³

It is apparent that the finding of "no consideration" is supported by the evidence. The alleged option, therefore, was at most a mere offer, an offer which in August or September, 1949, was withdrawn by defendant when plaintiff told him that in January, 1950, he would take up the 10 per cent of stock they had talked about. Defendant replied that he could not let plaintiff have 10 per cent; he would let him have only 9 per cent; and plaintiff responded that he was not interested in 9 per cent.

[3] *The court found that plaintiff failed to comply with an express material condition of the alleged oral agreement* in that he did not contribute his personal services and pitch in and help make the business a success. This failure to perform finds support in the testimony of the defendant and of the plaintiff. Plaintiff admitted he was unable to devote much time to the business until after January, 1950, other than attending directors' meetings and discussing different matters over the phone. Upon deposition, asked if he devoted much or any time to the business from the time of its acquisition, May 15, 1949, plaintiff replied

3. Westover testified: "Mr. Paoli came to my office, Mr. McBride being present, and told us that he had made the necessary arrangements with his bank so that he could pick up Mr. Haviside's interest—not his interest, but the percentage of the total stock. We congratulated one another, and then I asked each of the gentlemen present, including myself, to execute a check in the sum of \$10,000.00 odd dollars. I mean, some money to take care of the formation of the corporation. It was their percentage of a \$30,000.00

down payment which we had agreed to give Mrs. Ray if the deal went through. They all executed their checks at that meeting, and I believe that at that stage of the game I suggested to Mr. Paoli that I would like an opportunity—indicated to him that Jim would like an opportunity—Jim McBride—to purchase from him one-half of the twenty percent, or ten percent, of the stock that he was then picking up. I am referring to the additional twenty percent of Mr. Haviside, identified as a Haviside percentage."

"No, I haven't." He said he went out to the plant very little in 1949, 1950 or 1951.

[4, 5] *Plaintiff questions the findings that 10 per cent of the stock of the company was worth \$250,000 on December 31, 1949, and \$300,000 on January 28, 1950.*⁴ Here again plaintiff asks us to weigh the testimony and substitute our appraisal of it for that made by the trial judge. We find no basis for such a procedure. We find in the testimony which supports the court's finding no such implausibility as does the plaintiff. Quite the contrary. The witness who gave that testimony predicated his evaluation principally upon earnings (net earnings after taxes), earnings under the new arrangement, taking the period June 1 to December 31, 1949, for that purpose. He reduced the resulting estimated annual net by an amount which in his opinion would account for a seasonal variation. In capitalizing these earnings he multiplied by a factor which he derived from the negotiated price of \$1,900,000 in May of 1949 plus the \$250,000 paid in for the capital stock of the corporation, divided by the amount of the 1948 net earnings after taxes, increased by the percentage of increase in the Standard & Poor Index figures between May 16 and December 31, 1949. He then deducted the amount of the debt still owed by the corporation on account of the purchase price of the Delaware corporation stock. That gave him the fair value of all the stock on December 31, 1949, which amount he divided by ten to establish the value of the 25,000 shares in question.⁵ His increased valuation as of January 28, 1950, resulted from a \$585,000 reduction in the purchase price debt which was effected January 1, 1950, by payment from cash, not raised by borrowing.

In contrast, one of plaintiff's experts took no account of earnings. He took the book

value (the \$250,000 paid in for the Rayco shares plus \$211,000, the net earnings after taxes during the period from May 16 to December 31, 1949) and adjusted it downward, resulting in a valuation of but \$43,815.60 for 10 per cent of the stock. Thus, in fact, he valued the stock at but a few dollars more than twice the amount of its net earnings (after taxes) over a period of only 7½ months. No reviewing court could undertake to overrule a trial court's rejection of such a valuation.

Plaintiff's other expert arrived at a value of \$56,000 for 10 per cent of the stock. He gave consideration to earnings but used the annual average over a period (1940 to 1949) which included the war years, excluding 1947 which all concerned agree was an excessively high income year because of an accumulated demand and the lifting of governmental restrictions. This gave annual net earnings of less than half the amount of those which obtained under the new management, about three-fourths of those for 1948. He capitalized by multiplying by five. When asked why he used that as a factor instead of a higher number, the witness did not seem to have a clear explanation. The resultant figure was then reduced by averaging in the book value on a certain basis. Then, because the stock was closely held and not on the market, he further reduced it by 20 per cent, resulting in his appraisal of \$56,000. We do not see in that testimony a type of reasoning which compels acceptance of the opinion of the witness.

The conclusion is inescapable that the findings in question have ample support in the evidence. We note in passing that, while it has no direct bearing upon values in January of 1950, the fact that plaintiff, defendant and Westover sold all their stock in December, 1951, for the aggregate

4. Those dates were selected because of uncertainty whether plaintiff sought to exercise his option on the first business day or on the 28th of January, 1950.

5. Plaintiff argues it should be somewhat less than 10 per cent of the value of the entire outstanding stock, on the theory that a minority interest in such a corporation is worth less than its full percentage.

However that might be, plaintiff pleaded an option to pay \$25,000 plus 10 per cent of the increase in value of the stock from the date of the agreement to the date of the exercise of the option, and he stipulated that on May 16, 1949, 10 per cent of the stock was worth 10 per cent of the value of the entire stock issued.

sum of \$5,000,000, is some indication that the valuations which defendant's expert gave and the trial court accepted were not out of line. Incidentally, in his urge to throw out the testimony upon which these findings were based, plaintiff overlooks the fact that he has the burden of proving fair value. The evidence which he adduced does not compel acceptance and was not accepted by the trier of the facts. That would leave plaintiff without proof if defendant's expert were deemed incapable of belief.

Not without significance is the finding that if defendant had agreed to sell at book value the agreement would have been highly inequitable and unfair and that such a price would have been grossly inadequate. The lack of a promise to take over (upon exercising the option) an appropriate share of defendant's guarantee of Rayco's debt to the bank, was an additional inequitable feature.

[6] *Plaintiff challenges a finding that he did not offer to pay more than the book value of the stock when he undertook to exercise the asserted option.* That is supported by plaintiff's testimony that he told defendant he had obtained a valuation of \$46,000 or \$47,000 for 10 per cent of the stock; that defendant said the price was wrong; that plaintiff suggested defendant get an outside expert to put a price upon it and that if the parties could not agree on that price a third person would get the matter settled; but that defendant refused to do so. That was a concrete offer to pay \$46,000 or \$47,000 which, as the court found upon adequate evidence, was the book value, not the fair market value. Plaintiff's suggestion for arbitration did not convert it into an offer to pay \$250,000 or any other sum substantially greater than \$46,000 or \$47,000.

Plaintiff questions also the finding that the formation of the California corporation and the purchase of the stock of the Delaware corporation was not a joint adventure by plaintiff, defendant and Westover. We need not pass upon this question, for, as we have noted, the option in question was not an integral part of the enterprise.

Plaintiff asserts there exist a number of inconsistencies in the findings of fact. Our examination of the record convinces us that this point is not well taken.

[7] *Finally, plaintiff claims that the sustaining of a general demurrer to the constructive trust count of his amended complaint, without leave to amend, was reversible error.* We do not so view it. That count incorporated by reference all of the allegations of the first count, merely adding that because of many years of association in business plaintiff had acquired and reposed in the defendant the greatest trust, confidence and belief and therefore fully believed defendant's promise until defendant refused to perform. That relationship, if proved, might have served to toll the statute of limitations if plaintiff had proved a contract to sell, the very contract which he unsuccessfully sought to prove under the first count. Accordingly, we need not decide whether it was error to sustain the demurrer to the second count. Plaintiff sustained no prejudice therefrom.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.



CITY OF OXNARD, a municipal corporation, Petitioner,
v.

Ethel DALE, as City Clerk of the City of Oxnard, California, and Wm. H. Groff, as City Treasurer of the City of Oxnard, California, Respondents.

Civ. 21010.

District Court of Appeal, Second District,
Division 3, California.

July 25, 1955.

Hearing Granted Sept. 21, 1955.*

Mandamus proceeding by city to compel city treasurer and clerk to sign and countersign revenue bonds, which had been

* Opinion vacated 290 P.2d 859.

voted by electors and authorized by city council's resolution, proceeds of which were to be used to construct certain interceptor sewers to feed treatment plant under construction, and which were to be serviced and to be redeemed solely from sewer system revenues. The District Court of Appeal, Ashburn, J. pro tem., held that the revenue bonds did not constitute an indebtedness or liability within constitutional debt limitation and were valid.

Writ issued.

1. Municipal Corporations Ⓒ906

City's power to issue any type of bonds must necessarily find a source in some charter or statute.

2. Municipal Corporations Ⓒ864(4)

Under the "special fund doctrine", obligation payable only out of revenues of instrumentality purchased or constructed with proceeds of obligation does not constitute a debt or liability within ambit of constitutional debt limit provision, and such doctrine has been adopted in California. West's Ann.Const. art. 11, § 18; West's Ann.Gov.Code, § 54300 et seq.

See publication Words and Phrases, for other judicial constructions and definitions of "Special Fund Doctrine".

3. Municipal Corporations Ⓒ864(4)

Where revenue bonds are payable from special non-tax funds, under the "broad special fund theory", bonds are not debts within the debt limitation sense, regardless whether revenues pledged are confined to those of particular properties being financed.

See publication Words and Phrases, for other judicial constructions and definitions of "Broad Special Fund Theory".

4. Municipal Corporations Ⓒ864(4)

Under the "limited" or "restricted special fund theory", revenue bonds do not escape constitutional debt limitations unless bonds are to be paid solely from revenue of particular improvement constructed out of proceeds of issue, rather than from revenue of entire system of which improvement will be an addition.

See publication Words and Phrases, for other judicial constructions and definitions of "Limited Special Fund Theory" and "Restricted Special Fund Theory".

5. Statutes Ⓒ215

Legislation should be construed in light of court decisions existing at time of its enactment.

6. Constitutional Law Ⓒ48

Statute is presumed to be constitutional.

7. Municipal Corporations Ⓒ907, 950(15)

Statute, which in effect forbids segregation of revenues and requires withdrawal of all income of entire "enterprise" from other uses, such as servicing general bond issue in the particular property, requires its use exclusively for the revenue bonds, at least until they have been fully serviced and otherwise protected, and is constitutional.

8. States Ⓒ115

If revenue bond contract is drawn in form that prevents general revenues from being drawn upon, even though special fund proves insufficient for all demands that may be made upon it, and if no forfeiture of state interest can occur, case will not be outside scope of broad special funds doctrine.

9. Municipal Corporations Ⓒ864(4)

Revenue bonds, which had been voted by electors and authorized by city council's resolution, proceeds of which were to be used in construction of certain interceptor sewers to feed treatment plant under construction, and which were to be serviced and redeemed solely from sewer system revenues, did not constitute an indebtedness or liability within constitutional debt limitation and were valid. West's Ann.Gov.Code, §§ 54300 et seq., 54424-54426, 54428-54432, 54642; West's Ann.Const. art. 11, § 18.

Joseph W. Goss, Oxnard, City Atty., Oxnard, O'Melveny & Myers, James L. Beebe, James W. Beebe, Los Angeles, for petitioner.

Wm. A. Reppy, F. Gile Tiffany, Jr., Oxnard, for respondents.

ASHBURN, Justice pro tem.

City of Oxnard, a municipality of the sixth class, seeks a writ of mandate to compel the city treasurer and city clerk to sign and countersign, respectively, certain *revenue* bonds which have been voted by the electors and authorized by resolution of the city council. The proceeds of said bonds when issued are to be used in the construction of certain interceptor sewers to feed a treatment plant now under construction at Ormond Beach. These bonds are to be serviced and redeemed solely from sewer system revenues. The treatment plant has been financed by sale of general obligation bonds. The city has an existing sewer system which has operated profitably since service charges were imposed in 1946. The system has been built largely from proceeds of general obligation bonds of which \$795,000 face amount are now outstanding. Sewer system revenues have been applied in part toward payment of interest and redemption of one of said general obligation issues,—\$84,354.54 having been used for redemption. But, according to the petition, the city "does not presently intend to make further transfers from sewer revenues toward the retirement of said bonds."

The instant issue of revenue bonds was authorized pursuant to the Revenue Bond Law of 1941, Chapter 6, Part 1, Division 2, Title 5 of Government Code, section 54300 et seq. Respondents demur to the petition upon the ground of failure to state a cause of action. In their brief they argue that the issue in question constitutes an indebtedness or liability within the purview of section 18 of Article XI of the Constitution, and impliedly that the enabling statute is unconstitutional. Said section 18, so far as pertinent, provides: "No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an

annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof, on or before maturity, which shall not exceed 40 years from the time of contracting the same; * * *."

[1] The constitutionality of the Revenue Bond Law of 1941 is inextricably involved in respondents' contention that the subject issue of bonds creates an indebtedness or liability forbidden by the constitutional provision above quoted. For the power of a city to issue any type of bonds must necessarily find a source in some charter or statute. 43 Am.Jur. § 37, p. 298; *Sutro v. Pettit*, 74 Cal. 332, 336-337, 16 P. 7; *Lassen Municipal Utility Dist. v. Hopper*, 5 Cal.2d 18, 21, 53 P.2d 347. And if the bonds in suit constitute a debt or liability within the constitutional concept the statute necessarily falls because (1) the proceedings at bar faithfully follow its provisions, mandatory and permissive, and (2) it authorizes such debt or liability upon the vote of a majority of those voting at the special election while the constitution requires a two-thirds favorable vote.

[2,3] The special fund doctrine, that an obligation payable only out of the revenues of an instrumentality purchased or constructed from the proceeds of that obligation does not constitute a debt or liability within the ambit of a constitutional provision such as California's, prevails widely throughout the States¹ and has been adopted in this jurisdiction. Our problem is to ascertain whether the California rule is the "broad special fund theory" or the "limited" or "restricted special fund theory", for the bonds in question draw their sustenance from a special fund consisting of all the gross revenues of the Oxnard sewer system, including the main portion now operating, the treatment plant now under construction and the interceptor sewers to be built with the proceeds of this bond issue. The distinction between the two types of special funds is stated as follows in "A Joint Report of the Committees of the American Society of Civil Engineers and the Section

1. See annotations in 72 A.L.R. 688; 96 A.L.R. 1385; 146 A.L.R. 328.

of Municipal Law of the American Bar Association, etc." (1951), 12 Ohio State Law Journal, 179, 182: "Revenue bonds are payable from special non-tax funds. Thus, the prevailing view is that they are not debts in the debt limitation sense, and that is true without regard to whether the revenues pledged are confined to those of the particular properties being financed. This is the 'broad special fund theory.'

[4] "The courts of a few states, however, have placed a sharp limitation upon the application of this doctrine; they have held that any particular issue of revenue bonds does not escape constitutional limitations unless the bonds are to be paid solely from the revenue of the particular improvement which is to be constructed out of the proceeds of that issue, and not from the revenue of an entire system to which the improvement will be an addition. This is the 'limited' or 'restricted special fund theory.'"

The issue under discussion was in fact authorized by more than two-thirds of the voting electors at a special election. The initiating resolution No. 1610 provides for a \$450,000 issue pursuant to the Revenue Bond Law of 1941 for the purpose of providing funds for acquisition, construction and financing of interceptor sewers, "said bonds to be payable solely from the Sewerage Service Fund of said City (a fund into which all revenues derived from said sewer system are to be paid) or any other fund or funds into which moneys from said Sewerage Service Fund have been transferred for that purpose, and are not to be secured by the taxing power of the City * * *." The bond incorporates by reference all provisions of the resolution and of the statute. Section 2 of the resolution provides that the bonds are "special obligations of the City of Oxnard and shall be and are secured by a pledge of and lien upon, and shall be and are a charge upon, and shall be and are payable * * * solely from the gross revenues * * * of the enterprise which is defined * * * as follows: 'the entire sanitary sewer and sewage disposal system of the City of Oxnard as such system now exists, together with all additions and improvements to said

system hereafter made, including the acquisitions, extensions and improvements made with funds derived from the sale of the revenue bonds herein proposed to be issued.'" Section 3 specifies that the bonds are "secured by an exclusive pledge, charge and lien upon all of the revenues of the enterprise",—i. e. the existing sewer system with all additions and improvements thereto. Section 4: "The general fund of the City of Oxnard is not liable for the payment of the bonds or their interest, nor is the credit or taxing power of the City of Oxnard pledged for the payment of the bonds or their interest. The holder of the bonds or coupons shall not compel the exercise of the taxing power by the City of Oxnard or the forfeiture of any of its property. The principal of and interest on the bonds and any premiums upon the redemption of any thereof are not a debt of the City of Oxnard nor a legal or equitable pledge, charge, lien, or encumbrance, upon any of its property, or upon any of its income, receipts, or revenues, except the revenues of the enterprise which are, under the terms of this resolution and said Revenue Bond Law, pledged to the payment of said bonds and interest." Section 13 sets up five funds, Construction, Sewerage Service, Bond Service, Reserve, and Maintenance and Operation. Into the Construction Fund go the proceeds of sale of bonds. Into the Sewerage Service Fund go all gross receipts from the entire sewer system and all improvements and additions, present and prospective. Sufficient moneys to pay interest on the bonds are transferred monthly from the Sewerage Service Fund to the Bond Service Fund, and a sum adequate to provide for accruing principal has to be transferred from Sewerage Service to Reserve Fund. Next in order of transfer are monthly sums sufficient for current expenses of operation and maintenance of the enterprise. Any surplus remaining after those transfers must under the present law follow the course prescribed by sections 54424, 54425 and 54426 of the Government Code. Section 54424: "So long as any bonds or interest thereon are unpaid the revenues and interest thereon shall not be used for any other purpose, except as pro-

vided in Sections 54425 and 54426." Section 54425: "If the interest and principal of the bonds and all charges to protect or secure them are paid when due an amount for the maintenance and operation costs of the enterprise may be apportioned from the revenues." Section 54426: "Unless the legislative body provides otherwise in the resolution calling the election, the principal, interest, and sums for other security funds shall be paid from the revenues prior to paying the maintenance and operation costs of the enterprise." Foreseeing a statutory amendment the draftsman of the ordinance provided in section 19 that surplus funds may be invested in direct obligations of the United States, and "said surplus may also be used, if permitted now or when permitted hereafter under amendments to the Revenue Bond Law of 1941: (a) for the payment of the costs of extensions of or additions to and improvements of the enterprise, (b) for payment of principal and interest of general obligation bonds of the city issued for sewer purposes, or (c) for any other sewer purpose, and no other transfer or uses of said revenues may be made." Such an amendment did eventuate at the last session of the legislature. Senate Bill 1045 was passed, has been signed by the Governor, and becomes effective in September next. It amends section 54425 to read: "If the interest and principal of the bonds and all charges to protect or secure them are paid when due an amount for the *necessary and reasonable* maintenance and operation costs of the enterprise, *which costs include the reasonable expenses of management, repair and other expenses necessary to maintain and preserve the enterprise in good repair and working order*, may be apportioned from the revenues, and subject to any limiting covenants in the resolution providing for the issuance of bonds, the remaining surplus may be used for any lawful purpose of the local agency." (New matter is in italics.) This leaves the gross revenue of the entire enterprise applicable first to the principal and interest of these revenue bonds, both under the statute and under section 19 of the resolution.

The resolution contains a series of covenants,—to preserve and protect the security

of the bonds, make punctual payments, discharge all lawful claims, operate the enterprise efficiently and economically, not to mortgage or otherwise encumber the enterprise; to maintain adequate insurance; to furnish no free sewer service except to the extent presently required by contract; but the City is not thereby required "to expend any funds other than the revenues received or receivable from the enterprise" in order to perform said covenants. It is also covenanted that the City will prescribe and collect charges for service, sufficient to take care of this issue of revenue bonds, all payments required to meet any other obligations of the City "which are charges, liens, encumbrances upon or payable from the *revenues of the enterprise*", and all expenses of operation and maintenance. (Emphasis added.) No additional bonds shall be issued under any law having priority of payment out of the revenues of the enterprise. Section 33 declares the resolution to be a contract between the City and the bondholders enforceable by mandamus, accounting, mandatory injunction, etc. Like provision is found in section 54642 of the Government Code. Section 34 of the resolution says "* * * from and after the sale of the bonds the general fund of the City shall not include the revenues of the enterprise and no contract or other obligation payable from the general fund of the City shall be payable from the revenues of the enterprise, except as provided in Section 19 hereof." Section 19 is the one relating to use of surplus funds, quoted above. Sections 54428-54432 of the Code contain these specific provisions: "§ 54428. * * * The general fund of the local agency is not liable for the payment of the bonds or their interest.

"§ 54429. * * * The credit or taxing power of the local agency is not pledged for the payment of the bonds or their interest.

"§ 54430. * * * The holder of the bonds or coupons shall not compel the exercise of the taxing power by the local agency or the forfeiture of its property.

"§ 54431. * * * The principal of and interest on the bonds and any premiums upon the redemption of any thereof are not a debt of the local agency, nor a legal or

equitable pledge, charge, lien, or encumbrance, upon any of its property, or upon any of its income, receipts, or revenues except the revenues of the enterprise and other funds that may be legally applied, pledged, or otherwise made available to their payment.

"§ 54432. * * * Every bond shall recite in substance that the principal of and interest on the bond are payable solely from the revenues and other funds pledged or otherwise made available to its payment and that the local agency is not obligated to pay it except from the revenues of the enterprise and from such other funds."

The attack upon the bonds is aimed at the provisions of the resolution and the statute which siphon all of the gross revenues of all of the sewer system into a special fund for servicing and payment of the instant issue of revenue bonds, without any segregation of income from the interceptor sewers acquired with the proceeds of the particular issue, and without the possibility of any of the gross revenue from the entire system being used to service or pay general obligation bonds whose proceeds helped to create that system. Counsel also stress the argument that any shortage in the special fund will, as a practical matter, impose upon the general funds of the city a necessity of feeding the special fund, thus indirectly creating a general obligation payable out of taxes.

When first adopted in this state the special fund doctrine was stated in broad terms, which were entirely sufficient for the case in hand. *California Toll Bridge Authority v. Wentworth*, 1931, 212 Cal. 298,

302, 298 P. 485, 486: "The overwhelming weight of judicial opinion in this country is to the effect that bonds, or other forms of obligation issued by states, cities, counties, political subdivisions, or public agencies by legislative sanction and authority, if such particular bonds or obligations are secured by and payable only from the revenues to be realized from a particular utility or property, acquired with the proceeds of the bonds or obligations, do not constitute debts of the particular state, political subdivision, or public agency issuing them, within the definition of 'debts' as used in the constitutional provisions of the states having limitations as to the incurring of indebtedness." The case involved section 1 of Article XVI of the Constitution, which, so far as pertinent is set forth in the margin.² It arose under a special statute relating to a bridge across San Francisco bay, which created a special fund consisting of the revenues of the particular bridge. The court held, on the authority of *Shelton v. City of Los Angeles*, 206 Cal. 544, 275 P. 421, and cases in other states, that such a special-fund bond does not create a debt within the meaning of the constitutional limitation. There was no occasion to consider in the said Toll Bridge case (or in *Shelton*) the necessity of segregation of revenues when creating the fund. But that problem did arise soon.

Garrett v. Swanton, 1932, 216 Cal. 220, 13 P.2d 725, deals with a conditional sale contract between Fairbanks, Morse & Co., as seller, and City of Santa Cruz, as buyer. It covered the installation of a pumping plant which was to be an adjunct to the city's existing water distributing system. The

2. "The Legislature shall not, in any manner create any debt or debts, liability or liabilities, which shall, singly or in the aggregate with any previous debts or liabilities, exceed the sum of \$300,000, except in case of war to repel invasion or suppress insurrection, unless the same shall be authorized by law for some single object or work to be distinctly specified therein which law shall provide ways and means, exclusive of loans, for the payment of the interest of such debt or liability as it falls due, and also to pay and discharge the principal of such debt or liability within 75 years of the time of the contracting thereof, and

shall be irrevocable until the principal and interest thereon shall be paid and discharged, and such law may make provision for a sinking fund to pay the principal of such debt or liability to commence at a time after the incurring of such debt or liability of not more than a period of one-fourth of the time of maturity of such debt or liability; but no such law shall take effect until, at a general election, it shall have been submitted to the people and shall have received a majority of all the votes cast for and against it at such election;
* * *."

price was \$152,960, payable \$30,000 cash and balance in sixty monthly installments. The contract contained an appropriate forfeiture clause operative in case of default by the city. It also "stated that 'it is agreed that the obligation to pay the installments hereunder is not a general obligation of the said municipality payable from taxes or its general funds but only a special obligation payable from the Water Development Fund. * * * The municipality covenants to operate the said (water) department in an efficient and economic manner, and to maintain rates for the product or service of said department which will produce sufficient revenue for the payments called for by this contract so far as it may be permitted to do so by law.'" 216 Cal. at page 224, 13 P.2d at page 727. The city had previously incurred an indebtedness of \$555,000 in bonds which were general obligations of the city, the proceeds having been used in the acquisition and maintenance of the water system. By ordinance the entire receipts from the water system had been set aside for use solely in construction, improvement, extension, maintenance of the plant and payment of principal and interest on any bonded indebtedness then existing or thereafter incurred for any of said water system purposes. The contract was challenged by a taxpayers' suit. And it was shown that the necessary expenditures of the city for the fiscal year including the total obligation of the Fairbanks, Morse contract would exceed the entire revenues of the city. It was claimed that this created a liability or indebtedness forbidden by Article XI, section 18, of the Constitution, there having been no authorization of the contract by two-thirds vote of the electors. The problem was stated in these words: "Essentially the transaction above outlined presents a situation where the city agrees to purchase certain machinery on the conditional sales plan, title to remain in the seller until paid for, and agrees to pay for the same, part in cash and the balance in installments over a period of years, out of a special fund, which fund is created not only by the profits from the property purchased, but contains also the profits earned by the entire water plant of the city. Can a city, when the total

amount of such a purchase exceeds its income, enter into such a contract without submitting the same to a vote of the people?" 216 Cal. at page 226, 13 P.2d at page 727. The court first held that a liability for the full purchase price arose upon execution of the contract, and that it violated the constitutional limitation "unless that provision does not apply to this type of contract because of the fact that all payments are to be made from the water fund, and are not to constitute a general obligation of the city." 216 Cal. at page 227, 13 P.2d at page 728. California Toll Bridge Authority v. Wentworth, 212 Cal. 298, 298 P. 485, was quoted (as we have done supra), and the court said at page 229 of 216 Cal., at page 729 of 13 P.2d: "It therefore follows that, if the contract here involved comes within the limits of the 'special fund' doctrine, it does not violate the debt limit provision of the state Constitution. In order to determine this question, it is necessary to determine the exact limits and extent of that doctrine. * * * An examination of the cases from other jurisdictions establishes the fact that there are at least two well-settled limitations or exceptions to the 'special fund' doctrine. Thus it is well established that an indebtedness or liability is incurred when by the terms of the transaction a municipality is obligated directly or indirectly to feed the special fund from general or other revenues in addition to those arising solely from the specific improvement contemplated. It also seems to be well settled, as a second limitation to the doctrine, that a municipality incurs an indebtedness or liability when by the terms of the transaction the municipality may suffer a loss if the special fund is insufficient to pay the obligation incurred." At page 230 of 216 Cal., at page 729 of 13 P.2d: "It is the fund created from the revenue of the entire water system from which the payments on the contract are to be made. In other words, it is not only the income *earned by the property purchased* that constitutes the special fund from which the payments are to be made, but the income from the *entire water system* constitutes such special fund. It is obvious that, although the contract provides the payments to Fairbanks, Morse &

Co. shall solely be made from this fund, and shall not constitute a general obligation of the city, indirectly such contract does create a general indebtedness or liability of the city. It seems too clear to require further elaboration that, if the water fund be depleted by the payments made to Fairbanks, Morse & Co. for the pumping plant, the fund created for the payment of interest and principal on the bonds will be depleted, and that, since such bonds are a general obligation of the city, the taxpayers must at all times be ready to feed the special fund if the income is not sufficient to pay both the interest and principal on the bonds and the payments to Fairbanks, Morse & Company. It follows, of course, that, when this contract was executed, the taxpayers became indirectly liable to pay the amount thereof. We do not believe that the 'special fund' doctrine was ever intended to be applied to a situation where the municipality, directly or indirectly, is or may be compelled to feed the special fund from other revenues in addition to those arising from the special improvement contemplated. Such a subterfuge, if sanctioned would go far to effectually wipe out the purpose and intent of the constitutional provision." Quoting from *Schnell v. City of Rock Island*, 232 Ill. 89, 83 N.E. 462, 14 L.R.A., N.S., 874: "'A city may acquire a system of waterworks by pledging the income until it shall pay for the system, and no indebtedness is created. The same rule might apply to some definite extension of waterworks where the income of the extension could be separated and applied to payment, but an obligation to pay with the income of property already owned by a city is not different from an obligation to pay with any other funds, so far as the question whether the transaction amounts to a debt is concerned.'"³

"The logic of these cases, and of the cases cited by the Federal Circuit Court, seems unescapable. The contract here involved is not payable solely from the income of the improvement contemplated, but is payable from the revenues of the entire water system. Part of those revenues can, and in

fact must, be applied to the payment of the interest and principal on the bonds which is a general obligation of the city." 216 Cal. at pages 232, 233, 13 P.2d at page 730. The contract was held illegal upon the ultimate ground that "If this [special] fund is depleted, the obligation to feed the fund will fall upon the taxpayer." 216 Cal. at page 233, 13 P.2d at page 730. It was also held that the forfeiture clause rendered the contract violative of the constitution because "[t]he practical compulsion to protect the investment by making the payments from the general fund if the special fund prove insufficient constitutes, in our opinion, a violation of the constitutional provision in fact." 216 Cal. at page 234, 13 P.2d at page 731.

In the ensuing years this Garrett case has suffered a destructive erosion which will be considered presently. Viewed in the abstract the decision possesses considerable unspent logic and sound economics. The instant case serves to illustrate what may happen if the segregation rule of the Garrett case is abandoned. The general obligation issue of \$375,000 for the Ormond Beach treatment plant was sold in 1954. The sewer system had been self-supporting and profitable ever since sewer charges began in 1946; and the profits had been devoted, at least in part, to servicing and redeeming general obligation sewer bonds. What more natural than a representation to the voters that the bonds would be self-sustaining and self-liquidating? And what more natural than a voter's approval of the new bonds in that belief? Then (we assume) the City follows with an issue of self-sustaining revenue bonds which the people also vote because they do not threaten any taxes. But the source of servicing the treatment plant issue is immediately diverted to the interceptor sewers issue and (without the 1955 amendment to section 54425, Government Code) the treatment plant issue must be sustained from general tax revenues. Under the 1955 amendment that issue receives part of the sewer revenues only if there is a surplus after costs of operation and the interceptor bonds have

3. Illinois has gradually moved over into the "broad special fund" group of states.

See *Poole v. City of Kankakee*, 1950, 406 Ill. 521, 94 N.E.2d 416, 423.

been fully cared for. But it has been authoritatively held in effect that such considerations do not prove the special fund issues to be an indebtedness or present, liability.

While *Garrett v. Swanton*, supra, 216 Cal. 220, 13 P.2d 725, is still cited as authority for the proposition that a forfeiture clause in a conditional purchase contract renders it obnoxious to the constitutional debt limitation, *City of Los Angeles v. Offner*, 1942, 19 Cal.2d 483, 486, 122 P.2d 14, 145 A.L.R. 1358; *Dean v. Kuchel*, 1950, 35 Cal.2d 444, 447, 218 P.2d 521, the segregation requirement of the decision can no longer be said to prevail. And the same is true of an indirect obligation to feed the fund.

Some eight to ten months after the *Garrett* case came *California Toll Bridge Authority v. Kelly*, 1933, 218 Cal. 7, 21 P.2d 425, and *Department of Water, etc., v. Vroman*, 1933, 218 Cal. 206, 22 P.2d 698. The Toll Bridge case arose under Article XVI, section 1, Constitution, and involved revenue bonds payable out of a special fund derived from the tolls for use of the particular bridge that had been financed by the proceeds of the bonds. After this method of financing had been approved in *California Toll Bridge Authority v. Wentworth*, supra, 212 Cal. 298, 298 P. 485, certain legislation was passed to induce the Reconstruction Finance Corporation to purchase the bonds. This legislation specified that, so long as the bonds were outstanding the bridge and approaches should be maintained and operated and kept insured. Such costs and the cost of constructing the approaches were not to be paid out of the bridge revenues but from the state highway maintenance fund available for roadway purposes in the group of counties designated as group No. 1, "provided, that such cost of operation and maintenance 'may be paid from any other fund or funds which may hereafter be made available for such purposes.'" 218 Cal. at page 12, 21 P.2d at page 426. It was contended that the practical result of these provisions would be to convert the revenue bonds into general obligations of the state. The court rejected the argument saying at pages 12 and 13

of 218 Cal., at page 427 of 21 P.2d: "While the practical effect of the plan may be to impose a burden on certain special funds of the state, to protect the state's outlay in the construction of the approaches to the bridge and for the purpose of maintenance, operation, and insurance of the structure, it does not result that the bonds will be general obligations of the state in any sense.

* * * While it may be to the interests of the state, in the event of necessity, to make contribution for the preservation of the bridge, the better to conserve the amount of funds it has spent in assisting the consummation of the enterprise, it does not follow that the bonds themselves will be thereby converted into a liability against the general funds of the state. The construction of the bridge by the Bridge Authority with funds raised by the issuance and sale of revenue bonds which, under no circumstances, may create a general liability against the state, is one transaction, complete in and of itself. What the state may do in the way of assisting an enterprise which will result in the construction of an important link in its system of primary highways is a separate and distinct transaction, entirely aside the mark in considering the legality of the bonds in this case, unless by some legal transformation the bonds have been changed from revenue bonds, payable by the Bridge Authority from a special fund, into general liabilities of the state. Such transformation or transition is not apparent to the court." This looks like a rejection of the rule against possible feeding of the fund which was announced in the *Garrett* opinion. That case was then distinguished in these words: "We must not lose sight of the fact that these bonds are not, and cannot be, bonds of the state creating a general liability against it. So far as payment of principal and interest of the bonds is concerned, no funds of the state, general or special, can be resorted to. This fact serves to distinguish the present case from *Garrett v. Swanton*, 216 Cal. 220, 13 P.2d 725, and like cases from other jurisdictions cited and relied on by respondent. In *Garrett v. Swanton*, the contract for the purchase of the machinery provided that the price was

to be paid from the revenues received from the operation of the entire water supply system, of which the new equipment was but a part. The bonds were city bonds, and were not payable solely from the special fund created by segregation of the revenues for that purpose, but also from the general funds of the city in the event the special fund should be insufficient." 218 Cal. at pages 13, 14, 21 P.2d at page 427. This reasoning seems to recognize continued integrity of the Garrett rule. And it is followed by further discussion of the fact that shortage in the one special fund would at most cast an additional burden upon another special fund and hence the general revenues produced by the taxing power would not be called upon. This case cannot be said to overrule Garrett in the matter of the effect of possibility of feeding the fund.

Department of Water, etc., v. Vroman, supra, 218 Cal. 206, 22 P.2d 698 is less difficult to interpret. It involved the validity of a contract of the Los Angeles Department of Water & Power to borrow from the Reconstruction Finance Corporation some \$22,800,000 to finance construction of electricity transmission facilities from the Colorado River. The debt was to be evidenced by notes payable from the revenues of the entire electric system belonging to the city. The proceeds of a large issue of general obligation bonds had been placed in a power revenue fund created by the city charter and the revenues from the electric system had been used to pay, without resort to general funds or taxation, all principal and interest upon some ten million dollars of outstanding general obligation bonds. It was claimed that the borrowing on the revenue notes was invalid because the revenues from the electric system (the special fund) had previously been used to service and retire general obligation bonds. The court first held that the Department of Water & Power, not being one of the agencies named in section 18 of Article XI, was not subject to the limitation therein prescribed. 218 Cal. at pages 217, 219, 22 P.2d at pages 702, 703, 704. Then the court placed its ruling, which upheld the validity of the issue, upon a second ground which in effect puts an end to the segregation phase of the Garrett de-

cision. At page 218 of 218 Cal., at page 703 of 22 P.2d: "We attach no particular significance to the first objection, as such, viz., that the loan agreement provides for the repayment of moneys to be borrowed by the department out of revenues from the existing electric system as well as from revenues for the transmission system proposed to be constructed, and that thereby the constitutional provision is violated. If it has any importance it is in connection with the second objection which is to the effect that, although the moneys to be borrowed are payable only out of the power revenue fund, said fund may prove to be inadequate, and the general taxpayers may in that event be required to pay taxes to meet the sums to become due on the general bonds of the city heretofore issued for the construction and acquisition of a municipal electric system, thus rendering the loan agreement and the notes to be issued pursuant thereto without the scope of the special fund doctrine to which this state is committed." And, in disposing of Garrett the court further said, 218 Cal. at page 219, 22 P.2d at page 704: "It is true that, if the contingency should arise that the funds of the department should be so depleted as to be insufficient to satisfy all of the obligations enjoined by contract and by the charter upon it, then the taxpayers might be called upon to provide the revenue with which to pay the principal and interest on certain outstanding general bonds. But the electors in authorizing those bonds bound the taxpayers constitutionally to meet those payments, and nothing has occurred since the issuance thereof which would relieve them of that burden, unless it may be said that by the charter amendment subsequently adopted the obligation to pay them has been transferred by the fundamental law of the city from the taxpayers to the board.

"Each case must necessarily rest upon its own facts. On the showing here made, the department is and will be able, not only to repay the proposed loan from the federal government, but will also be able to meet, as provided by the charter, the obligations heretofore assumed by the city by general bond issue for electric system purposes. Under such circumstances the taxpayers

would be in no position to complain by reason of the proposed loan, and under the law the special fund doctrine may be applied in its most comprehensive sense. We therefore conclude that the city, as such, has not by its own act incurred, nor is the board proposing to incur, an indebtedness or liability in violation of the constitutional provision.

"Counsel for the petitioner have exhaustively reviewed the authorities from other jurisdictions bearing upon the special fund theory, in an endeavor to show that the holding in *Garrett v. Swanton*, supra, is contrary to the weight of authority. In view of our conclusion that that case could in no event be controlling under the facts and the law here presented, it is unnecessary to review or comment on the cases cited." Thus it is held that reimposing the burden of the general bonds upon the taxpayers is not objectionable because they have voted to discharge that obligation and the fact that they have been temporarily relieved of it by the use of the revenues necessary to feed the special fund is legally inconsequential.

City of Glendale v. Chapman, 1951, 108 Cal.App.2d 74, 238 P.2d 162, upheld the validity of certain revenue water bonds of the City of Glendale. The proceeds were to be used for extension of the existing waterworks system, which was subject to certain outstanding general obligation bonds. All of the revenues of the system were to go into a special fund to be used primarily for servicing and liquidation of the new issue. The city covenanted to charge and collect rates adequate to care for the revenue bonds. Concerning the matter of possible necessity of feeding the special fund the court had this to say: "The amici curiae who appear in support of respondents contend that, although the moneys to be received from the sale of the bonds are payable only out of the net earnings of the waterworks, should that fund prove to be inadequate, the general fund will be invaded and the taxpayer be required to pay the sums due on the bonds. In reason how could such claim be made? In *Shelton v. City of Los Angeles*, 206 Cal. 544, at page 551, 275 P. 421, at page 424, Mr. Justice

Shenk says this obligation 'is not a financial one, in default of which the city would be required to disburse the general funds of the city or other moneys derived from taxation.'" 108 Cal.App.2d at page 80, 238 P.2d at page 165. "The contract of a city for the payment of money out of a special fund, such as is involved herein, may impose a strong moral obligation to approve a schedule of rates to discharge the principal and interest of the indebtedness as it becomes due. Such obligation is not of a financial character in default of which the city would be required to disburse its general funds derived from taxation." 108 Cal.App.2d at page 81, 238 P.2d at page 166. "While in the *Garrett* decision the court indicated that the depletion of the revenue fund below the safety point might render taxation necessary for the payment of the outstanding bonds thereby creating an indebtedness forbidden by section 18, article XI of the Constitution, yet in the subsequent *Vroman* decision with facts which closely parallel those at bar, the same court held that a depletion of the revenue fund to the same degree would not create an indebtedness contrary to the Constitution." 108 Cal.App.2d at page 84, 238 P.2d at page 167. The last quoted paragraph seems to be a fair appraisal of the effect of the *Vroman* decision upon the *Garrett* case. The Supreme Court denied a hearing.

Board of State Harbor Com'rs v. Dean, 1953, 118 Cal.App.2d 628, 258 P.2d 590, upholds an issue of revenue bonds, authorized under a special statute, for the improvement of San Francisco harbor. There was outstanding a series of general obligation bonds and the special fund consisted of revenues from the entire harbor, but only the net left after servicing all outstanding general obligation bonds and after payment of expenses of operation and maintenance. 118 Cal.App.2d at page 631, 258 P.2d at pages 591, 592. An honest and a sound economic approach. The revenue bonds were attacked as a violation of Article XVI, section 1, Constitution. The court ruled that the issue was within the special fund rule and valid. The opinion concludes as follows: "But however the future shall de-

velop in this respect, the actual pledge of revenue proposed to be made is, as we have said, limited to the surplus remaining after servicing prior debts and providing for maintenance and operation, and under those contractual provisions bondholders cannot under any contingency make demand, legal, moral or by way of constraint, upon the general credit of the State." 118 Cal.App.2d at page 635, 258 P.2d at page 594. After reviewing the earlier cases, particularly Garrett, the court defined the present state of the law: "If the contract be in such form that the general revenues cannot be drawn upon, even though the special fund proves insufficient for all of the demands that may be made upon it, if no forfeiture of State interest can occur, then the case will not be one outside the scope of the doctrine." 118 Cal.App.2d at page 635, 258 P.2d at page 594. The Supreme Court denied a hearing in this case.

Housing Authority of Los Angeles County v. Dockweiler, 1939, 14 Cal.2d 437, 94 P.2d 794, arose upon refusal of the chairman of The Housing Authority (a California agency) to sign a note in favor of United States Housing Authority as a preliminary to an issuance of certain revenue bonds. The note specified that it should not be payable out of any funds or property other than those of the local Housing Authority, "a first lien therefor being impressed upon all of petitioner's revenues." 14 Cal.2d at page 448, 94 P.2d at page 800. Apparently the bonds were to be payable and secured in the same manner. Having held that section 18 of Article XI does not apply to The Housing Authority the court at page 460 of 14 Cal.2d, at page 806 of 94 P.2d said: "However, even if it were assumed that housing authorities are subject to the debt limitation provision of the Constitution, its bonds being payable exclusively from the revenues or property of the project or projects which are constructed with their proceeds and with federal aid, would not constitute a debt within the meaning of the provision. California Toll Bridge Authority v. Kelly, 218 Cal. 7, 14, 21 P.2d 425; Department of Water & Power Co. v. Vroman, 218 Cal. 206, 217, 22 P.2d 698; California

Toll Bridge Authority v. Wentworth, 212 Cal. 298, 302, 298 P. 485; Mesmer v. Board of Public Service Com'rs, 23 Cal. App. 578, 583, 138 P. 935; 11 So.Cal.L.Rev. 444, 469. It necessarily follows from what has been said that no violation of the debt limitation clause results from the loan contract between petitioner, The Housing Authority of the County of Los Angeles, and the United States Housing Authority by which the former agrees to sell and the latter to buy bonds issued by the local authority which are payable solely out of housing project revenues and any annual contributions made by the federal authority." It will be noted that the Garrett case is not cited, nor is either of its limitations upon the special fund rule mentioned.

[5-9] In 1941 the legislature, having the benefit of all of the foregoing Supreme Court decisions (but not the City of Glendale or the Dean case, both decided by District Court of Appeal) enacted the "Sanitation, Sewer and Water Revenue Bond Law of 1941", now known as "Revenue Bond Law of 1941." "The principle is well established that legislation should be construed in the light of court decisions existing at the time of its enactment." Miller v. McColgan, 17 Cal.2d 432, 439, 110 P.2d 419, 423, 134 A.L.R. 1424. And there is a presumption that the statute is constitutional. 23 Cal.Jur. § 132, p. 757; Franklin v. Peterson, 87 Cal.App.2d 727, 730, 197 P.2d 788. This statute in effect forbids segregation of revenues and requires withdrawal of all income of the entire "enterprise" from other uses, such as servicing a general bond issue on the particular property, requires its use exclusively for the revenue bonds,—at least until they have been fully serviced and otherwise protected. It is our conclusion that the statute does correctly interpret and reflect the ruling of the Supreme Court, that it is constitutional, and that the present scope of the special fund doctrine is accurately stated in the Dean case, supra, 118 Cal.App.2d at page 635, 258 P.2d at page 594, as follows: "If the contract be in such form that the general revenues cannot be drawn upon, even though the special fund proves insufficient for all of the demands that may be made

upon it, if no forfeiture of State interest can occur, then the case will not be one outside the scope of the doctrine." This is the broad special fund doctrine.

The bonds which are the subject of this proceeding are valid.

Let the writ issue as prayed.

SHINN, P. J., and VALLÉE, J., concur.



134 Cal.App.2d 834

William S. BECK and Helene A. BECK,
Plaintiffs and Respondents,
v.

BEL AIR PROPERTIES, Incorporated, a corporation, Somera Corporation, a corporation, Bel Air Building Company, a corporation, John Arthur Thompson, John Harris Thompson and Frank E. McCauley, copartners doing business under the fictitious firm name and style of J. A. Thompson & Son, Hiram J. Hamer, John Arthur Thompson, Elwain E. Steinkamp, Harry E. Williams, Seth S. Low, Marilyn M. Low, E. Sibley Moore, Rozene Moore, D. L. Phillips, Joy Bradley Phillips, Bel Air Land Company, a corporation, et al., Defendants.

Bel Air Properties, Incorporated, a corporation, Somera Corporation, a corporation, Bel Air Building Company, a corporation, John Arthur Thompson and John Harris Thompson, copartners doing business under the fictitious firm name and style of J. A. Thompson & Son and John Arthur Thompson; and Bel Air Land Company, a corporation, Appellants.

Civ. 20237.

District Court of Appeal, Second District,
Division 1, California.
Aug. 9, 1955.

Hearing Denied Oct. 5, 1955.

Action for injuries to plaintiffs and their property when streams of mud, rocks and debris inundated their home on lot at bottom of canyon during heavy rainfalls as

alleged results of negligent bulldozing and grading when some of defendants subdivided other defendants' higher lots. From a judgment of the Superior Court of Los Angeles County, Stanley Mosk, J., on seven verdicts of a jury for plaintiff against eight defendants, five of them appealed. The District Court of Appeal, Drapeau, J., held that earth moving operations incident to subdividing and grading hills and slopes into building lots is not so obviously and plain ultrahazardous as to impose liability on parties doing work and owners of such lots for resulting injuries to owners of lower lot and their property by inundation of their home thereon by streams of mud, rocks and debris during subsequent heavy rainfalls, regardless of care used in doing work.

Judgment reversed.

Doran, J., dissented.

1. Release ⇐37

The rule that release of one of several joint tortfeasors from liability operates as release of all of them is inapplicable to covenant not to sue, which does not have effect of release.

2. Damages ⇐63, 182

Though covenant not to sue one of several joint tort-feasors does not discharge other tort-feasors liable for same harm, payments by one tort-feasor on account of harm for which he and another tort-feasor are each liable diminish amount of claim against such other tort-feasor, whether or not it was so agreed at time of payments and whether payments were made before or after judgment for injured person, and evidence of such payments is admissible to reduce pro tanto amount of damages he may recover, since he can have but one satisfaction.

3. Dismissal and Nonsuit ⇐29

Lot owners' covenants not to sue some of defendants in such owners' action for personal injuries and damages to their property when streams of mud, rocks and debris inundated their home on lot at bottom of canyon during heavy rainfalls, as alleged result of negligent bulldozing and grading by other defendants when lots above plain-

tiffs' lot were subdivided, and voluntary dismissal of action as to covenantees, in consideration of their payment of specified sums to plaintiffs, did not constitute retraxit requiring dismissal of action as against other defendants on their motions.

4. Bailment ⚡21

Torts ⚡1

The California policy of imposing strict liability on property owners or bailors in connection with certain activities causing injuries to others is limited to obviously and plainly ultrahazardous activities.

5. Torts ⚡28

Whether case is proper one for imposing absolute or strict liability on tortfeasor for injuries to another is question of law for court in action for such injuries.

6. Torts ⚡1

One deliberately doing an act under known conditions in conduct and maintenance of lawful and proper enterprise with knowledge that injury may result to another therefrom should be required to compensate such other for damage done to him as direct and proximate consequence of act, however carefully done.

7. Torts ⚡1

One carrying on ultrahazardous activity is liable to one whose person, land or chattels actor should recognize is likely to be harmed by unpreventable miscarriage of such activity for harm resulting to him from that which makes activity ultrahazardous, though utmost care is exercised to prevent harm.

8. Torts ⚡1

An activity is ultrahazardous, so as to render one carrying it on liable for injuries to another's person, land or chattels as result of unpreventable miscarriage of such activity, if it necessarily involves risk of serious harm, which cannot be eliminated by exercise of utmost care, to others' persons, land or chattels and is not a matter of common usage.

9. Torts ⚡1

An activity, which normally can be safely carried on, or instrumentality which can ordinarily be safely used, if reasonable care is exercised, is not ultrahazardous, so

as to render actor or user liable for resulting injuries to another, though carried on or used to gratify purely personal idiosyncrasy of actor or user, but even activities or instrumentalities which cannot be made safe by utmost precaution and care may be carried on or used without incurring absolute liability for resulting injuries, if they are commonly carried on or used.

10. Torts ⚡28

What facts are necessary to make an activity ultrahazardous, so as to render actor liable for resulting injuries to another, is matter for judgment of court in action for such injuries.

11. Evidence ⚡5(2)

To residents of Southern California, it is matter of common knowledge that retaining walls, hillside terracing and planting, and similar methods have been extensively and successfully used to hold hillside fills in place particularly in territory surrounding Los Angeles.

12. Adjoining Landowners ⚡6

Earth moving operations incident to subdivision and grading of hills and slopes into building sites are not such obviously and plainly ultrahazardous activities as to impose absolute liability on persons engaging therein for injuries to owners of lower lot because of inundation of their home by streams of mud, rocks and debris during heavy rainfalls after such operations, regardless of care used therein as they can ordinarily be safely carried on, if reasonable care is used, and creation, construction and maintenance of hillside fills is matter of common usage.

13. Appeal and Error ⚡1064(1)

In action for injuries to plaintiffs and their property by streams of mud, rocks and debris inundating their home on lot at bottom of canyon during heavy rainfalls as alleged result of negligent bulldozing and grading when higher lots were subdivided, trial court's error in instructing jury on doctrine of absolute liability of persons engaged in ultrahazardous activities for resulting injuries to others was prejudicial to defendants against whom jury rendered verdicts, so as to require reversal of judgment thereon, as District Court of Appeal

cannot determine whether verdicts were based on negligence or influenced by such instruction.

Chase, Rotchford, Downen & Drukker, Donn B. Downen, Jr. and Otto M. Kaus, Los Angeles, for appellants, Bel Air Properties, Bel Air Land Co., and copartners Thompson.

Combs & Hoose, Beverly Hills, for appellants, Somera Corp. and Bel Air Building Co.

Gold & Needleman, Beverly Hills, for respondents.

DRAPEAU, Justice.

By the instant action, plaintiffs sought to recover damages for personal injuries sustained by them, and for injuries to their property, when streams of mud, rock and debris inundated their home during heavy rainfalls in the year 1952.

It appears from the record that the Bel Air Land Company, a corporation, was organized in 1946 by defendants J. A. Thompson, Hiram J. Hamer and E. Steinkamp. Bel Air Properties, Inc., was incorporated at the same time, having as its directors the same men, who owned all the stock of both corporations; with J. A. Thompson as president. In March of that year, said Land Company acquired a large tract of land from Alphonzo E. Bell Corporation. This tract embraced all of the land referred to in this action, including tracts numbers 13333 and 14643.

In April of the same year, Somera Corporation was organized with J. A. Thompson as its president.

In September, 1946, Land Company completed its sale to Somera Corporation of the upper portion of said tract designated as Tract No. 13333. And Somera contracted with the defendants Thompson for the necessary work of subdividing and grading Somera Ridge into building sites. Bel Air Properties acted as selling agent for Somera.

Bel Air Building Company was incorporated on January 15, 1947, and acquired

several lots from Somera for speculative building purposes.

In September, 1948, Land Company sold to West Coast Bond & Mortgage Co., the lower portion of said land lying in Roscomare Canyon. This was subdivided and recorded as Tract No. 14643.

On May 31, 1950, plaintiffs acquired Lot 4 of Tract No. 14643 and built a single family residence on Roscomare Road at the bottom of the canyon. Defendants Williams, Phillips, Low and Moore were the owners of Lots 83, 85, 86, 87 and 88, respectively, of Tract No. 13333. These lots were situated on Somera Road above and to the east of plaintiffs' lot.

The land between the two tracts, consisted of a steep slope and small canyon of hard packed soil and rock which, it is alleged had effectively resisted the elements for centuries without change. It was capable of withstanding heavy rainfall and the run-off therefrom without eroding or washing away. And it was thickly covered with trees and natural vegetation.

It is also alleged that when Somera, Bel Air Properties, Bel Air Building and others subdivided the upper lots in 1946, the bulldozing and grading was negligently done, to-wit: That large quantities of soil and rock were cut from the top of the slope and pushed over the summit above plaintiffs' lot; and were left there unsupported and in an inherently dangerous position. In January and March of 1952, heavy rainfalls caused such loose soil and rocks to flow in large quantities over plaintiffs' land, damaging their house and inflicting injuries on them.

In the work of bulldozing and grading at the summit, two fills were constructed on the hillside to the rear of plaintiffs' lot. Fill No. 1 was large and to the left of the lot; fill No. 2 was smaller and joined No. 1 to the right above the east boundary of plaintiffs' property. Fill No. 1 was located largely on lots 87 and 88 (Moore) and partly on lots 85 (Phillips) and 86 (Low), all in Tract No. 13333. Fill No. 2 was located on Lot 83, owned by defendant Williams, in the same tract. It is admitted that Thompson & Son constructed Fill No. 1 under contract with Somera.

The complaint alleged eleven causes of action, to-wit: For damages to property: (1) resulting from negligence; (2) based on the rule of absolute liability; (3) caused by trespass. For mental suffering of plaintiffs husband and wife: (4-7) resulting from negligence; (5-8) based on absolute liability; (6-9) caused by trespass. For injunctive relief (10), and for declaratory relief (11).

The answers denied all allegations of negligence and the allegations charging absolute liability and trespass, except that it was admitted that Somera contracted with Thompson & Son for the earthmoving operations at the summit of the ridge. Affirmative defenses of contributory negligence, assumption of risk and inevitable accident were pleaded.

During the trial, plaintiffs elected to abandon the tenth and eleventh causes of action for equitable relief. Causes sixth and ninth for mental suffering caused by trespass were not submitted to the jury.

At the start of the trial, it was stipulated that defendants Low would pay \$2,000; defendants Elwain Steinkamp and E. Steinkamp, Inc. would jointly pay \$2,000, and defendants Phillips \$1,500, in consideration for which plaintiffs "will execute a covenant not to sue * * * and will dismiss the action as to those defendants * * * without prejudice."

In accordance therewith, the trial court advised the jury that by agreement between them and plaintiffs, the said defendants had been excused from the lawsuit. Also, that their being excused "casts no implication of any kind that the other defendants are or are not liable as charged."

The court denied the other defendants' motions to dismiss on the ground that plaintiffs had accepted payment for damages from joint tortfeasors. At that time, permission was granted to said defendants to amend their answers setting up the covenants not to sue and payment of \$5,500 thereunder and, praying that such sum be deducted from the amount of plaintiffs' final recovery, if any.

Thereafter, the motions of defendants for nonsuit were denied, except as to defendant Hamer, whose motion was granted.

The jury was instructed on all phases of the case, including the doctrine of absolute liability.

The jury rendered seven separate verdicts in favor of plaintiffs and against the following defendants:

Bel Air Land Co.	\$5668.41	
Bel Air Properties	5668.41	
Bel Air Building Company	5668.41	
Somera Corporation	5668.41	
Thompson & Son	5668.43	
Harry E. Williams	1000.00	
F. Sibley Moore and Rozene Moore	1000.00	\$30,342.07.

From the judgment entered on said verdicts, the first five above-named defendants have appealed.

Two sets of appeal briefs have been filed: one on behalf of Somera and Bel Air Building Company; the other for Bel Air Land Company, Bel Air Properties, and the Thompsons.

It is first urged that the trial court erred in denying appellants' motions to dismiss. This for the reason that the voluntary dismissal of defendants Low, Steinkamp and Phillips for a consideration constituted a retraxit.

As hereinbefore stated, it was stipulated that upon payment of a total of \$5,500 by said defendants, plaintiffs "will execute a covenant not to sue and not to sue further * * * and will dismiss the action as to those defendants * * * without prejudice."

Immediately thereafter, the court advised the jury as follows: "Ladies and Gentlemen of the Jury, the defendants Elwain Steinkamp and E. Steinkamp, Inc., Seth E. Low and Marilyn Low, have been excused for legal reasons from this lawsuit. Let me advise you that their exclusion, of course, carries no implication of any kind that any of the other defendants are or are not liable. * * *

"Mr. Downen: I am sorry, I know that the Court has done probably the best the Court felt it could do in handling this, but I think by telling the jury that these people have been excused for legal reasons, implies that they have been dismissed by the court from the lawsuit.

"The Court: Well, I will state 'by agreement', if you prefer. * * * Ladies and Gentlemen of the Jury, it has been called to my attention that the exclusion of the two groups of defendants that I mentioned has been by agreement between those defendants and the plaintiffs. * * *

"The Court: I want to advise the jury pursuant to an agreement between the plaintiffs and defendant D. L. Phillips and Joy Bradley Phillips, the Phillipses have been excused from the lawsuit and will not be in these proceedings further. I also want to advise you their being excused, of course, casts no implication of any kind that the other defendants are or are not liable as charged in the complaint and denied in the answers."

In the minutes of the court for the respective days, the following memoranda appear:

"Cause having been settled as to defendants Low and Steinkamp, the said defendants and their counsel are excused by the Court from further attendance. * * *

"Cause having been settled as to defendants Phillips, the said defendants and their attorney are excused by the Court from further attendance."

[1, 2] In *Laurenzi v. Vranizan*, 25 Cal. 2d 806, 813, 155 P.2d 633, 637, the Supreme Court stated: "The contention is made that the court erred in admitting evidence over objection that the sum of \$3,175 was paid to the plaintiff by L. Ferro Produce Co. prior to the latter's dismissal from the action. The dismissal was made without prejudice, and, so the plaintiff claims, the consideration stated was received in return for a covenant not to sue. The question is not an issue on this appeal, but the plaintiff asks that the rule be declared at this time for the guidance of the court on a retrial. In *Kincheloe v. Retail Credit Co., Inc.*, 4 Cal.2d 21, 46 P.2d 971, and *Ellis*

v. Jewett Rhodes Motor Co., 29 Cal.App.2d 395, 84 P.2d 791, it was pointed out that the rule that a release of one of several joint tortfeasors operates as a release of all does not apply to a covenant not to sue inasmuch as such an agreement does not have the effect of a release. The distinction is recognized in *Restatement of the Law of Torts*, section 885, where it is stated that although a covenant not to sue does not discharge another who is liable for the same harm, payments by one tortfeasor on account of a harm for which he and another are each liable, diminish the amount of the claim against the other whether or not it was so agreed at the time of payment and whether the payment was made before or after judgment. Since the plaintiff can have but one satisfaction, evidence of such payments is admissible for the purpose of reducing *pro tanto* the amount of the damages he may be entitled to recover. [Citing cases.]"

The rule above enunciated is applicable to the facts here presented. No order of dismissal of the defendants Low, Steinkamp or Phillips was ever made or entered in the case.

In *Markwell v. Swift & Co.*, 126 Cal. App.2d 245, 248, 272 P.2d 47, 49, upon which appellants rely, the trial court made the following order:

"Pursuant to stipulation the Court orders this action dismissed as to defendants Swift & Company, a corporation, Ralph Chilton, Doe I, and Doe II. Due to the fact that both defendants * * * made settlements with the plaintiff, said defendants are not given judgment for their costs."

Upon motion of the other defendants that such dismissal constituted a retraxit and barred recovery against them, the court granted nonsuits as to them. This court affirmed the judgment of nonsuit on appeal. A number of cases were cited to support such affirmance, in each of which judgments of dismissal were made and entered. Among such authorities was *Lamb v. Herndon*, 97 Cal.App. 193, 202, 275 P. 503, from which the following was quoted in 126 Cal.App. at page 254, 272 P.2d at page 52:

"In the case under consideration, had the application for dismissals * * * been made in open court upon the agreement of the litigants as hereinbefore set forth and thereupon the court had entered judgments of dismissal, they would have been judgments on *retraxit* and would have barred further litigation of the matter involved. (Citing cases.)'"

[3] The instant covenants not to sue did not constitute a *retraxit*.

Appellants also assert that the doctrine of absolute liability is not applicable to the instant situation. And that the court erred in instructing the jury that they (appellants) were absolutely liable for the damage caused by the dangerous condition of the fills on the slope above respondents' property, regardless of the degree of care exercised in their creation and maintenance.

[4] In discussing the doctrine in the late case of *Boyd v. White*, 128 Cal.App.2d 641, 654, 276 P.2d 92, 100, the court stated:

"California has adopted a policy of imposing strict liability on owners or bailors in connection with certain activities. But this state has limited such policy to those activities that are obviously and plainly ultrahazardous. Thus, drilling an oil well in a settled area that 'blows off', damaging adjoining properties, imposes liability regardless of the care used, *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 P. 952, 60 A.L.R. 475; or where hydrocyanic gas used to exterminate cockroaches escapes, *Luthringer v. Moore*, 31 Cal.2d 489, 190 P.2d 1; or where the defendant farmer employed an independent contractor to spray his farm with gas containing arsenic and the fumes from such spraying killed plaintiff's bees located on nearby land, *Miles v. A. Arena & Co.*, 23 Cal.App.2d 680, 73 P. 2d 1260. Cases involving other ultrahazardous activities can undoubtedly be cited. But the operation of an airplane in the year 1954 is not such a dangerous activity that it can be placed in this category."

[5] In the escaping hydrocyanic gas case of *Luthringer v. Moore*, supra, 31 Cal. 2d 489, 190 P.2d 1, the supreme court in holding defendant liable without proof of negligence, relied upon sections of the Re-

statement of Torts. In the course of its discussion, it stated, 31 Cal.2d at page 496, 190 P.2d at page 5: "It appears to be settled that the question of whether the case is a proper one for imposing absolute or strict liability is one of law for the court. See, *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 P. 952, 60 A.L.R. 475; *Munro v. Pacific Coast Dredging, etc., Co.*, 84 Cal. 515, 24 P. 303, 18 Am.St.Rep. 248; Rest., Torts, sec. 520, Com. h."

The *Green* case, 205 Cal. 328, 270 P. 952, was one for damages for injuries to property caused by the blowing out of an oil well during drilling operations. In the eruption a stream of oil, gas, mud and rocks shot into the air and upon respondent's property situated about 200 feet from the well. The court held that there was no negligence on the part of appellant in the drilling operations. And, in considering the question of liability, stated in 205 Cal. at page 331, 270 P. at page 953:

"It is matter of common knowledge that the inner earth contains powerful gaseous forces, frequently found in proximity to and in connection with deposits of petroleum substances. It was a known fact that a tremendous pressure of gas underlay the particular locality in which appellant was carrying on its drilling operations. It proceeded with full knowledge of the situation."

[6] The court then stated the rule applicable in such cases as follows, 205 Cal. at pages 333 and 334, 270 P. at page 955:

"Where one, in the conduct and maintenance of an enterprise lawful and proper in itself, deliberately does an act under known conditions, and, with knowledge that injury may result to another, proceeds, and injury is done to the other as the direct and proximate consequence of the act, however carefully done the one who does the act and causes the injury should, in all fairness, be required to compensate the other for the damage done."

[7] The same principle is stated in Restatement of the Law of Torts:

"Section 519 * * * one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the

actor should recognize is likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm."

[8] "Section 520. An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage."

[9] Under comment on Clause (b) of section 520, *supra*, the following appears:

"g. *Concurrence of risk of harm and unusual nature.* In order that an activity may be ultrahazardous it is necessary that it satisfy the conditions stated in both Clauses (a) and (b). An activity which normally can be safely carried on, or an instrumentality which can ordinarily be safely used if reasonable care is exercised, is not ultrahazardous even though it is carried on to gratify some purely personal idiosyncrasy of the actor. On the other hand, even those activities or instrumentalities which cannot be made safe by the utmost precaution and care may be carried on or used without incurring absolute liability if the activity or instrumentality is one which is commonly carried on or used * * *."

[10] "h. *Function of court and jury.* What facts are necessary to make an activity ultrahazardous under the rule stated in this Section is a matter for the judgment of the court."

The situation here resolves itself into the query:

Should earth moving operations incident to subdividing and grading hills and slopes into building sites be grouped with escaping gas, oil drilling and dynamiting? Or, is it an activity that ordinarily can be safely carried on, if reasonable care is used?

This court is inclined to the latter view.

Respondents' expert, Mr. Benson, was asked (1) if it was customary in 1946 and 1947 to construct hillside fills; and (2) whether they could be constructed in such manner as to obviate a risk to others if

carefully done? To both questions he answered "Yes."

Expert witnesses on both sides related methods of fill construction which, in their opinion, made the fills safe and stable. They agreed that if the fills were bonded into the hillside, uniformly compacted in thin layers to the required density, properly planted, the planting maintained, and some provision made to carry excess water from the face of the fill, they represented no danger.

[11] To residents of Southern California, it is a matter of common knowledge that retaining walls, hillside terracing, planting and similar methods have been extensively and successfully used to hold fills in place. This is particularly true in the territory surrounding Los Angeles; and is evidenced by the extensive building operations made possible by hillside fills in the Baldwin Hills, the Hollywood Hills and the Santa Monica Mountains.

[12] Moreover, the creation, construction and maintenance of hillside fills is a matter of common usage. Cutting, leveling and filling are the inevitable, constant and ordinary methods pursued in the development of hillside areas.

It follows that the instant activity is not so obviously and plainly ultrahazardous as to impose liability regardless of the care used.

[13] As a result the trial court erred when it instructed the jury on the doctrine of absolute liability. Since it cannot be determined whether the jury's verdicts were based on negligence or were influenced by the instruction on absolute liability, such instruction was prejudicial.

In view of the conclusion reached, it is deemed unnecessary to pass upon other points raised by appellants.

For the reasons stated, the judgment is reversed.

WHITE, P. J., concurs.

DORAN, J., dissents.

135 Cal.App.2d 1

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Vance BAKER, Defendant and Appellant.
Cr. 1033.

District Court of Appeal, Fourth District,
California.

Aug. 11, 1955.

Defendant was convicted of possession of a firearm capable of being concealed upon person by one previously convicted of a felony. The Superior Court of San Diego County, John A. Hewicker, J., entered judgment and denied defendant's motion for new trial. Defendant appealed. The District Court of Appeal, Mussell, J., held that where defendant was arrested for driving under the influence of intoxicating liquor and officers took possession of defendant's automobile for safe keeping and found a gun under front seat on driver's side, automobile and gun were legally in officers' possession and gun was legally obtained and admissible in evidence.

Affirmed.

1. Arrest ⚭71

Criminal Law ⚭395

Where defendant was arrested for driving under the influence of intoxicating liquor and officers took possession of defendant's automobile for safe keeping and found a gun under front seat on driver's side, automobile and gun were legally in officers' possession and gun was legally obtained and admissible in evidence. Pen.Code, §§ 836, 12021.

2. Criminal Law ⚭742(1)

Where there were inconsistencies in the testimony of a witness against defendant in a criminal prosecution, but it was not shown that such evidence was knowingly used by prosecution to obtain conviction, it was for jury to determine the credibility of witness and the weight to be given to his testimony.

3. Weapons ⚭17(4)

Evidence was sufficient to sustain conviction for possession of a firearm capable

of being concealed upon the person by one previously convicted of a felony. Pen.Code, § 12021.

4. Criminal Law ⚭641(1)

In criminal prosecution of defendant for possession of a firearm capable of being concealed upon the person by one previously convicted of a felony, defendant's claim that his attorney did not protect his rights was not supported by record. Pen.Code, § 12021.

Vance Baker, in pro. per.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant was charged with the crime of possession of a firearm capable of being concealed upon the person by one previously convicted of a felony, Penal Code, § 12021, and it was further alleged in the information that the defendant had previously suffered six felony convictions for which he had served terms of imprisonment in state prisons. Defendant admitted the six prior convictions and after trial by jury, a verdict was returned finding him guilty of the offense charged. His motion for a new trial was denied and he was sentenced to imprisonment in the state prison for the term prescribed by law. He appeals from the judgment and from the order denying his motion for a new trial and contends that the gun received in evidence was obtained illegally and therefore was inadmissible; that false testimony was received in evidence; that certain hearsay evidence was introduced; that the trial court erred; and that his attorney did not protect his rights.

On January 3, 1955, at approximately 8:15 P. M., state highway patrol officer Shannon and chief petty officer Cattlidge were traveling west on state route 78 at the intersection into Vista (San Diego county) when they observed a Ford automobile which pulled out from one side of the street and proceeded in front of the officers. Shannon testified that "It was very erratic. He ran two cars off the road. He was weaving across the center line of the road. So I

started in pursuit of him, turned my red light on and he turned the corner approximately a half mile that we had followed him trying to get him stopped in two blocks, but he turned left and went into the alley behind the liquor store. We pulled in behind him and I got out of the car and opened his car door and took him out of the car. It was the defendant"; that the defendant smelled strongly of liquor and was more or less belligerent; that "I had seen him drive the automobile and in my opinion he was under the influence of intoxicating liquor, so I arrested him for 502"; that he called a tow car and defendant's automobile was taken to a garage in Vista; that they took the defendant to the Oceanside jail and he, Shannon, returned to the garage in about forty-five minutes and found a loaded .38 caliber revolver under the front seat of defendant's car on the driver's side. This gun was taken to the office in San Diego and was thereafter identified in court as People's exhibit 1.

H. D. Thurtle testified that on January 3, 1955, at about 7:00 or 8:00 P.M., the defendant came to his house; that he showed signs of having been drinking and talked rather loudly; that he used abusive language and then went out; that he drove his car into a ditch and when he backed out he threatened to shoot Thurtle's son and said he was also going to shoot his (defendant's) wife and daughter.

Frank Lovell testified that he bought the revolver (People's exhibit 1) at a store in Ocean Beach; that on the evening of January 1, 1955, at about 11:00 P.M. he and the defendant went to Lovell's house and got the gun; that they then went to the residence of a Mrs. Burkhalter in Vista and Lovell there took the shells out of the gun and put it in a desk drawer; that after the defendant had been released on bail he asked Lovell to tell the authorities that he (Lovell) left the gun in the car "because it would help the situation"; that after the gun was discovered defendant asked him to say that he (Lovell) had accidentally left the gun in the car; that on the day defendant was released on bail he stated to Lovell that the reason he happened to have the gun

in his possession was that Danny Burrell gave it to him to take back to Mrs. Burkhalter's house.

Mary Burkhalter testified that she saw the gun in the possession of Danny Burrell on the morning of January 2, 1955; that he took it out of a desk drawer in her house and put it in his waistband and that the defendant was standing by the door.

Mary Durbin (Burrell's sister) testified that in the afternoon of January 3rd her brother borrowed the defendant's automobile to go from her home to the grocery store; that the defendant was at the house at the time; that before leaving, her brother gave her the revolver involved and she put it in a closet; that she and her brother then went to the store and when they returned the gun and the defendant were gone and she did not see the gun again.

On January 4, when questioned by the officers concerning his possession of the revolver, defendant stated he knew nothing of it and further stated that he was the only one who had driven his car on January 3rd. He testified in his own behalf at the trial and stated that he saw the revolver on January 2nd on a table at Mrs. Burkhalter's place but did not see it thereafter; that he did not know that the gun was in his car at the time he was arrested and that he did not recall threatening to kill anyone while he was at the Thurtle house.

[1] Appellant first contends that the gun was obtained illegally and therefore inadmissible in evidence. This argument is without merit. No contention was made at the trial that there was no reasonable or probable cause for the search of defendant's car by the officers or that the possession of the gun was obtained by them unlawfully. In this connection the record shows that defendant was arrested for the public offense committed in the presence of the officers. Such an arrest without a warrant is authorized by section 836 of the Penal Code. Under the circumstances the officers legally took possession of defendant's car for safekeeping. The evidence shows that just as the officers were leaving the Oceanside jail where they had left the

defendant after "booking" him, they received a call on the air from their office asking whether they had found a gun on the defendant. On receiving a negative answer, Shannon was instructed by his office to check the car. He testified that the night watchman let him into the garage where the car was stored and after checking the glove compartment, he noticed the gun under the front seat on the driver's side. Since the defendant's automobile was legally in the possession of the officers, the gun involved was also legally in their possession and under the circumstances it was legally obtained. The case of *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, which is cited by appellant in support of his contention, has no application under the circumstances existing in the present case.

[2, 3] Appellant argues that false evidence was used in the trial to obtain the conviction. Apparently this contention is based on inconsistencies in the testimony of the witness Lovell in his statements to the officers. However, it was not shown that such evidence was knowingly used by the prosecution to obtain the conviction and it was for the jury to determine the credibility of the witness and the weight to be given to his testimony. As was said in *People v. Cannon*, 77 Cal.App.2d 678, 688, 176 P.2d 409, 415:

"Although impeaching evidence in the nature of contradictions or otherwise has been received, it is still the right as well as the duty of the jury to determine to what extent they believe or disbelieve the testimony. *Estate of Gird*, 157 Cal. 534, 108 P. 499, 137 Am. St.Rep. 131; *Secondo v. Secondo*, 218 Cal. 453, 23 P.2d 752. They may likewise give credence to a witness who has falsely testified in part (*Robinson v. Robinson*, 159 Cal. 203, 113 P. 155),

or whose testimony contains contradictions or inconsistencies. *Bitsekas v. Parechian*, 67 Cal.App. 148, 226 P. 974.'"

The evidence, other than that which appellant claims to be false, is amply sufficient to sustain a conviction, and as is said in *People v. Thomas*, 103 Cal.App.2d 669, 672, 229 P.2d 836, 838: "A judgment cannot be set aside on appeal unless it clearly appears that on no hypothesis whatever is there sufficient substantial evidence to sustain it."

In the instant case defendant was in possession of and driving his automobile containing the gun involved at the time of his arrest and was exercising control of both the gun and the car. He stated to one of the witnesses that he was taking the gun back to the Burkhalter residence when he was arrested. These circumstances, together with defendant's threats made to the witness Thurtle and his equivocal statements after arrest, are sufficient to support the judgment. *People v. Noland*, 61 Cal.App. 2d 364, 366, 143 P.2d 86; *People v. Wissenfeld*, 36 Cal.2d 758, 764, 227 P.2d 833.

[4] Appellant contends that the trial court erred. Apparently this contention is directed to the admission of evidence of certain statements of witnesses which defendant claims were inconsistent and hearsay. However, it was the jury's function to determine the weight to be given to the testimony and we are unable to find any reversible error in this connection. Likewise, appellant's claim that his attorney did not protect his rights is not supported by the record.

The judgment and the order denying the motion for new trial are affirmed.

BARNARD, P. J., and SHELL, J. pro tem., concur.

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**JULIUS H. ANDERSON, James C. Ballance,
Quong Soon and Mae Schultz, Plaintiffs
and Respondents,**

v.

**FAY IMPROVEMENT COMPANY, a corporation, et al., Defendants and
Appellants.**

Civ. 16252.

**District Court of Appeal, First District,
Division 1, California.**

Aug. 2, 1955.

Rehearing Denied Sept. 1, 1955.

Hearing Denied Sept. 28, 1955.

'Action in inverse condemnation and in fraud by owners whose property abutted street leading to subdivision, against subdivider, its builder, and paving contractor doing work on subdivision and with whom owners had contracted to grade and pave street, to recover for injuries caused them when street was graded at such high level that they were denied ingress to their property. The Superior Court, City and County of San Francisco, I. L. Harris, J., entered judgment for plaintiffs and defendants appealed. The District Court of Appeal, Peters, P. J., held, inter alia, that evidence supported trial court's findings that paving contractor's agent had knowingly made material misrepresentations to plaintiffs regarding grading that such representations were made with intent to induce plaintiffs to rely upon them, that plaintiffs reasonably believed they were true, and that plaintiffs relied upon them to their damage, but that evidence would not warrant finding that paving contractor's agent was agent of other defendants.

Affirmed in part, reversed in part, and remanded.

1. Municipal Corporations ⇨323(1)

Mandatory injunction was not available to compel private contractor to remove completed and accepted public street which he had built according to government approved plans and specifications.

2. Dedication ⇨20(1)

Municipal Corporations ⇨648

Use by public of area as street for long uninterrupted period of time creates

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public highway by prescription or implied dedication without formal declaration by governmental agency.

3. Municipal Corporations ⇨669

Owners of land abutting public street which had for long uninterrupted period been used as such, had at least prescriptive easement not only to use street in common with public but also had easement of ingress and egress to respective properties.

4. Eminent Domain ⇨106

Abutting landowners' easement to use public street for ingress and egress could not be taken away, damaged or interfered with for public purpose without payment of compensation.

5. Municipal Corporations ⇨671(5)

Where it became apparent that grading and paving of public streets by private contractors prior to public acceptance thereof would raise street to point at which abutting landowners would be deprived of ingress to their property, landowners were entitled to anticipate impending loss and prevent it by prohibitory injunction or temporary restraining order against contractors and were not required to wait until injury occurred and then rely upon action for damages.

6. Eminent Domain ⇨121

Where city and county authorized and accepted grading and paving of public street leading to subdivision, neither contractor nor subdividers would be liable to abutting property owners, in a reverse condemnation, when grading of streets prevented property owners' ingress and egress.

7. Municipal Corporations ⇨400

Where contractor follows plans and specifications furnished by public agency, public agency and not contractor is liable for damage resulting to adjacent property, even when contractor is performing work for private subdivider.

8. Municipal Corporations ⇨400

That approval of city and county of a subdivision was allegedly void because approval was given by resolution of board of supervisors rather than by ordinance would

not allow abutting property owners to maintain action against contractor for damages when street abutting their property and leading to subdivision was graded so as to deny them ingress and egress to their property, where city and county subsequently had accepted streets by ordinance.

9. Municipal Corporations ⚡400

Private contractor and subdivider would not be responsible to abutting property owners for changing street grade of street leading to subdivision so as to deny them ingress to property where contractor and subdivider followed plans and specifications approved by city and county, even if there were serious procedural defects in changing of grade, in view of fact that such were legal responsibility of city and county.

10. Municipal Corporations ⚡404(6)

In action, by persons whose property abutted street leading to subdivision, against subdivider and contractor who was doing work on subdivision and whom plaintiffs had engaged to pave street, on ground that grade had been raised so as to deny them access to their property, evidence supported finding that contractor's agent had knowingly made material misrepresentations regarding such grading with intent to induce plaintiffs to act upon them, that plaintiffs had reasonably believed they were true and that plaintiffs had relied upon them to their damage.

11. Principal and Agent ⚡190(3)

In action by owners whose land abutted street leading to subdivision, against subdivider, its builder, and paving contractor whom owners had engaged to pave road, for damages because street grade had been raised so that they were denied ingress to property, evidence on issue whether paving contractor's agent had purported to act as agent of builder or subdivider was insufficient to support findings against them.

12. Principal and Agent ⚡163(1)

"Ratification" is subsequent adoption by one person of act which another without authority assumed to do as his agent.

See publication Words and Phrases, for other judicial constructions and definitions of "Ratification".

13. Principal and Agent ⚡163(1)

"Ratification" contemplates act by one person in behalf of another and there must exist at time unauthorized act was done an agency relationship either actual or assumed.

14. Estoppel ⚡118

In action by owners whose land abutted street leading to subdivision, against subdivider, its builder, and the paving contractor whom owners had engaged to pave street, for damages because street had raised so that they were denied ingress to property, evidence on issue of whether builder or subdivider had engaged in any conduct which would have estopped them to deny liability for acts of paving contractor to plaintiff would not support finding against them.

15. Principal and Agent ⚡190(3)

In action by owners whose land abutted street leading to subdivision against subdivider, its builder, and paving contractor whom owners had engaged to pave street, for damages because grade was raised so that they were denied ingress to property, evidence on issue of whether builder was undisclosed principal of paving contractor's agent who had made misrepresentations to owners would not support finding against building contractor.

16. Principal and Agent ⚡23(5)

In action by owners whose land abutted street leading to subdivision, against subdivider, its builder and the paving contractor whom owners had engaged to pave street for damages because street grade was raised so that they were denied ingress to property, evidence on issue of whether paving contractor's agent who had made false representations to plaintiffs was agent of rough grader would not support judgment against rough grader.

17. Fraud ⚡59(2)

Statute providing that one who has been defrauded is entitled to recover difference between actual value of that with

which he has parted and actual value of that which he has received, incorporates out-of-pocket rule as proper measure of damages, which is decrease in value caused by fraud and not the increase of value that would have been realized had the fraud not been committed. West's Ann.Civ.Code, § 3343.

Eugene S. Clifford, Heller, Ehrman, White & McAuliffe, San Francisco, for appellant Fay Improvement Co.

Maynard Garrison, Wallace, Garrison, Norton & Ray, San Francisco, for appellant Robert A. Farish.

Keith, Creede & Sedgwick, Frank J. Creede, John S. Howell, Frank J. Creede, Jr., San Francisco, for appellants Atlas Realty Co. and Standard Building Co.

McMurray, Brotsky, Bancroft & Tepper, Lloyd E. McMurray, San Francisco, for respondents.

PETERS, Presiding Justice.

The plaintiffs brought this action against the several defendants for an injunction to compel the removal of a public improvement, and for damages. The trial court granted plaintiffs, as against all defendants, both an injunction and damages. Defendants appeal.

Plaintiffs are the owners of separate parcels of real property, that, prior to January of 1950, abutted on the easterly side of an unpaved unimproved dead end street known as Knox Street in San Francisco. This street ran in a general north-south direction, intersecting at its southern end with Felton Street, the northern end being a cul de sac. The corner lot on the easterly side of the intersection of Felton and Knox, with a 75-foot frontage, is owned by one Sullivan, not a party to this suit. Then comes the properties of the plaintiffs, in the following sequence: Schultz, with a 25-foot frontage, Anderson with a 100-foot frontage, Ballance with a 50-foot frontage, and Quong Soon,¹ with a 50-foot frontage.

Plaintiffs' homes had been built on these lots some years before 1950, some of them as much as 35 or 40 years prior.

Knox Street ran along the natural contour of a steep hillside, plaintiffs' homes being located on the lower east side of the street. There was some conflict as to the length of Knox Street as shown on the official maps, the testimony varying from 75 to 300 feet.

Prior to 1949 the property on the upper or west side of Knox Street was unimproved and belonged to Thomas Vallergera and Richard Mesak. Early in 1949 Vallergera and Mesak decided to subdivide their property and filed a subdivision map with the Board of Supervisors pursuant to the provisions of the Subdivision Map Act, § 11500 et seq., of the Business & Professions Code. The Board of Supervisors, by resolution, approved the plan and map. This plan called for the elimination of Knox Street by a new street to be known as Peru Avenue. As proposed, Peru Avenue was to intersect with Knox Street at a 45 degree angle in front of the Anderson property and then proceed southerly along the line of Knox Street to its intersection with Felton. This would create in front of the Ballance and Quong Soon properties an angular section of abandoned property. The subdivision map called for Peru Avenue to be graded to the "official grade." As fixed by the Board of Supervisors prior to 1905 the official grade in front of the Anderson property was 415 feet, but the subdivision map fixed this grade at 411 feet, and it was at this grade that the street was ultimately constructed. The 411-foot grade was about five feet higher than the natural grade on the easterly side of Knox Street, abutting on the Anderson property.

On August 29, 1949, Vallergera and Mesak entered into a contract to sell their property to the Atlas Realty Company, the contract providing that title was not to pass until after Vallergera and Mesak had completed the street work called for by the subdivision plan.

1. This plaintiff died before trial. His executor was substituted as a party, but no further activity on his part appears in the record. The case proceeded to

trial with Schultz, Anderson and Ballance as plaintiffs, and they are the only parties granted judgment.

On August 23, 1949, Vallergera and Mesak had contracted with defendant Fay Improvement Company for that company to do the street improvements for the tract, and on September 1, 1949, they contracted with defendant Robert A. Farish to do the rough grading for the subdivision, including making a cut on the west side of Peru Avenue and making a fill on the east side of that street, formerly Knox Street.

Vallergera and Mesak then entered into a new arrangement with Atlas whereby Atlas purchased the subdivision, the buyer taking an assignment of the Farish and Fay contracts for the grading and street improvements. The deed in this deal was executed in December, 1949.

In the meantime, in the fall of 1949, Paul Fay, Jr., on behalf of the Fay Improvement Company, approached the plaintiffs. He told them that the Fay company was going to do extensive work for the subdivision, and that it would be to plaintiffs' interests to agree to have the Fay company, at the same time, pave Knox Street, and to provide sewers for Schultz and Anderson. He represented that Peru Avenue, to be constructed for the subdivision, was to intersect Knox Street at an angle in front of the Anderson property, and then curve along the line of old Knox Street to Felton, so that a portion of Knox Street would thus become a part of Peru Avenue. He also told the plaintiffs that Peru Avenue would be a paved roadway with curbs and sidewalks; that it would have sewers for Schultz and Anderson; that it would be graded to the "official grade"; that at the intersection with Felton this official grade would be at the present grade of Knox Street; that in front of the Anderson property the official grade would be $2\frac{1}{2}$ feet higher than present Knox Street, and in front of the Ballance property it would be 4 feet higher; that the difference in grade would not only not adversely affect the plaintiffs, but, because the new street would be paved and would have sewage connections, their property values would be enhanced. The plaintiffs, based on these representations, in October or November, 1949, signed an agreement dated August 23, 1949, agreeing to the improve-

ment and agreeing to pay a proportionate portion of its cost. The agreement called for grading Peru Avenue at the "official grade," for paving the street, and for the construction of curbs and sewers. By thus securing the consent of the abutting property owners the subdividers eliminated the lengthy procedure set forth in the ordinances of San Francisco for the involuntary assessment of plaintiffs' lands.

In August of 1949, while Vallergera and Mesak were negotiating with Atlas, Vallergera told Atlas that the street work in question was to be done by Fay through private contracts between Fay and the adjoining property owners who had consented to the improvement, and similar representations were made to Farish. As a result, Atlas, sometime after December 16, 1949, entered into the contract between Fay, Vallergera and Mesak, and the plaintiffs, for the improvement of Peru Avenue and Knox Street.

Fay applied to the City and County of San Francisco for a permit to do the work, and such a permit was issued by the city. Fay then furnished Farish with a map obtained from the City which set forth the official grades. A city engineer came to the site and put in grade stakes in accordance with the official grades as set forth in the subdivision map. In January, 1950, on orders from Atlas, Farish commenced grading Peru Avenue. In order to rough grade this street at the fixed grade Farish cut into the west bank of Peru Avenue to a depth of two to four feet and moved this dirt to the east or lower side of the street. This had the effect of raising the height of Peru Avenue above the old easterly line of Knox Street some five feet in front of the Anderson property and as much as 14 feet in front of the Ballance property. The new street is so high in front of their properties that plaintiffs' garages are completely useless and it is impossible for them to get sewer connections. Their only method of access to their homes is by foot.

Plaintiffs, as soon as it became apparent that the improvement would seriously and adversely affect their respective rights of ingress and egress, complained vigorously to Fay and then to the City and County.

Getting no relief they filed their complaint for injunctive relief, and subsequently filed an amended complaint, this time joining with their cause of action for an injunction a cause of action for fraud, seeking reformation of their contract and specific performance as reformed, or, in the alternative, damages. No preliminary injunction was sought or granted, and defendants went ahead and finished the construction work, and started construction of homes in the subdivision. Originally the City and County of San Francisco was joined as a defendant, but its demurrer was sustained with leave to amend. Plaintiffs failed to amend and the City and County was dropped as a defendant.

On August 31, 1950, the Board of Supervisors, by ordinance, accepted Peru Avenue as built. Atlas then paid Fay for the street work done for Atlas, and Fay billed the plaintiffs for their share of the work done on Peru Avenue. Plaintiffs refused to pay.

It should be mentioned that the stock of Atlas Realty Company is wholly owned by Carl and Fred Gilbert, and that Standard Building Company, the builder of some of the houses in the subdivision, is a partnership of the two Gilberts.

The court held that plaintiffs, as against all the defendants, were entitled to both damages and a mandatory injunction. It granted Schultz a joint and several judgment for \$1,250 as against Fay Improvement Company, Standard Building Corporation, Atlas Realty Company and Robert A. Farish, and granted Ballance \$1,750 and Anderson \$3,550 against the same defendants. These amounts were determined to be the amounts plaintiffs' properties would have been enhanced in value had the contract been performed as represented. The court then found the maintenance of the street as constructed was a nuisance as to plaintiffs, and that plaintiffs were entitled to have Knox Street restored to its original condition. The court therefore ordered all the defendants to remove the soil placed on the east 12 feet of Knox Street as part of the regrading and to restore the street to its original grade. Plaintiffs were each awarded \$20 a month against defendants

as damages to be paid until the obstruction to their ingress and egress was removed. To comply with the injunctive provisions of the judgment would require dividing Peru Avenue and constructing a retaining wall.

[1] It is quite clear that the injunctive provisions of the judgment are erroneous. Such provisions purport to compel the contractors and subdividers to remove a completed and accepted public street built according to government approved plans and specifications. This cannot legally be done.

[2,3] There can be no doubt that plaintiffs have been damaged, and seriously damaged, by the construction of Peru Avenue. The evidence shows that Knox Street was a dedicated street throughout its entire length. The use by the public of a certain area as a street for a long uninterrupted period of time creates a public highway by prescription or implied dedication without a formal declaration by the governmental agency involved. *People v. Power*, 38 Cal. App. 181, 175 P. 803. Clearly, at the very least, plaintiffs were the owners of a prescriptive easement.

[4] This easement included not only the right to use the street in common with the public, but also included a private easement of ingress and egress to their respective properties. This right cannot be taken away, damaged or interfered with for a public purpose without just compensation. *Rose v. State of California*, 19 Cal.2d 713, 123 P.2d 505; *Bacich v. Board of Control*, 23 Cal.2d 343, 144 P.2d 818; *People v. Ricciardi*, 23 Cal.2d 390, 144 P.2d 799.

[5] This right of ingress and egress has been seriously impaired by the construction of Peru Avenue. Plaintiffs are clearly entitled to compensation for such impairment. They could undoubtedly have secured an injunction against defendants, prohibiting the construction of the improvement unless or until compensation for their loss was provided. They were not required to sit back and wait until the injury occurred and then rely upon an action for damages. They could have anticipated the impending loss and have prevented the same by a pro-

hibitory injunction or temporary restraining order against the contractors. *Mulvey v. Wangenheim*, 23 Cal.App. 268, 137 P. 1106; *Geurkink v. City of Petaluma*, 112 Cal. 306, 44 P. 570; *Wilcox v. Engebretsen*, 160 Cal. 288, 116 A. 750; *Sievers v. Root*, 10 Cal.App. 337, 101 P. 925, is directly in point. In that case the official grade had been established, and, after the plaintiff had improved his property, the Board of Supervisors increased the grade of an abutting intersection which damaged plaintiffs' right of access. A prohibitory injunction against the contractor was affirmed. At page 340 of 10 Cal.App., at page 926 of 101 P. it is stated:

"That a landowner is entitled to compensation, under the Constitution of this state, for such damages as were proved and found by the court in this case, is amply sustained by the following authorities: [Citations.] He may recover his damages in an action at law, after they have been inflicted [citations], or *he may prevent the threatened injury by injunction*. [Citations.] * * * 'Until compensation was made, the city (*or its licensee*) had no right to damage the plaintiff's property. Payment of such damage was a *condition precedent to the creation of the right*; and, until payment, the city was a trespasser. In such a case injunction is the plain, ordinary, and best remedy.' *Geurkink v. City of Petaluma* [112 Cal. 310, 44 P. 570.]

"* * * Until compensation has been made to plaintiff for the damage to his property, *the ordinance changing the grade is as to him invalid and of no effect.*" (Italics added.)

[6] Thus, there can be no doubt that plaintiffs were entitled to damages for the impairment of their respective rights of ingress and egress, and that they could have secured an injunction prohibiting the construction until they were paid. But in the instant case plaintiffs have been granted a mandatory injunction against the contractors and subdividers compelling them to restore Knox Street to its former condition after the improvement has been completed and accepted by the city. That they

had a right to a prohibitory injunction against the contractors is clear, but even before they filed their complaint Farish had rough graded the street to its new level, and, after filing, no temporary restraining order was sought to prevent the completion of the work. The city has accepted the improvement and the public use has attached. Under such circumstances, even if the proceeding could be considered an inverse condemnation proceeding, which it is not, the contractors and subdividers would not be liable for the damage caused by the impairment of the right of access. The City and County having authorized and accepted the improvement, caused the impairment, and it alone is liable in a condemnation proceeding. It however, is no longer a party to this action. The contractors not being liable for the impairment certainly cannot, by mandatory injunction, be compelled to restore the status quo.

[7] The law is well settled that the contractors or subdividers could not be held liable for the damage in a direct or inverse condemnation suit. "If the contractor follows the plans and specifications furnished by the public agency, and damage results to the adjacent property, the public agency and not the contractor is liable." *Heimann v. City of Los Angeles*, 30 Cal.2d 746, 757, 185 P.2d 597, 603, quoting from *Veterans' Welfare Board v. City of Oakland*, 74 Cal.App.2d 818, 832, 169 P.2d 1000; see also *Marin Mun. W. Dist. v. Peninsula P. Co.*, 34 Cal.App.2d 647, 94 P.2d 404; *De Baker v. Southern Cal. Railway Co.*, 106 Cal. 257, 39 P. 610; *Shaw v. Crocker*, 42 Cal. 435; *Eachus v. City of Los Angeles*, 130 Cal. 492, 62 P. 829; *Engebretsen v. Gay*, 158 Cal. 27, 109 P. 897. The reason for the rule is obvious. In case of damages in an inverse condemnation proceeding it is the public that has devoted the property to the public use, and the public and not the private contractor should pay for the damage. The damage to the right of access was, in effect, a taking by the government for a public use. The fact that in the instant case the contractor was performing work for a private subdivider has no legal significance. As far as the regrading of the street is concerned the work was being

done on a public street under a government permit. The wrongful act entitling the plaintiffs to compensation was that of the City and County.

[8] Plaintiffs, in apparent recognition of the force of the above arguments, contend that they have no application here because, so it is claimed, the approval of the subdivision by the City and County was void, and the contractors had no right to rely upon it. The approval was void, it is contended, because such approval was given by resolution of the Board of Supervisors and that this was unlawful because an ordinance was required. The distinction between the two in this connection is quite technical, both being legislative in nature. In any event, after giving approval, the City and County subsequently accepted the street by ordinance. This cured the defects, if any, in the original approval. The other arguments about invalidity of the proceedings are equally unavailing and must fall with the formal acceptance by the City and County of the street.

[9] Thus, so far as the first cause of action for an injunction, or for damages in an inverse condemnation proceeding is concerned, if anyone is liable it is the City and County, not now a party to this case. The defendants followed the plans and specifications approved by the City and County. They are protected from direct or indirect results of this condemnation. This is so even if there were, as urged by plaintiffs, several serious procedural defects in the changing of the grade. These defects were the legal responsibility of the City and County, and not of the contractors. They were not jurisdictional defects. They did not affect the City and County's right to impair plaintiffs' rights subject to paying just compensation.

The second cause of action for damages was, in effect, for fraud. It was on this cause of action that the trial court awarded the three plaintiffs substantial damages. Of course, if any of the defendants were fraudulent, and such fraud caused damage to plaintiffs, such fraudulent defendants are liable to plaintiffs independently of any

rights the plaintiffs may have in a proper condemnation proceeding, direct or indirect.

[10] The evidence clearly supports the finding that Paul Fay, Jr., acting on behalf of the defendant Fay Improvement Company, made material misrepresentations to plaintiffs that he did not know were true; that such representations were made with the intent to induce the plaintiffs to act upon them; that plaintiffs reasonably believed they were true, and that plaintiffs relied upon them to their damage. Thus, fraud was clearly established so far as Fay Improvement Company is concerned. *Hobart v. Hobart Estate Co.*, 26 Cal.2d 412, 159 P.2d 958.

The plaintiffs testified that Fay represented that the grading of Peru Avenue would result in raising the grade of old Knox Street 2½ feet and not more than 4 feet; that this difference in grade would not injure plaintiffs, but, in fact, would enhance the value of their properties; that sewers would thus be made available to Schultz and Anderson. These representations were material because plaintiffs would not have consented to the improvement had they not been made. They were false, and it is a reasonable inference that Paul Fay, Jr., being an engineer, knew or should have known that they were false. These representations were made with intent to secure plaintiffs' consent to the improvement, and they, as laymen, reasonably relied upon them. Thus, fraud against this company was shown.

Did plaintiffs suffer legal damage because of such fraud? It is quite apparent that they did. While it is true that defendants, under the applicable provisions of the statutory law of the City and County, could have lawfully performed the work upon obtaining the consent of the owners of 60 per cent of the frontage upon a street "between main intersections," it is extremely doubtful that such 60 per cent consent could have been secured here without including some of the plaintiffs. If the "area" involved under these ordinances means the total frontages on Knox Street, and if the area "between main intersections" means

from the intersection of Knox and Felton to the dead end, 60 per cent consent could not be secured without some of the plaintiffs agreeing. This is a reasonable interpretation of these provisions. Moreover, even if 60 per cent consent could have been secured without the plaintiffs, the ordinances provide for notice to the minority and an opportunity for protest. Thus, the regrading was made possible by Fay fraudulently securing the consents. Thus, the fraud of Fay was a proximate cause of the damage that deprived plaintiffs of the access to their properties without an opportunity to be heard.

As to defendants Atlas Realty Company, the subdivider, and Standard Building Corporation, the builder, it is clear that the judgment against them for damages for fraud cannot be sustained because they were not parties to the fraud nor was Fay, Jr., their agent. The trial court did not expressly find that Fay, Jr., in making the false representations acted as the agent of these two companies. It imposed liability on the theory of ratification, that is, that these two companies "by continuing to obstruct Knox Street after the filing of the complaint herein, ratified and accepted" the acts of Paul Fay, Jr.

[11, 12] There is certainly no evidence that would support any finding that Fay, Jr., acted as the agent or purported to act as the agent of these two companies when he made the false representations. This being so, there could be no ratification. Ratification is the subsequent adoption by one person of an act which another without authority assumed to do as his agent. (See cases collected 2 Cal.Jur.2d p. 731, § 75.) The proper rule, supported by many cases, is stated as follows in 2 Cal.Jur.2d p. 741, § 83:

[13] "But since ratification contemplates an act by one person in behalf of another, there must exist at the time the unauthorized act was done a relationship, either actual or assumed, of principal and agent, between the person alleged to have ratified and the person by whom the unauthorized act was done. For example, one cannot ratify a contract entered into by a

corporation which did not in fact act, or assume to act, for him.

"Furthermore, the prevailing view is that there can be no ratification if the person who performed the unauthorized act did not at the time profess to be an agent."

[14] In apparent recognition of the application of this rule to the facts of this case plaintiffs argue that even if ratification is inapplicable an estoppel exists. It is argued that these two defendants knew that plaintiffs' consents were necessary, and they knew or should have known that such consents would never have been granted had plaintiffs been honestly informed. This is not a basis for an estoppel. Neither of these corporations committed any act that deceived the plaintiffs. These defendants owed no duty to the plaintiffs. Fay did not even represent to the plaintiffs that he was acting on behalf of these defendants, and there is no evidence that plaintiffs believed he was. Atlas agreed to pay to the Fay corporation its proportionate share of the cost of the improvements, that is, for the improvements on the west side of the street. This it had a right to do. There is not only no finding of estoppel, but no evidence to support such a finding had one been made.

[15] The same conclusion is applicable to plaintiffs' argument that Atlas was the undisclosed principal of Fay. All the evidence demonstrates is that Fay was acting for his own company alone in making the representations, trying to get plaintiffs' consent to the improvements and to secure their agreement to pay his company for them. The judgment against these two defendants must be reversed.

[16] The trial court also rendered a money judgment for fraud against Farish. The trial court concluded as to him that Fay in making the false representations acted as the agent of Farish. This finding is unsupported. While Farish may or should have known that it was necessary to secure plaintiffs' consents to perform the work, this does not support a finding that Fay was Farish's agent. Farish's contract to rough grade the street was with Atlas, not with the Fay Improvement Company. When

Farish made the cut and moved the dirt from the west to the east side of the street he was complying with his contract with Atlas, and not assisting the Fay company. Fay, Jr., was obviously acting on behalf, and solely on behalf, of his own company. Plaintiffs did not contract with Farish. Their contracts were with Fay. Farish received no compensation from either plaintiffs or Fay. He received his compensation and took orders solely from Atlas. Thus, the fraud judgment against this defendant must be reversed.

[17] Under the evidence, the only defendant liable for damages for fraud is the Fay Improvement Company. But even as to this defendant the judgment must be reversed for a retrial on the issue of damages, because the trial court imposed the wrong measure of damages. The proper measure of damages is that set forth in *Bagdasarian v. Gragnon*, 31 Cal.2d 744, 192 P.2d 935. That case held that section 3343 of the Civil Code incorporates the so-called "out of pocket" rule as the proper measure of damages in fraud cases. Here the trial court awarded damages predicated on the enhanced value of the property had the contract been performed in accordance with the representations, and the value of the property before the contract was entered into. That is not the "out of pocket" rule. Under that rule the plaintiffs are entitled to the difference between the actual value of that with which they parted and that which they received—the decrease in value caused by the fraud, and not the increase of value that would have been realized had the fraud not been committed.

It is therefore ordered that the injunctive provisions of the judgment are reversed as to all defendants; that the money damage provisions of the judgment are reversed as to all defendants with the exception of Fay Improvement Company; that as to Fay Improvement Company the portions of the judgment finding it liable to the plaintiffs for fraud are affirmed, but the portions of the judgment fixing the amount of the damages are reversed because of the application of the incorrect rule of damages. It is further ordered that as to Fay Improvement Company the cause be retried on the

issue of damages alone. In the interests of justice, and acting pursuant to Rule 26, it is further ordered that all appellants, other than Fay Improvement Company, shall recover their costs on appeal, and that Fay Improvement Company shall bear its own costs.

BRAY and FRED B. WOOD, JJ., concur.



134 Cal.App.2d 811

Wilma Jane FOX, Plaintiff and Appellant,
v.
Cyril FOX, Defendant and Respondent.
Civ. 5104.

District Court of Appeal, Fourth District,
California.
Aug. 3, 1955.

Former husband's proceeding against former wife, for post-decretal order, in divorce action, to obtain custody of 12 year old child. The Superior Court of San Diego County, L. N. Turrentine, J., entered order awarding custody to former husband, and former wife appealed. The District Court of Appeal, Barnard, P. J., held that evidence on issue of child's welfare supported trial court's order.

Order affirmed.

1. Divorce $\hookrightarrow$ 303(1)

Divorcing court had continuing jurisdiction to modify decree respecting custody of child, in absence of valid order transferring matter to another court. West's Ann.Civ.Code, § 138.

2. Divorce $\hookrightarrow$ 303(1)

Jurisdiction of divorcing court to modify decree respecting custody of child, on former husband's motion, did not depend upon former husband's gaining possession of child. West's Ann.Civ.Code, § 138.

3. Appeal and Error ⇨870(3)

Where trial court's order denying motion for change of venue was not appealed, venue issue was not reviewable on appeal from final order in proceeding.

4. Divorce ⇨66

On appeal from order entered in divorcing court, modifying decree so as to award custody of child to former husband, there was no abuse of discretion in trial court's refusing to change venue to county of former wife's residence.

5. Divorce ⇨303(3)

In former husband's proceeding for post-decretal order modifying divorce decree so as to award him custody of 12 year old child, evidence on issue of child's welfare supported trial court's order changing custody from former wife to him.

R. M. Switzler, San Diego, for appellant.

John T. Holt, San Diego, Henry F. Walker, Los Angeles, for respondent.

BARNARD, Presiding Justice.

The plaintiff obtained a divorce from the defendant in the Superior Court of San Diego County on August 17, 1953. The interlocutory decree awarded the custody of the minor son of the parties to the plaintiff, subject to the right of the defendant to visit the child at reasonable times and to take said child with him for periods of reasonable visitation.

Immediately after the interlocutory decree was entered the plaintiff moved to Oakland, where she still resides. The defendant, who was an officer in the U. S. Navy and then stationed in Washington, D. C., sent a telegram to the plaintiff on February 15, 1954, saying he desired to have the boy spend his Easter-week vacation "with me in California". The plaintiff replied in a telegram saying that the boy's vacation was from April 10 to April 18, and asking further information as to where and with whom the boy would stay. The defendant replied by wire on February 18, 1954, saying that the boy would stay with

him at an address in Los Angeles, and that he would pick the boy up on April 10.

The defendant took the boy with him on April 10, 1954. On April 19, 1954, he filed notice of a motion to modify the interlocutory decree by awarding the custody of the boy to him, on the grounds that there had been a complete change of circumstances since the interlocutory decree was entered; that the moral and mental welfare of the boy was being endangered because of the conduct of the plaintiff since that time; and that it was for the best interest of the child morally, physically and mentally, that custody be awarded to the defendant. An affidavit was also filed stating certain facts relied on. On April 22, 1954, the plaintiff filed a verified answer denying all the allegations in defendant's affidavit and alleging that the defendant is unfit to have the custody of the child by reason of his drinking habits, and that the defendant is devoid of integrity as evidenced by his deceit in getting possession of the boy by stating that the boy would stay with him in Los Angeles. On the same day, the plaintiff filed a motion for a change of venue from San Diego County to Alameda County, on the grounds of convenience of witnesses and that the ends of justice would be promoted thereby.

The two matters were heard on April 22, 1954. The court first denied the motion for a change of venue, and then proceeded to hear the motion for a change of custody. Several witnesses were heard, including the plaintiff, the man she intended to marry when her divorce became final, a friend from Oakland who testified as to conditions in the plaintiff's home and the minor who was then 11 years old. Findings were waived by a stipulation made in open court. On April 27, 1954, the court entered an order modifying the interlocutory decree of divorce by awarding the custody and control of the boy to the defendant until the further order of the court. The plaintiff has appealed from that order.

The appellant first contends that the San Diego Superior Court had no jurisdiction to make this order. It is argued that juris-

diction of this matter was obtained by the fraud of the respondent in getting possession of the child on the statement that the boy would be kept in Los Angeles, instead of which the boy was brought to San Diego, and that, since the court was without jurisdiction, the order appealed from is void for all purposes.

[1,2] The San Diego Superior Court had a continuing jurisdiction to modify its decree respecting the custody of this child. Civ.Code, § 138; *Beal v. Beal*, 218 Cal. 755, 24 P.2d 768; *Greene v. Superior Court*, 37 Cal.2d 307, 231 P.2d 821; *Browne v. Superior Court*, 16 Cal.2d 593, 107 P.2d 1, 131 A.L.R. 276; *Crider v. Crider*, 11 Cal. App.2d 594, 54 P.2d 485. That court retained jurisdiction, in the absence of some valid order transferring the matter to another court. *Cooney v. Cooney*, 25 Cal.2d 202, 153 P.2d 334. The jurisdiction of the court did not depend upon the respondent's getting possession of the child. Moreover, it does not appear, as a matter of law, that the respondent was guilty of deceit in that connection. The record would justify an inference that his action in that regard resulted from information he obtained after his last telegram was sent.

[3,4] It is next contended that the trial court erred in denying the appellant's motion for a change of venue. No appeal was taken from that order, and the matter is not reviewable here. *Bohn v. Bohn*, 164 Cal. 532, 129 P. 981; *Brun v. Evans*, 80 Cal.App. 74, 251 P. 330; *Chard v. O'Connell*, 48 Cal. App.2d 475, 120 P.2d 125. It may be further observed, however, that appellant's notice of motion for change of venue and affidavit in support thereof failed to allege the essential facts. The witnesses were not named, and nothing was said as to what facts would be testified to by any witness. While the appellant, on the stand, was allowed to state the names of several witnesses in Oakland who would testify if the trial were held there, and that their testimony would "describe the situation," no formal offer of proof was made as her

counsel recognized that the motion for change of venue had already been denied. The appellant, who was present at the hearing, and two of her witnesses from Oakland, did testify as to the conditions in her home. No abuse of discretion appears.

[5] Appellant's final contention is that the order changing custody was not sufficiently supported by the evidence. It would serve no useful purpose to review the evidence in detail. The appellant occupied a house in Oakland. Admittedly, the man whom she intended to marry when her divorce became final moved into the house about the first of January, 1954, and continued to live there up to the time of the hearing in this matter. She cooked the meals; shortly after he moved in she replaced the single bed she had previously used with a double bed; she had the boy taking lessons in Hebrew and taking part in religious classes in a Hebrew church, which he didn't like; and neither of his parents had previously been a member of that faith. The boy's testimony, which the court believed, disclosed a situation which could only be described as deplorable. The appellant argues that while the boy had always been truthful before, his testimony was untruthful because of the influence of his father during the 12-day period. However, the boy said essentially the same thing in a letter he wrote to his father nearly two months before he saw his father on April 10. While the appellant and her intended husband denied some of the facts testified to by the boy, the facts which they admitted disclosed an existing situation which was far from what it should have been if the moral and mental effect upon the boy were given any reasonable consideration. The explanation offered, that this situation was maintained for reasons of economy, was hardly sufficient in view of the admitted facts, and was not accepted by the court. The evidence was entirely sufficient to support the order made.

The order is affirmed

MUSSELL, J., concurs.

135 Cal.App.2d 65

The PEOPLE of the State of California,
Respondent,

v.

Noel BIBLE, Appellant.
Cr. 3111.

District Court of Appeal, First District,
Division 1, California.

Aug. 15, 1955.

Proceeding for writ of error coram nobis. The Superior Court, County of Alameda, James R. Agee, J., denied petition for writ of error coram nobis. Petitioner appealed. The District Court of Appeal, Peters, P. J., held that petitioner's failure to set forth necessary probative facts by affidavit or otherwise and failure to allege any facts as to time and circumstances under which matters set forth in petition were discovered justified trial court in denying his petition.

Affirmed.

1. Criminal Law §997(6)

A writ of error coram nobis is a limited writ, available only when no other remedy exists, aimed at reaching errors of fact extrinsic to the record.

2. Criminal Law §997(2)

The writ of error coram nobis cannot be used to review error of fact or of law that can be reviewed on an appeal.

3. Criminal Law §997(11)

Trial court, on petition for writ of error coram nobis, is not required to accept at face value the allegations of the petition unsupported by affidavits or other evidence even though the petition is verified and uncontradicted.

4. Criminal Law §997(16), 1147

The granting of relief on petition for writ of error coram nobis is a matter largely within the discretion of the trial court, and its ruling will not be upset on appeal except for an abuse of that discretion.

5. Criminal Law §997(11)

It is essential in petition for writ of error coram nobis that petitioner not only

set forth probative facts upon which he relies, but also alleges times and circumstances under which these newly discovered facts were discovered and failure to so allege warrants trial court in denying his petition.

6. Criminal Law §997(11, 15)

Failure to set forth the necessary probative facts by affidavit or otherwise and failure to allege any fact as to time and circumstances under which the matters set forth in petition were discovered justified trial court in denying petition for writ of error coram nobis.

7. Criminal Law §997(4)

Where petitioner for writ of error coram nobis charged that the corpus delicti had not been proved, that the prosecution failed to connect him with the crime of robbery, that the indictment for robbery was faulty, and that hearsay was admitted at his trial, such matters were not within the scope of coram nobis.

8. Criminal Law §1028

Facts not presented to the trial court cannot be raised on appeal.

Noel Bible in pro. per.

Edmund G. Brown, Atty. Gen. of California, Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

This is an appeal from a trial court order denying a verified petition for a writ of error coram nobis.

The petition, which was filed in December of 1954, alleges appellant's arrest, trial, conviction, and sentence (on August 13, 1952) for robbery. Then, in most general terms, it is alleged that appellant prepared his notice of appeal to this Court, and his attorney also promised to perfect the appeal, but "through no fault of the petitioner's he was deprived of his right to appeal"; that "evidence which should have been presented in open court was concealed, suppressed by wrongful persuasion of extrinsic deliberate fraud which was not known by

your petitioner"; that "he was convicted on false perjured testimony known to have been false against him by the prosecution"; that his "attorney refused to present the facts to the court which was his duty to prove in open court trial"; that the trial court committed error in several unspecified respects; that "A fair trial was impossible by the inflammatory conspiracy of the District Attorney"; and that he was prevented in some unspecified way from presenting his main defense.

All that appellant presented to the trial court was this petition containing these most general charges. There were no affidavits filed or other evidence offered. The petition does not allege why the notice of appeal was not filed, nor that public officials were responsible for the non-filing; what evidence was concealed or suppressed, nor by whom or in what manner it was suppressed; what testimony was false or perjured, or how petitioner knows that it was false or perjured; what facts his attorney did not present to the court; what petitioner's main defense was, or how he was prevented from presenting it; or with whom the district attorney is supposed to have conspired.

[1,2] Under such circumstances the trial judge was justified in denying the petition. The writ of error *coram nobis* is a limited writ, available only where no other remedy exists, aimed at reaching errors of fact extrinsic to the record. It cannot be used to review errors of fact or of law that can be reviewed on an appeal. These principles are elementary and frequently have been stated by the courts. See discussion and cases 12 Cal.Jur.2d 551, § 1, et seq.

In such a proceeding "it is incumbent upon the defendant to establish by a preponderance of substantial and credible evidence that the error of which he complains was such that he was deprived of legal rights by extrinsic causes amounting to a deprivation of a trial on the merits." People v. Devora, 105 Cal.App.2d 457, 459, 233 P.2d 653, 654, quoting from People v. Lewis, 64 Cal.App.2d 564, 565, 149 P.2d 27. A good summary of some of the rules applicable to such a proceeding is found in Peo-

ple v. Bailey, 105 Cal.App.2d 150, 232 P.2d 518. After pointing out that in such a proceeding the petitioner is deemed to be prima facie guilty and has the burden of producing convincing evidence of his charges (see also People v. Shorts, 32 Cal.2d 502, 197 P.2d 330), the court stated (105 Cal.App.2d at page 152, 232 P.2d at page 519): "Appellant refused to present affidavits in support of his application and failed to produce evidence to establish his right to the writ. The allegations in the motion as to the claimed fraud, deceit, duress and misrepresentations are not specific and are merely appellant's conclusions. * * * No convincing proof is shown entitling appellant to set aside the order denying his petition."

[3,4] The trial court, in such a proceeding, is not required to accept at face value the allegations of the petition unsupported by affidavits or other evidence even though the petition is verified and uncontradicted. People v. Martinelli, 118 Cal.App.2d 94, 257 P.2d 37. The granting of relief in such a proceeding is a matter largely within the discretion of the trial court, and its ruling will not be upset on appeal except for an abuse of that discretion. People v. Devora, 105 Cal.App.2d 457, 233 P.2d 653; People v. Adamson, 34 Cal.2d 320, 210 P.2d 13.

There are other fatal defects in this petition. In People v. Adamson, 34 Cal.2d at page 327, 210 P.2d at page 16, the court pointed out that: "The applicant for the writ 'must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ; otherwise he has stated no ground for relief.' (People v. Shorts, 1948, 32 Cal.2d 502, 513, 197 P.2d 330, 336.)"

[5] In other words, it is essential in such cases for the petitioner not only to set forth the probative facts upon which he relies, which the appellant has not done here, but also to allege the times and circumstances under which these facts were discovered. Failure to do so warrants the trial court in denying the application. The cases are collected and these rules summarized in 12 Cal.Jur.2d 558, § 8, as follows:

"It is essential to the availability of the writ of error coram nobis that the facts upon which the petitioner relies for relief were not known to him at the time of the trial, and could not in the exercise of due diligence have been discovered by him substantially earlier than the time of his application for the writ. And it is no excuse that counsel refused to establish the facts during the trial. In other words, it must appear that the new matter is truly newly discovered by the defendant, not merely newly disclosed."

At p. 559, § 9, it is stated: "The applicant must present his petition for the writ of error coram nobis within a reasonable time after discovering that an error of fact occurred during his trial. His duty to pursue his rights diligently continues after judgment. Thus, the court may hold that an unexplained delay in the filing of the petition is ground for denial of the writ."

[6] In the instant case appellant has alleged only the most general conclusions. He not only did not see fit to set forth the necessary probative facts by affidavit or otherwise, but failed to allege any facts as to the time and circumstances under which the matters set forth in his petition were discovered. The trial court was therefore justified in denying the petition.

[7, 8] In his brief filed on this appeal appellant makes several charges of irregularities in his trial that he did not see fit to charge in his petition. Thus, it is charged that the *corpus delicti* was not proved, that the prosecution failed to connect appellant with the crime, that the indictment was faulty, and that hearsay was admitted. All of these are matters not within the scope of *coram nobis*. Moreover, facts not presented to the trial court cannot be raised on appeal. *People v. Bailey*, 105 Cal.App.2d 150, 232 P.2d 518; *People v. Gilpin*, 38 Cal. App.2d 24, 100 P.2d 356; *People v. Evans*, 102 Cal.App.2d 320, 227 P.2d 461.

The order denying the petition is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

135 Cal.App.2d 70

Manuel PUIM, Plaintiff and Appellant,
v.

Martin E. CALLAHAN and Callahan Engineering Co., Defendants and Respondents.
Civ. 20802.

District Court of Appeal, Second District,
Division 1, California.

Aug. 15, 1955.

Rehearing Denied Aug. 25, 1955.

Hearing Denied Oct. 13, 1955.

Action for accounting brought against licensees by licensor after he had terminated exclusive license he had granted licensees to manufacture and sell certain inventions in consideration of payments of royalties of 4% on net sales. The Superior Court of Los Angeles County, Thurmond Clarke, J., rendered judgment from which licensor appealed. The District Court of Appeal, White, P. J., held, *inter alia*, that evidence sustained finding that licensees' weekly payments of \$100 to licensor for nearly two year duration of license, during which time licensor worked for licensees, constituted advances on royalties, and not wages.

Judgment affirmed.

1. Patents ⇨211(3)

In action for accounting brought against licensees by licensor after he had terminated exclusive license he had granted licensees to manufacture and sell certain inventions in consideration of payment of royalties of 4% on net sales, licensees, who were standing upon and affirming license agreements, could not be heard to question title of licensor under whom they claimed.

2. Stipulations ⇨14(1)

Entry of findings of fact or judgment in direct violation of stipulation under and pursuant to which action is tried, is error.

3. Stipulations ⇨21

Trial ⇨59(1)

In action for accounting brought against licensees by licensor after he had terminated exclusive license he had granted licensees to manufacture and sell certain inventions in consideration of payments of royalties of 4% on net sales, evidence fail-

ed to show understanding, stipulation or ruling by court as to manner in which evidence was to be presented.

4. Appeal and Error ⇨967(1)

Reference ⇨20

Granting or refusal of motion for reference is addressed to sound discretion of court, and ruling thereon will not be disturbed on appeal unless there is showing of abuse of discretion.

5. Reference ⇨8(1)

Where transaction under consideration is not complex, court may, after examination of testimony, make accounting itself, rather than order reference.

6. Patents ⇨219(6)

In action for accounting brought against licensees by licensor after he had terminated exclusive license he had granted licensees to manufacture and sell certain inventions in consideration of payments of royalties of 4% on net sales, there was substantial evidence upon which court could arrive at accounting, and conclusion that questions fit for referee could be determined by court was not abuse of discretion.

7. Appeal and Error ⇨1071(1)

In action for accounting brought against licensees by licensor after he had terminated exclusive license he had granted licensees to manufacture and sell certain inventions in consideration of payment of royalties of 4% on net sales, wherein no claim was made that mathematical computation of amount due licensor did not represent 4% of the more than 63 machines found to have been sold, licensor was not prejudiced by alleged insufficiency of finding that licensees had manufactured and sold in excess of 63 of the machines.

8. Patents ⇨219(5)

In action for accounting brought against licensees by licensor after he had terminated exclusive license he had granted licensees to manufacture and sell certain inventions in consideration of payment of royalties of 4% on net sales, evidence, inter alia, that government restrictions rendered it impossible to obtain parts without order from government, that drawings furnished

by licensor were insufficient, and that licensor acquiesced in delay in manufacturing one of inventions, sustained finding that licensor's contention that licensees never commenced to manufacture or sell such invention, was untrue.

9. Patents ⇨219(5)

In action for accounting brought against licensees by licensor after he had terminated exclusive license he had granted licensees to manufacture and sell certain inventions in consideration of payments of royalties of 4% on net sales, evidence sustained finding that licensees' weekly payments of \$100 to licensor for nearly two year duration of license, during which time licensor worked for licensees, constituted advances on royalties, and not wages.

10. Appeal and Error ⇨989

Power of appellate tribunal in reviewing challenge to sufficiency of evidence to support conclusions of trier of facts is limited to determination as to whether record contained substantial evidence, contradicted or uncontradicted, to support such findings and conclusions.

William Katz, Los Angeles, for appellant.

Bailey & Poe, by Rufus Bailey, Los Angeles, for respondents.

WHITE, Presiding Justice.

[1] Plaintiff is an inventor of three patented devices known as: (1) the Puim fork lift vehicle, referred to in the testimony and hereinafter in this appeal as the "universal loader". It is a hoister type of vehicle. A more minute description is unnecessary for the purposes of this appeal;

(2) the buck-rake loader attachment for tractors, being a fork-lift device designed for attachment to tractors and referred to in the testimony at the trial as a Puim fork-lift or universal fork-lift attachment, and hereinafter referred to as the fork-lift attachment;

(3) the hold-down clamp which is a two-pronged steel device that is attached to the top of the fork-lift part of the universal

loader, or to the top of the fork-lift attachment, and which may be moved down upon the load picked up by the fork-lift attachment to clamp or hold the load in place. It will hereinafter be referred to as the hold-down clamp. Defendants assert that only one of the devices was patented and that upon the other three, letters patent have not been issued by the Patent Office. However, as pointed out by plaintiff, since defendants "are standing upon and affirming the license agreement, they may not be heard to question the title of the licensor under whom they claim."

Defendant Callahan Engineering Co., is a partnership comprised of the individual defendant Martin E. Callahan and Juanita S. Callahan.

On July 19, 1951, plaintiff and defendants entered into an agreement whereby defendants were granted an exclusive license to manufacture and sell the aforementioned three devices in consideration of the payments by defendants to plaintiff of 4% of the net sales thereof in the month following date of delivery.

The license agreement was to remain in force so long as defendants continued to manufacture and sell said devices, barring conditions beyond the control of licensee and acts of God, and if licensee ceased the manufacture of the licensed items for a period of 90 days, licensor had the option to cancel said license.

The initial meeting between plaintiff and defendant Martin E. Callahan took place at San Jose, California, on July 14, 1951. At that time a pencil memorandum of the aforesaid license agreement was prepared. During the negotiations for the license agreement, plaintiff told defendant Martin E. Callahan that he, plaintiff, desired a provision in the contract that if defendants didn't manufacture or sell all of the licensed items for a stipulated time, to wit: 90 days, the license agreement would automatically be void, or that he could cancel the license agreement. Defendants agreed to manufacture and sell all of the items, and if defendants failed so to do for a period of 90 days, the plaintiff would have the right to cancel the license agreement. Plaintiff and defendants made a "package deal" and

plaintiff had the right to cancel the license agreement if defendants did not manufacture for a period of 90 days all three devices covered by the license agreement.

At the conclusion of the negotiations for the license agreement, defendant Martin E. Callahan asked plaintiff to come to Los Angeles from San Jose for about four or five weeks to help defendants get started on the manufacture of the devices. Plaintiff thereupon informed defendants that he was interested in working for defendants if the compensation was satisfactory, and defendants asked plaintiff how much he wanted. Plaintiff stated that he wanted \$125 per week. Defendants countered with an offer to pay him \$100 per week, which plaintiff accepted. Plaintiff requested an advance from defendants to enable him to defray his expenses to go to Los Angeles from San Jose, and defendants advanced him \$100. Plaintiff, pursuant to such arrangement, came to Los Angeles within a few days, arriving here about, but prior to July 19, 1951.

Defendants commenced to manufacture the fork-lift attachment and hold-down clamps within one to three weeks after plaintiff came to Los Angeles. Two sample or pilot models of the fork-lift attachment and a pilot sample or model of the hold-down clamp were made first by the defendants to take the "bugs" out and to be certain such devices were in good working order before making production runs thereof.

The universal loader is the largest of the items covered by the license agreement, and from the date of the execution of the agreement to and including July 8, 1953, the defendants never manufactured a universal loader or a sample or pilot model thereof. The defendants asserted a variety of reasons for their failure to manufacture the universal loader or a sample or pilot model thereof. While defendants asserted they could not manufacture the universal loader because the plans thereof were incomplete or inadequate, and that they required plaintiff's services to prepare plans and drawings, nevertheless it is contended that defendants proceeded to manufacture the hold-down clamp and fork-lift attach-

ment without drawings. Plaintiff also offered testimony that defendants could have completed a universal loader by the end of the year 1952, that after defendants, on July 8, 1953, received the notice of termination and cancellation of the license agreement from plaintiff, the latter was employed by another machine works and prepared from memory a complete set of plans and completed construction of the universal loader in less than six months.

Plaintiff worked for defendants from July 19, 1951, to July 8, 1953. No conversation concerning plaintiff's working for defendants was had during the two-year period of his employment other than that heretofore mentioned, which occurred at the time of the execution of the license agreement, wherein plaintiff agreed to come from San Jose to Los Angeles for four or five weeks upon payment to him of \$100 per week, but no arrangement was made regarding plaintiff's compensation if he remained longer than originally contemplated. However, during the aforesaid two-year period, plaintiff received each week the sum of \$100.

Defendants contended at the trial that the foregoing weekly checks were advanced against royalties and not paid as salary. Under the license agreement plaintiff was entitled to a royalty of 4% on the net sales and was not required to work for defendants as a prerequisite to receiving such royalties. Defendants contended that the payments of \$100 per week made to plaintiff as an advance against royalties was a device adopted for income tax reasons. In addition to plaintiff there were approximately six other persons working for defendants, to whom weekly checks were issued and for whom no deductions were made for withholding taxes, old age benefits, social security, etc.

Concurrently with the service by plaintiff upon defendants of the notice terminating the license agreement, plaintiff did not report for work and the record reflects that the \$100 weekly payments were stopped at that time.

In his notice to defendants terminating the license agreement plaintiff demanded an

accounting. When no accounting was rendered this action ensued.

The court found that it was not true that plaintiff was employed by defendants as a mechanical technician from July 19, 1951, to July 3, 1953, at a salary of \$100 per week. "That it is not true that the defendants never, from the date of said licensing agreement, to wit, on or about July 16, 1951, to on or about July 8, 1953, commenced to manufacture or sell the Universal Loader or the hydraulic hold-down clamp, and for more than 90 days prior to July 8, 1953 had ceased to manufacture the fork lift." It was further found, "That during the period from the 16th day of July, 1951, to and including the 1st day of January, 1954, defendants manufactured and sold in excess of sixty-three (63) of the fork-lift attachments and hold-down clamps described in said licensing agreement, and that the royalties due to plaintiff under the terms of said licensing agreement during said period amounted to \$3,609.27, all of which said sum has been credited to the advanced royalty account of plaintiff and was fully accounted for by defendants to plaintiff."

"That it is true that defendants advanced and paid to plaintiff the sum of \$10,186.49 as prepaid royalties to be earned under the terms of said licensing agreement, which said advances were made between the 16th day of July, 1951, and the 8th day of July, 1953; that during said period said advances to plaintiff by the defendant were charged to plaintiff's account, and that the royalties earned under the terms of said licensing agreement were credited to said account; that as of the 1st day of January, 1954, the royalties earned under the terms of said licensing agreement amounted to \$3,609.27, leaving a debit balance of \$6,577.22, and in this regard the Court finds that it was the intention of the parties to look only to royalties earned under the terms of said licensing agreement for repayment of said advances of \$10,186.49." The court further found, "That it is true that the defendants did commence to manufacture or sell the units described in said licensing agreement on or about the 16th day of July, 1951, and have ever since said date contin-

used the manufacture or sale thereof, and have not ceased to manufacture or sell said units for a period of ninety (90) days, and that said licensing agreement and arrangement for the manufacture and sale of said units dated the 19th day of July, 1951, a copy of which is attached to plaintiff's complaint as Exhibit A, has not been breached by any act of the defendants and that plaintiff knew of the manner in which defendants were proceeding in the manufacture and sale of said units and acquiesced therein."

From the foregoing findings the court entered the following conclusions of law: "1. That the licensing agreement between the parties dated the 19th day of July, 1951, a copy of which is attached to plaintiff's complaint, marked Exhibit A, is in full force and effect, and has not been breached by the defendants.

"2. That defendants have accounted to plaintiff for all moneys due under said licensing agreement, and have paid to plaintiff the sum of \$10,186.49, and have credited against such advanced royalties the sum of \$3,609.27, as of the 1st day of January, 1954, leaving a balance of \$6,577.22 which should be recovered only from future royalties due plaintiff under the terms of said licensing agreement as, if, and when received.

"3. That defendants are not entitled to a personal judgment against plaintiff under the counter-claim set forth in defendants' answer.

"4. That defendants are not indebted to plaintiff for salary in any amount as set forth in plaintiff's complaint." Judgment was accordingly entered and plaintiff prosecutes this appeal therefrom.

As his first ground for reversal of the judgment herein appellant urges that, "The trial court erred in entering a final judgment in violation of the stipulations under and pursuant to which the action was tried, and contrary to, and in violation of the basic rules of law governing the trial of and judgments in actions for an accounting."

It is appellant's contention that the case was tried in part only; that there was an

understanding and agreement between court and counsel that the issues respecting the validity of plaintiff's termination of the license agreement, his employment by defendants, and his right to an accounting for royalties under the license agreement and compensation under any employment agreement be determined first, and if it were found that an accounting was necessary, the court would then better be enabled to determine whether the matter of an accounting should be referred to a referee or special master, or whether the court should itself hear and determine such account. That it was understood between court and counsel that an interlocutory judgment only would be entered, and a final judgment would await a hearing and determination of the accounting, if one was found necessary.

[2,3] While it is elementary that findings of fact or a judgment entered in direct violation of a stipulation under and pursuant to which an action is tried is error, the record herein does not sustain appellant in his claim that there was an understanding, stipulation or ruling by the court as to the manner in which the evidence was to be presented. Examination of the record reveals that at the outset of the trial the following occurred:

"Mr. Katz (Attorney for appellant): I think we will go into the matters first of the licensing agreements, and if it then appears there is any accounting, I think maybe your Honor will refer it to a referee or perhaps by that time, if there is an indication that an accounting will be necessary, perhaps that accounting can be kept between ourselves.

"The Court: You may proceed as you deem best, Mr. Katz. At this time, of course, I can make no indication.

"Mr. Katz: Yes, thank you, your Honor."

Later in the trial the following reference to the subject of an accounting occurred:

"Mr. Katz: If your Honor please, at this time other than the matters that have to do with the accounting of a number of items manufactured and the prices received by the Callahan Engineering Company and

the calculations involved, I have nothing further than those matters. I am going to, and I indicated to the Court and counsel too, it is my feeling that the matter of the accounting should await the presentation of the other evidence that goes to the merits of the matter, *and if an accounting is needed we can work it out some other way* not to take the time of this Court to go into that.

"Mr. Bailey: Yes, that is agreeable to us." (Emphasis added.)

The final word as to reference for an accounting occurred later in the trial when appellant's counsel stated:

"Mr. Katz: If your Honor please, that is our case as heretofore indicated, and we rest subject to proceeding with an accounting *if this Court finds it should be done.*" (Emphasis added.)

[4, 5] Assuming, but not deciding, that the foregoing might be construed as a motion for a reference, the granting or refusal of such a motion is addressed to the sound discretion of the court, and the ruling thereon will not be disturbed on appeal unless there is a showing of abuse of discretion, *Reed v. Reed*, 118 Cal.App.2d 399, 400, 257 P.2d 1002. References are ordered merely as an aid and assistance to the court. In a case where the court can get along well enough without it, a reference may be dispensed with. Where the transaction under consideration is not complex, the court itself may make the accounting after an examination of the testimony, *Berkowitz v. Kiener Co.*, 37 Cal.App.2d 419, 426, 99 P.2d 578.

[6] The reporter's transcript in the case now engaging our attention embraces some 950 pages, and from an examination thereof we are satisfied that the case was fully tried from an accounting standpoint. The conduct of respondents' business was fully inquired into. Its internal affairs were examined, as were the income tax reports of the business and the individual partners therein. The testimony of respondent Martin E. Callahan and of the accountant Ralph D. Stolrow furnished substantial evidence upon which the court could arrive at an accounting between the

parties. The learned trial judge was ready at all times to receive any evidence to support appellant's claims. No abuse of discretion appears in the conclusion arrived at by the trial judge from an examination of the record, that questions fit for a referee could be determined by him, thus saving time and expense, and that no useful purpose would be served by a referee.

[7] Appellant earnestly assails the findings of fact as unsupported by the evidence. He complains that the finding that respondents "manufactured and sold in excess of sixty-three (63) of the fork-lift attachments and hold-down clamps described in the licensing agreement" is insufficient. That appellant is entitled to know the exact number of such appliances manufactured and sold as well as the price at which they were sold. However, the court did find that the royalties due appellant under the terms of the license agreement amounted to \$3,609.27. When it is remembered that under the license agreement appellant was entitled to 4% of the net sales it is manifest that appellant was not prejudiced because no claim is made that the mathematical computation of the amount due him does not represent 4% of the more than sixty-three machines found to have been sold. The exact number was reflected in the proof obtained from respondents' books and records during the trial and was therefore known to appellant.

[8] With reference to the finding that appellant's contention that respondents never, from the date of the license agreement, commenced to manufacture or sell the universal loader was untrue, such finding was justified on substantial evidence that there were government restrictions on the purchase of the axles required by these larger devices and that it was impossible to purchase them during the early part of the agreement without a defense order from the Federal Government; that the drawings furnished by appellant were not set out in sufficient detail, and that appellant acquiesced in the delay in manufacturing said item.

[9, 10] The finding that the money paid by respondents to appellant constituted roy-

alties and not wages is supported by substantial evidence including appellant's own admission that in his income tax returns he treated this money as advances on royalties, and also by testimony that appellant in his divorce trial, testified that he owed respondents the balance shown on an exhibit introduced into evidence and which reflected royalties. We have examined the other findings complained of by appellant but a reading of the record convinces us that we are without authority to disturb them under the familiar rule that the power of an appellate tribunal in reviewing a challenge to the sufficiency of the evidence to support the conclusions of the trier of facts is limited to a determination as to whether the record contains substantial evidence, contradicted or uncontradicted, to support such findings and conclusions.

The judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.



134 Cal.App.2d 512

The CANADIAN INDEMNITY COMPANY,
a corporation, Plaintiff and Appellant,
v.

**WESTERN NATIONAL INSURANCE COM-
PANY,** a corporation, Defendant and
Respondent.

Civ. 16335.

District Court of Appeal, First District,
Division 2, California.

July 22, 1955.

Action for declaratory judgment by insurer of garage, against garage employee's automobile insurer decreeing which insurer had obligation to defend action and assume liability imposed on garage owner for accident that occurred while owner was driving employee's automobile with permission on garage business. From an adverse declaratory judgment of the Superior

Court, San Francisco County, Milton D. Sapiro, J., the garage owner's insurer appealed. The District Court of Appeal, Kaufman, J., held that where garage owner, who was on his way to make personal visit in automobile borrowed from employee for pick up of repair parts, was involved in accident 14 blocks from where visit was to be made and 10 blocks from motor company where parts were to be picked up, and garage owner was engaged in garage business and accident was therefore within terms of the exclusion in employee's automobile policy that denied coverage to any person, operating automobile repair shop or public garage, with respect to an accident arising out of the operation thereof.

Judgment affirmed.

1. Master and Servant ⇨305

In cases concerned with an employee, a deviation from strict course of duty does not necessarily put the employee outside the scope of his employment if his main purpose is still to carry on employer's business.

2. Insurance ⇨146(3)

A policy is to be construed most strictly against the insurer if the language used in the policy is ambiguous.

3. Insurance ⇨435.4

If language of exclusion in automobile liability policy clearly extends to an incident such as use of automobile in operation of automobile repair shop, reasons of the insurer for including the exclusion in policy were immaterial.

4. Insurance ⇨435.4

Where garage owner, who was on his way to make personal visit in automobile borrowed from employee for pickup of repair parts, was involved in accident 14 blocks from place where visit was to be made and 10 blocks from motor company where parts were to be picked up, garage owner was engaged in garage business at time of accident and accident therefore fell within exclusion of employee's automobile policy, that denied coverage to any person operating an automobile repair shop or public garage, with respect to any accident arising out of the operation thereof.

Edward A. Friend, San Francisco, for appellant.

George N. Shield, San Francisco, for respondent.

KAUFMAN, Justice.

This is an appeal from a declaratory judgment of the Superior Court of the City and County of San Francisco, decreeing that plaintiff and appellant, The Canadian Indemnity Company is obligated under the terms of its insurance policy to defend an action on behalf of its insured, Luther Burnett, and to pay any disability which may be imposed upon him therein. The judgment also declared that defendant and respondent, Western National Insurance Company has no liability under an automobile policy issued to Ivan Mercer as to plaintiff insurance company or to Luther Burnett in respect to the pending action.

On June 2, 1953, Luther Burnett, owned an automobile repair shop and service station in San Pablo, California. His only employee was Ivan Mercer, a mechanic who owned a Lincoln automobile insured by respondent company. Burnett owned a truck which he used in his garage business. On some occasions he used it to pick up spare parts, and on two or three occasions prior to the accident he had used Mercer's Lincoln for this purpose. Burnett also worked as a house mover during the day, and in his garage evenings and weekends.

Burnett arrived at his garage in his truck at about 4:30 p.m. on the afternoon of June 2, 1953, and instructed Mercer to make some repairs on it. Mercer informed Burnett that he needed certain repair parts for a customer's car which Mercer had ordered from Richmond Motors but which had not been delivered by that company's parts salesman, Jim Williams. When Burnett ordered parts, if he could not go after them, Williams would deliver them to him. Burnett was a personal as well as business friend of Williams. Mercer asked Burnett to pick up the order and Burnett borrowed Mercer's Lincoln for the purpose. In the meantime Mercer was to work on Burnett's truck.

Prior to leaving the garage, Burnett learned that Williams was ill. He was on his way to see Williams first, before going on to Richmond Motors, when the accident occurred. Both Williams' home and Richmond Motors were in the same general direction. The scene of the accident was 14 blocks from Williams' home and 10 blocks from Richmond Motors. Burnett testified that Williams had been going to bring the parts out, and when he was told that he was sick, he said "I'll go down and see him about it." He took the parts order with him. He stated that his principal intention was to pick up the repair parts and that he would not have taken the Lincoln otherwise.

Burnett at the time of the accident had a "Comprehensive Bodily Injury and Property Damage Liability Policy" which indicated the insured's principal business as "Auto Repair Shop and Service Station". Endorsement No. 3 thereon insured Burnett for legal liability arising out of the ownership, maintenance or use of *any* automobile in connection with the operations of a repair shop and service station. The policy of respondent company covered Mercer for legal liability arising out of the ownership, maintenance or use of Mercer's personal automobile and the following coverage was excluded: "to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any accident arising out of the operation thereof."

Appellant contends that the "garage exclusion" in the policy which Mercer purchased from defendant and respondent company may not be applied in this case, and that the two policies must apply pro rata to Burnett's liability. It is conceded that Burnett was using Mercer's automobile with permission of the owner, hence the policy would cover Burnett's liability unless the exclusion is applicable to the factual situation here involved. The question presented, according to appellant is, therefore, whether the accident of June 2, 1953, arose out of

the operation of the garage or service station.

Appellant maintains that the exclusion may not apply to the facts herein, inasmuch as the purpose of the exclusion is to eliminate the risks involved in the handling and operation of cars by persons working in repair shops, public garages, service stations, parking lots, and the like. Such persons have permission to drive the insured's automobile, but he is often not acquainted with them nor does he know anything about their driving skill. It was pointed out in *Wendt v. Wallace*, 185 Minn. 189, 240 N.W. 470, that such an exclusion is a reasonable limitation, for the chance of accidents while the car is being driven by one of the excluded class is probably greater, and that such persons are usually covered by policies of their employers who pay premiums proportionate to the risks involved. Similar reasons were given in *Paine v. Finkler Motor Car Co.*, 220 Wis. 9, 264 N.W. 477, 479, for this type of exclusion.

In *Barry v. Sill*, 191 Minn. 71, 253 N.W. 14, it was held that where the insured gives permission to a friend to use his car for social purposes, the fact that the friend also happens to be a garageman is of no importance. There the driver of the borrowed car was a garage bookkeeper making a trip for his own pleasure after his regular working hours. He had been asked by a mechanic in the garage to pick up a spare part for a truck, and the employee said that he would do so if he had time. The court found that the trip was being made for the driver's own business, and that he was not in any sense acting as an agent or employee of the garage company. In *Stephanelli v. Yuhas*, 135 Pa.Super. 573, 7 A.2d 124, it was held that the garage keeper's exception did not apply where the person using the car with permission picked up repair parts for his own truck. In that case it was decided that the borrower of the automobile was not acting as the agent or employee of the garage-owner, whose wife's car he had borrowed, and that the verdict was supported, for the main purpose of the driver's trip was to secure his own pay check, and the court also noted that it could be considered

part of the truck driver's duties within the scope of his employment to expedite the repairs. The court in their opinion commented that it would be possible for a driver in such a situation to be the servant of both his regular employer and of the garage owner at the same time. But since in the case then before the court the car being used was that of a third party, the garage owner's wife, and there was abundant evidence to support a finding that the driver was under the control and direction of his employer at all times and had merely assumed to act for his employer in expediting the repairs to his truck, the decision was supported.

[1] It is further contended that the exclusion may not apply because Burnett was driving Mercer's car on a merely social call at the time of the accident. However, the evidence clearly supports a holding that the car was being used by the garage owner for a purpose connected with the garage business. It is true that he intended to stop first at the home of Williams, the parts salesman, who was ill and could therefore not make the delivery as he usually did. Burnett took the purchase order with him from the repair shop. He testified that he would not have borrowed the car if he did not have to get the parts. He had used the car for a similar purpose on previous occasions. The evidence therefore clearly supports the findings that Burnett had not departed from nor abandoned his purpose of obtaining the repair parts by driving toward Williams' home en route, and that at the time of the accident the automobile was being used in connection with the operation of the garage and repair shop. It is noteworthy that in cases concerned with an employee, a deviation from the strict course of duty does not necessarily put the employee outside the scope of his employment if his main purpose is still to carry on the employer's business. *Cain v. Marquez*, 31 Cal.App.2d 430, 88 P.2d 200; *Kruse v. White Bros.*, 81 Cal.App. 86, 253 P. 178. Here it surely cannot be said as a matter of law that the garage owner had departed completely from his business of operating the garage when he was on his way to see a

man with whom he usually transacted the phase of his business concerned with repair parts, merely because the salesman was also a personal friend and was ill that day.

It is therefore clear that Burnett was using the borrowed car at the time of the accident on a mission which arose out of the operation of a garage or repair shop. The insurance policy exclusion extends to any person operating such a shop "with respect to any accident arising out of the operation thereof." The exclusion clearly applies to the situation here involved if we are to hold that the language used therein is clear and unambiguous.

[2] It is true that as between the insurer and the assured, a policy is to be construed most strictly against the insurer if the language used in the policy is ambiguous. But, as said in *Wendt v. Wallace*, supra, a case cited by appellant, if the language is clear, it is the duty of the court to give it effect, and this duty cannot be ignored because of the fact that an insurance company is a party to the action. This rule is enunciated in *Carabelli v. Mountain States Life Insurance Co.*, 8 Cal.App.2d 115, 117, 46 P.2d 1004, 1006, where it is said that where "terms are plain and explicit, the courts cannot create a new contract for the parties by a forced construction of such plain and explicit terms. Thus the rule of liberal construction in favor of the insured can only have application when the policy presents some uncertainty or ambiguity."

Appellant does not really argue that there is an ambiguity in the policy, as he could not, for the meaning of the words excluding "any person * * * operating an automobile repair shop * * * with respect to any accident arising out of the operation thereof," are perfectly clear. (Emphasis ours.) He argues rather, that the *purpose* of the exclusion was to eliminate the class of risks involved in the driving of customers' cars by employees of public garages while those cars are being repaired, serviced or parked.

[3] However, if the language of the exclusion clearly extends to an incident of the type involved herein, the reasons of the

insurer for including the exclusion in the policy are immaterial. It was said in *Alberga, to Use of Colton v. Pennsylvania Indemnity Corporation*, 114 Pa.Super. 42, 173 A. 697, 699, that, "Whatever reason may have prompted the insertion of the exceptions is of no consequence if the business is included within the exceptions. The parties had a right to write their own contract, and it is not the function of this court to rewrite the same or to give any other construction thereto than implied from the plain language used." See, *Lumbermens Mut. Casualty Co. v. Indemnity Ins. Co.*, 186 Va. 204, 42 S.E.2d 298. The fact that in several cases the exclusion has been held reasonable in its application to the customer or patron relationship does not necessarily imply that the exclusion may only apply when the borrowed automobile is that of a customer of the garage operator. The exclusion does not require a customer relationship to exist in order that it apply, but only that the car be used by any one operating an automobile repair shop and that the accident arise out of the operation of such an establishment.

The activity of securing repair parts is part of the operation of a garage business. In *Wendt v. Wallace*, supra [185 Minn. 189, 240 N.W. 472], it is said that the word "operated" usually means the same as "to run a business; to carry on in the business to which the word is applied; to continue in operation or activity; to carry out or through; to work; to act; to conduct a business." That case went on to state that "the 'operation' of a public garage as here involved and as this term was used in this policy includes all the various activities which together constitute the carrying on of the business; and all the employees, as well as the manager, whether on the sales floor, soliciting prospects on the street, in the accounting department, in the repair shop, or delivering storage cars to the customer-owner, are all engaged in the 'operation' of the garage."

[4] Since it appears that the activity in which Burnett was engaged at the time the accident occurred fell within the terms of

the exclusion, the court's decision declaring Burnett's liability to be covered by the terms of appellants' policy and excluded under the terms of respondent's policy is therefore correct.

Judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.



135 Cal.App.2d 6

W. B. RODGERS, Mary M. Rodgers, James R. Millette, Gertrude A. Millette, Godfrey W. Rodgers, Clement A. Rodgers, Robert E. Rodgers, Mary E. O'Laughlin, formerly Mary E. Rodgers, Jennie Rodgers, William Rodgers, J. B. Lewis and Jackle Lewis, Plaintiffs, Cross-Defendants and Respondents,

v.

ROSEVILLE GOLD DREDGING CO., a corporation, et al., Defendants,

Carroll A. Leason, Defendant, Cross-Complainant and Appellant.

Civ. 8620.

District Court of Appeal, Third District,
California.

Aug. 12, 1955.

Quiet title action involving a common boundary dispute. The Superior Court, Placer County, Bertram D. Janes, J., rendered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Finley, J. pro tem., held that evidence sustained finding that location of demolished fence, which marked true boundary, was as contended by plaintiffs.

Judgment affirmed.

1. Boundaries ⇨40(1)

True location of survey of a tract of land is a question of fact.

2. Boundaries ⇨3(3)

In boundary disputes, monuments control over courses and distances. West's Ann.Code Civ.Proc. § 2077, subd. 2.

3. Boundaries ⇨5

Where circumstances warrant, fences may be considered as "monuments".

See publication Words and Phrases, for other judicial constructions and definitions of "Monuments".

4. Boundaries ⇨37(3)

In quiet title action involving a common boundary dispute, evidence sustained finding that location of demolished fence, which marked true boundary, was as contended by plaintiffs. West's Ann.Code Civ.Proc. § 325.

5. Courts ⇨104

It is not province of reviewing court to present a detailed argument on sufficiency of evidence to support findings where it appears that question is one purely of determining which side shall be believed, and where trial court has determined this with witnesses before it, controversy is settled.

H. D. Jerrett, Sacramento, for appellant.
F. H. Bowers, Roseville, for respondents.

FINLEY, Justice pro tem.

This is an appeal from the judgment in a quiet title action involving a common boundary dispute. Judgment was in favor of plaintiffs, quieting their title to the disputed area and fixing the boundary according to a survey which their evidence showed was designed to follow the line of a previously existing fence between the properties, which fence was obliterated when the property was dredged for gold.

These adjoining properties lie immediately north of the old Auburn-Sacramento road in Placer County. It is admitted that for many years prior to 1934 the two parcels were separated by a wire fence which commenced at the southwest edge of the Auburn-Sacramento road and extended approximately 1,400 feet therefrom in a northwesterly direction. Likewise it is undisputed that said fence was obliterated

in 1934 when the property was dredged for gold. However appellant denies that the true eastern boundary line of his property was marked by the former fence, or that it was located where claimed by respondents.

Appellant urges these points for reversal in his opening brief:

"1. The plaintiffs did not establish a title in themselves to the premises in controversy (Parcel 2) superior to that of the defendant Leason.

"2. That the boundary lines in Parcel 2 having a bearing N. 37 10'W, and a distance of 1396.02 feet, and of N.01 22½'E. a distance of 1386.8 feet, have not been properly identified by the plaintiffs as the true lines between the contiguous lands of the Plaintiffs and the Defendant Leason.

"3. There was not substantial evidence in the case sufficient to support the Findings and Decree that the Plaintiffs acquired title to the land in controversy by adverse possession.

"4. That the Decree Quietening Title in the Plaintiffs is against law."

It is obvious that each point urged depends for its validity, if any, upon the sufficiency of the evidence to support the trial court's finding and judgment. Appellant points to no errors or irregularities in the proceedings of the trial court, nor is prejudice claimed by reason of any rulings made in admitting or excluding evidence. Under the heading, "Introduction to the Argument," in appellant's opening brief appears this statement:

"The record as well as the evidence show no occupancy and possession by the plaintiffs of the lands in controversy under Parcel 2. Neither does the evidence produced determine and establish, on the part of the plaintiffs, the true boundary lines disputed by the action of the plaintiffs."

It seems quite plain that the question of "occupancy and possession" in this case would depend upon whether the land claimed by respondents and to which the decree quieted their title lay on respondents' side of the line marked by the obliterated wire fence. The essential claim to oc-

cupancy and possession made by them is that they occupied and possessed the land because it did lie within the enclosure or on their side of the fence, or at least the long-accepted line delineated by the original presence of the fence. Code of Civil Procedure, sec. 325. See also Posey v. Bay Point Realty Co., 214 Cal. 708, 7 P.2d 1020, and cases therein cited.

The obvious crux of the entire controversy then is the location of the demolished fence, which we hold the trial court justifiably accepted as marking the true boundary.

Respondents testified that the southeast end of said fence was attached to an old oak tree near the northwest edge of the Auburn-Sacramento road, and was directly across from and in a straight line with a presently standing fence which extends to the southeast. Mr. Packard, a civil engineer who made the survey and prepared the plat upon which the description of respondents' property is based, testified that he established the disputed western boundary thereof by starting at the stump of the old oak tree and projecting therefrom to the northwest a line which, if extended across the Auburn-Sacramento road, would coincide with the fence which runs therefrom in a southeast direction. He further testified that he found remnants of a fence at both extremities of said line, but that all other evidence thereof had been removed and obliterated. Mr. Packard testified that preparatory to making his survey, he studied old abstracts and the field notes of the land office in order to place the section corners, the markers of which had disappeared. The results of his work differed slightly from that of Mr. Andregg who was produced as an expert witness by appellant, but we are not concerned with the relative accuracy of their surveys. Appellant's complaint seems to be directed more to a lack of proper identification of the property to which respondents' title was quieted rather than to the methods employed by Mr. Packard. Appellant states in his brief that, "The controlling question in the case is, were the premises in controversy properly and sufficiently identified as the premises described in the com-

plaint of the Plaintiffs, or prior written grant or record." It is true that the description of respondents' property in the complaint and judgment herein is not identical with that contained in a prior quiet title decree or in certain deeds in the chain of title. However, although Mr. Packard referred to, and quoted from, said documents, none were introduced in evidence and no plea of *res adjudicata* was interposed. The description of respondents' property in the complaint and judgment herein is based on the plat prepared by Mr. Packard which was introduced in evidence, and which he testified depicted the result of his survey. Such identification of respondents' property was sufficient. It was not necessary that the description thereof be established by "prior written grant or record." The decree is based on a finding of adverse possession for which there is sufficient evidentiary support. There is no merit in appellant's contention to the contrary.

Respondents testified that prior to the dredging operations in 1934 their pear orchard had extended up to the old fence and that buildings, since destroyed, stood approximately 30 to 50 feet west thereof. They further testified that since 1907 they had occupied and paid taxes on the property extending up to the former fence. Since said fence was used by Mr. Packard as the basis for the description herein of the western boundary of respondents' property, it is clear that the evidence amply supports the trial court's finding as to adverse possession.

[1-3] The true location of the survey of a tract of land is a question of fact. *Miller v. Doheny*, 50 Cal.App. 413, 195 P. 745. It is an old and well established principle that in boundary disputes monuments control over courses and distances. Code of Civil Procedure, sec. 2077, subd. 2; *Phelps v. Pacific Gas & Elec. Co.*, 84 Cal.App.2d 243, 190 P.2d 209; *Cords v. Goodwin*, 173 Cal. 61, 159 P. 138; *Howard v. Cunningham*, 36 Cal.App. 229; 171 P. 976; *Golden v. City of Vallejo*, 41 Cal. App. 113, 182 P. 347; *Weaver v. Howatt*, 161 Cal. 77. 118 P. 519; *Hunt v. Barker*,

27 Cal.App. 776, 151 P. 165. Where circumstances have seemed to warrant, fences have been considered as monuments as will appear from the following language in *Keiper v. Dunn*, 207 Cal. 643, 647, 279 P. 772, 774, quoting with approval from *Perich v. Maurer*, 29 Cal.App. 293, 155 P. 471:

"The fence itself is a monument, visible and obtrusive, which has existed for forty years or more, that under the peculiar circumstances of this case is quite persuasive in favor of the claim of defendants. It is a fair presumption that this fence was originally placed upon the true line as then recognized and understood, and it is proper to assume, in the absence of evidence to the contrary, that when the fence was built, either that the contiguous owners had knowledge and information of the lines of the Sutter survey and acted accordingly, or that the true line was uncertain and by agreement it was fixed and marked by said fence. It is not surprising that this fence seemed so important to Boyd [a licensed surveyor] and to the trial judge. Its existence for so many years, the recognition accorded it as the true boundary, the acquiescence of the respective owners in the location and the improvements made accordingly, were rightfully regarded as important, if not decisive, considerations in the determination of a line otherwise obscure and uncertain."

See also *De Escobar v. Isom*, 112 Cal.App. 2d 172, 245 P.2d 1105; *Hannah v. Pogue*, 23 Cal.2d 849, 856, 147 P.2d 572; and *Togni v. Slocomb*, 12 Cal.App. 733, 108 P. 723.

[4] As we have pointed out above, the location of the survey of a tract of land is a question of fact. The trial court, upon conflicting evidence, found in favor of respondent. We are satisfied that the findings and decision are amply supported by competent and legally sufficient evidence, and beyond this we are not required to go. *Risley v. Lenwell*, 129 Cal.App.2d 608, 625, 277 P.2d 897; *Crawford v. Southern Pac. Co.*, 3 Cal.2d 427, 45 P.2d 183; and *Estate of Bristol*, 23 Cal.2d 221, 143 P.2d 689.

[5] As was said in *Sonkin v. Hershon*, 130 Cal.App.2d 491, 279 P.2d 156, 157:

"It is not the province of a reviewing court to present a detailed argument on the sufficiency of the evidence to support the findings where it appears that the question is one purely of determining which side shall be believed. The trial court having determined this with the witnesses before it, the controversy is settled."

The judgment is affirmed.

SCHOTTKY, J., concurs.



134 Cal.App.2d 819

Edna GOHDES, Plaintiff and Respondent,

v.

Henry L. GOHDES, Defendant and Appellant.

Civ. 5114.

District Court of Appeal, Fourth District,
California.

Aug. 4, 1955.

Proceeding by wife under the Reciprocal Enforcement of Support Act. From decree of the Superior Court, San Diego County, L. L. Turrentine, J., requiring husband to make monthly payments for support of wife, the husband appealed. The District Court of Appeal, Shell, J. pro tem., held that support decree entered by Ohio court, which had jurisdiction over person of husband, could not be terminated by Florida court in divorce proceeding instituted by husband upon substituted service, and therefore Superior Court of California had jurisdiction, based on personal service of process upon husband, to make a reasonable order for support of former wife.

Judgment affirmed.

Divorce ⇨393(2)

Husband and Wife ⇨308

Support decree entered by Ohio court, which had jurisdiction over person of husband, could not be terminated by Florida Court in divorce proceeding instituted by husband upon substituted service, and therefore Superior Court of California had jurisdiction, based on personal service of process upon husband, to make a reasonable order for support of former wife in a proceeding under the Reciprocal Enforcement of Support Act. Gen. Code Ohio, §§ 11997-11999; R.C. Ohio, §§ 3115.01 to 3115.15; West's Ann.Code Civ.Proc. §§ 1650-1690.

Swing, Scharnikow & Staniforth, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., and Victor Griffith, Deputy Atty. Gen., for respondent.

SHELL, Justice pro tem.

Appellant herein was the defendant and respondent was the plaintiff in a proceeding under the California Reciprocal Enforcement of Support Act in the Superior Court of San Diego county. Appellant appeals from the decree of that court requiring him to make monthly payments for the support of respondent.

This appeal presents no controversy as to the facts established by the record, which are as follows:

Respondent and appellant were married at Delaware, Ohio, on June 17, 1914. Three children were born of that marriage, each of whom had reached the age of majority before January 7, 1942, on which date, in a divorce proceeding initiated by appellant, the Licking County Court of Common Pleas at Newark, Ohio, denied a divorce, but by decree ordered appellant to pay to respondent \$60.60 per month for her support. This order for alimony without divorce is provided for by the Ohio statutes, Ohio Gen. Code, secs. 11997-11999, and is, in effect, comparable to our decree of separate maintenance. On September 28, 1944, the Circuit Court of Dade County, Florida,

made its decree of final divorce in an action instituted there by appellant, dissolving the marriage theretofore existing between the parties, which decree made no provision for the support of the wife. Service in that divorce action was by publication of process.

Respondent filed a petition for support under the Uniform Reciprocal Support Act of Ohio, R.C. Ohio, §§ 3115.01 to 3115.15, in the Court of Common Pleas of Franklin County, Ohio, and on April 28, 1954, that court made its findings that since November 11, 1944, appellant had failed to contribute to the support of respondent; that she is unable to work; that she is in need of the sum of \$60 per month for her support; that the residence of appellant is at or near Escondido, San Diego county, California.

Under the provisions of the California Uniform Reciprocal Enforcement of Support Act, Code Civ.Proc. §§ 1650-1690, a proceeding was thereafter filed in the Superior Court of the State of California, County of San Diego, and hearing was had on July 8, 1954. The appellant was present, was sworn and examined at said hearing, and was represented by his present counsel. He testified that he now receives \$200 per month net pay. At the conclusion of this hearing the trial court, by decree, ordered him to pay \$16 per month for the support of his former wife. This decree was entered July 22, 1954.

At the hearing on July 8, 1954, and upon this appeal, appellant urges that the duty of a husband to support his wife is entirely dependent upon the continued existence of the marital status and that therefore his obligation for the support of his former wife was finally terminated by the Florida decree of divorce.

The appellant relies largely upon the case of *Dimon v. Dimon*, 40 Cal.2d 516, 254 P.2d 528. That case did not involve facts which are at all analogous to the facts in the case here on appeal. In the *Dimon* case the wife was the actor in obtaining a divorce

decree in Connecticut on constructive service and the court pointed out that she had an election to seek a divorce without alimony, on constructive service in Connecticut, or to seek a divorce in a jurisdiction where personal service on her husband might be obtained, or of proceeding in a jurisdiction where awards of alimony subsequent to the decree are authorized; that having made such election, the wife could not in California later obtain an award of support for herself. The *Dimon* case further points out that the Reciprocal Enforcement of Support Act did not become effective until after the *Dimon* action was commenced, and that no claim was then being made that it came within the provisions of that act.

We believe that the contentions of the appellant here are completely answered by the Supreme Court of California in *Worthley v. Worthley*, 44 Cal.2d 465, 468, 283 P.2d 19, 21, in which the court says:

"We must therefore conclude that defendant's obligations under the New Jersey decree were not terminated by the dissolution of the marriage effected by the Nevada court in a proceeding in which personal jurisdiction over plaintiff was not obtained."

In the case here on appeal we point out that the decree of January 7, 1942, of the Ohio court, awarding the wife \$60.60 per month support was made by a court having jurisdiction over the person of the husband; that under the *Worthley* case, *supra*, this order could not be terminated by a court of another jurisdiction upon substituted service, and that the Superior Court of California therefore had jurisdiction, based on personal service of process upon the husband, to make a reasonable order for support of the former wife in a proceeding under the California Reciprocal Enforcement of Support law.

The judgment appealed from is affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.

134 Cal.App.2d 765

John W. HAYDEN and Olivette Y. Hayden,
Plaintiffs and Respondents,

v.

Walter I. HATCH and Edna B. Hatch,
Defendants and Appellants.

Civ. 8593.

District Court of Appeal, Third District,
California.

Aug. 2, 1955.

Rehearing Denied Sept. 1, 1955.

Action to rescind contract. The Superior Court, Sacramento County, J. O. Moncur, J., entered judgment for plaintiffs and defendants appealed. The District Court of Appeal, Finley, J. pro tem., held that evidence was sufficient to support trial court's finding, on question of laches, that there was sufficient factual justification for plaintiffs' delay in bringing their action.

Judgment affirmed.

1. Appeal and Error ⇨110, 870(6)

That portion of appeal from judgment for plaintiffs in action to rescind contract, which purported to be from order denying defendants' motion for new trial, would be dismissed, but court's ruling on such motion was reviewable on appeal from judgment. West's Ann.Code Civ.Proc. §§ 956, 963.

2. Appeal and Error ⇨989

Where sufficiency of evidence is question, province and duty of Appellate Court begins and ends with determination that there is in record evidence legally sufficient to support findings and judgment.

3. Appeal and Error ⇨930(1)

In reviewing evidence on appeal, all conflicts must be resolved in favor of respondent, and all legitimate and reasonable inferences indulged in to uphold verdict if possible.

4. Appeal and Error ⇨989

When verdict is attacked as being unsupported, power of Appellate Court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury.

5. Appeal and Error ⇨996

Where two or more inferences can be reasonably deduced from facts, reviewing court is without power to substitute its deductions for those of trial court.

6. Courts ⇨104

It is not province of reviewing court to present detailed argument of sufficiency of evidence to support judgment, where it appears that question is one purely of determining which side shall be believed, and trial court having determined this with witnesses before it, controversy is settled.

7. Courts ⇨104

Where appellant has failed to show that trial court was wrong, it is not incumbent upon reviewing court to engage in dissertation upon law for purpose of demonstrating that court was right.

8. Cancellation of Instruments ⇨47

In action to rescind contract, evidence was sufficient to support trial court's finding, on question of laches, that there was sufficient factual justification for plaintiffs' delay in bringing their action.

Desmond, Miller & Artz, Sacramento, for appellants.

Busick & Busick, Sacramento, for respondents.

FINLEY, Justice pro tem.

This is an appeal from a money judgment in favor of plaintiffs-respondents and against defendants-appellants in the sum of \$3,000 plus interest for damages based upon a finding by the court that respondents were entitled to rescission of a contract for purchase from appellants of the right to manufacture and sell a "bust pad" with the trade name of "Hatch Contourette."

[1] The appeal also purports to be from the order denying appellants' motion for a new trial. Since there is no appeal from an order denying a motion for a new trial in a civil action, this portion of the appeal will be dismissed. Code of Civil Procedure, § 963. The court's ruling on the motion is, however, reviewable on appeal from the judgment. Code of Civil Procedure, § 956.

Appellants do not set out in so many words the points urged for reversal, but their argument is to the effect that the evidence is insufficient to justify the findings and judgment, and that appellants were guilty of laches and thereby forfeited any right to rescind.

The record consists of over 400 pages of testimony. Appellants have devoted much time and space in their brief to summarizing most of it and in reproducing portions thereof verbatim. They have not pointed out any manner in which the trial court committed prejudicial error in the conduct of the trial in admitting or excluding evidence or in applying rules of law to the findings made. The sum and substance of their argument is that in view of the evidence most favorable to appellants, the trial court should have arrived at a different conclusion.

[2-5] It seems strange indeed that, in view of the numberless and constantly recurring pronouncements by appellate courts that they cannot invade the province of the jury or trial judge, litigants still persist in appealing cases on the ground that the trier of fact believed the wrong witnesses and relied upon the wrong evidence. The statement has become almost classical that where sufficiency of the evidence is questioned, the province and duty of an appellate court begins and ends with a determination that there is in the record evidence legally sufficient to support the findings and judgment. As is pointed out in *Risley v. Lenwell*, 129 Cal.App.2d 608, at page 625, 277 P.2d 897, at page 909, the rule is aptly stated in *Crawford v. Southern Pac. Co.*, 3 Cal.2d 427, at page 429, 45 P.2d 183, at page 184, as follows:

"In reviewing the evidence on such an appeal, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontra-

dicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.'

"In discussing the rule it is said in *Re Estate of Bristol*, 23 Cal.2d 221, at page 223, 143 P.2d 689, at page 690:

"* * * The critical word in the definition is "*substantial*"; it is a door which can lead as readily to abuse as to practical or enlightened justice. It is common knowledge among judges and lawyers that many cases are determined to the entire satisfaction of trial judges or juries, on their factual issues, by evidence which is overwhelming in its persuasiveness but which may appear relatively unsubstantial—if it can be reflected at all—in a phonographic record. Appellate courts, therefore, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding; and in searching the record and exploring the inferences which may arise from what is found there, to discover, whether such doubt or conflict exists, the court should be realistic and practical.'"

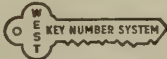
[6, 7] Appellants here have not pointed out any particular instance wherein the evidence in this case fails to meet this test, but, as stated, have merely argued that the evidence produced in their behalf is sufficient to have supported findings and judgment in their favor. In this contention they are undoubtedly correct, and had the trial court found in their favor the findings and judgment would have rested on what appears from the record to be firm footing. But the trial judge was in position to determine the credibility of the witnesses, and as is apparent from the findings and judgment, chose to place his credence in respondents' testimony and the evidence produced by them. With his conclusion we do not, and could not, legally disagree. Furthermore, "It is not the province of a reviewing court to present * * * a detailed argument on the sufficiency of the evidence to support the judgment, where it appears that the ques-

tion is one purely of determining which side shall be believed. The trial court having determined this with the witnesses before it, the controversy is settled."'" Gillespie v. Gillespie, 121 Cal.App.2d 95, 97, 262 P.2d 607, 608; De Freitas v. De Freitas, 133 Cal. App.2d —, 285 P.2d 111. And further, "Where an appellant has failed to show that the trial court was wrong it is not incumbent upon a reviewing court to engage in a dissertation upon the law for the purpose of demonstrating that the court was right." In re Estate of Phelps, 132 Cal.App.2d 850, 283 P.2d 293, 295.

[8] On the question of laches the trial court unquestionably determined that there was sufficient factual justification for respondents' delay in bringing their action to rescind. We find nothing in the record which would constitute a compelling legal mandate to the contrary.

The judgment is affirmed.

SCHOTTKY, J., concurs.



134 Cal.App.2d 589

Donald L. ROZELLE, Plaintiff and
Appellant,

v.

Elmer GUNN, Harriett L. Gunn, John V. Goselin, Jay Frederick, Sally Frederick, Leola M. Law, Dale H. Robinson, Martie L. Robinson, John Doe, Richard Roe, Jane Doe, Mary Roe, Doe and Roe, a co-partnership and Doe One, a corporation, Defendants,

Jay Frederick and Sally Frederick,
Respondents.

Civ. 20988.

District Court of Appeal, Second District,
Division 1, California.

July 27, 1955.

Rehearing Denied Aug. 16, 1955.

Hearing Denied Sept. 21, 1955.

Action to quiet title to realty. The
Superior Court of Los Angeles County,

John J. Ford, J., found that plaintiff was owner of realty except for certain portion found to be owned by defendants and entered judgment accordingly. Plaintiff appealed. The District Court of Appeal, Dorian, J., held that questions of forgery, nondelivery, and invalidity of conveyances to defendant were questions of fact to be resolved by trial court and there was substantial evidence to support findings of trial court.

Affirmed.

1. Appeal and Error ⇐1010(1)

An appellant who charges that the evidence is not sufficient to sustain the trial court's determination must demonstrate that there is no substantial evidence to support the challenged findings.

2. Appeal and Error ⇐931(1), 995

Conflicts in the evidence will be construed as favorably as possible in support of findings and unless it clearly appears that upon no hypothesis whatever is there substantial evidence to support a finding of the trier of fact, it cannot be set aside on appeal.

3. Quietling Title ⇐10(1)

Plaintiff in action to quiet title must recover upon the strength of his own title and not upon the weakness of the defendant's claim.

4. Appeal and Error ⇐991

Questions of forgery, nondelivery invalidity of conveyances to defendants in action to quiet title to realty were questions of fact to be resolved by trial court.

5. Forgery ⇐8

Fact that vendor took and conveyed property in an assumed name, that of a brother, would not necessarily amount to forgery or affect legality of the documents.

6. Quietling Title ⇐44(4)

In action to quiet title to realty, evidence was sufficient to support findings of trial court that plaintiff was owner of realty except for a certain portion found to be owned by defendants.

Donald L. Rozelle, in pro. per.

Guerin & Guerin, John J. Guerin, Los Angeles, for respondents.

DORAN, Justice.

The complaint herein seeks to quiet title to certain real estate described as Lot 13 in Palmdale Colony Lands, with the exception of 3.94 acres not involved in this appeal. The land was purchased by plaintiff Rozelle from the State of California on August 20, 1945. A trial without jury resulted in findings that plaintiff was the owner of the described property "except the southwest quarter of said Lot 13", which latter portion was found to be owned by the defendants Jay Fredericks and wife. Judgment was entered quieting title accordingly. Plaintiff now appeals from that portion of the judgment which quiets title in the respondents Fredericks to the southwest quarter of Lot 13.

The record discloses certain recorded conveyances constituting a chain of title under which respondents claim, and attacked by appellant as being invalid:

March 24, 1951. Grant deed from appellant Rozelle to W. H. Morris, covering Lot 13 as described in the complaint.

April 3, 1951. Grant deed from W. H. Morris and wife to Elmer Gunn and wife, conveying an undivided one-half interest in Lot 13.

June 2, 1951. Quitclaim deed from Elmer Gunn and wife to W. H. Morris and wife, of an undivided one-half interest in the Southwest Quarter of Lot 13.

October 15, 1951. Grant deed from W. H. Morris and wife to John V. Gosselin, of the Southwest Quarter of Lot 13.

October 15, 1951. Grant deed from John V. Gosselin to respondents Jay Frederick and wife, of the Southwest Quarter of Lot 13.

In respect to the deed of March 24, 1951 from Rozelle to Morris, mentioned above, appellant's brief recites that after making an agreement to sell the property to Morris, "Appellant commenced an action for rescission against said W. H.

Morris et al., on April 9, 1952 (Rozelle v. Morris, Sup.Ct. No. 597877) for breach of said agreement. On July 20, 1952, appellant and said W. H. Morris agreed to completely cancel and rescind their agreement of March 23, 1951 by the return of money and notes by appellant and by the delivery of the deed by said W. H. Morris to appellant conveying all the said land back to appellant and by both parties stipulating to dismiss said action". About September 1, 1952, appellant received a notice of foreclosure on the land, and then learned that the defendants herein claimed some interest, whereupon the present action was filed.

It is appellant's contention that the evidence is insufficient to support the findings in respondents' favor. In respect to this claim appellant says that "The only evidence of any document showing a severance of the Southwest Quarter of Lot 13 from the entire property prior to September 19, 1951 was a deed *form* signed by Elmer Gunn and his wife which did not bear the name of any grantee or the description of any property and was not acknowledged", citing Mr. Gunn's testimony to the effect that when signed, this deed was a mere blank form. In like manner appellant points to certain testimony that one Charles J. Gosselin signed the name of a brother, John V. Gosselin, on the deed of October 15, 1951 to the respondents Frederick, and avers that since the deed was "forged", no title could be conveyed thereby. It is also claimed that John V. Gosselin never appeared before the notary whose certificate appears on the conveyance.

[1,2] The rule is well settled that an appellate who charges that the evidence is not sufficient to sustain the trial court's determination must demonstrate that there is no substantial evidence to support the challenged findings. *Richards v. Plumbe*, 116 Cal.App.2d 132, 253 P.2d 126. Conflicts in the evidence will be construed as favorably as possible in support of the findings, and as said in *Murphy v. Ablow*, 123 Cal.App.2d 853, 858, 268 P.2d 80, 83, "Unless it clearly appears that upon no hypothesis whatever is there substantial

evidence to support a finding of the trier of fact, it cannot be set aside on appeal."

Applying these rules to the present case, it is apparent that the appellant has not demonstrated that there is no substantial evidence in support of the findings. As pointed out in respondents' brief, the record discloses three conveyances, duly recorded, which ultimately vest title to the southwest quarter of Lot 13 in the respondents Frederick. The situation is not basically different from that set forth in *Willis v. Holback*, 33 Cal.App.2d 145, 147, 91 P.2d 140, 141, where the court said: "Defendant's title was deraigned through deeds which appeared to be entirely regular and they were all duly recorded. All presumptions were in favor of the validity of said deeds. * * * The most that can be said is that the evidence of Katherine Girard was in conflict with said presumptions but said presumptions remained as evidence and were sufficient to support the findings even though the evidence of said Katherine Girard may have been contradicted by other direct evidence."

Moreover, as respondents aver, "even if the documents were forgeries, the effect of applying the rules of law to forged instruments would not result in the conclusion that the appellant was the owner of the southwest quarter. * * * Assuming the deed from Gunn to Morris was a forgery, the title to an undivided one-half interest in the southwest quarter would be in Gunn, and assuming that the deed from John V. Gosselin to respondents was a forgery, the title to the other undivided one-half interest would be in John V. Gosselin. Such clearly does not show title in the appellant * * *".

[3-5] All of which calls to mind the long established rule clearly applicable in the instant case, that the plaintiff, in an

action to quiet title, "must recover upon the strength of his own title and not upon the weakness of the defendant's claim." *Tanner v. Title Ins. & Trust Co.*, 20 Cal. 2d 814, 824, 129 P.2d 383, 389. The trial court in the present case heard the evidence and contentions of the parties, and came to the conclusion that the plaintiff had not sustained the burden of proving title to the southwest quarter of Lot 13. This, like the questions of forgery, non-delivery and invalidity of the conveyances, was a question of fact to be resolved by the trial court. Incidentally, it may be said that although Charles J. Gosselin took and conveyed the property in an assumed name, that of a brother, John V. Gosselin, this fact would not necessarily amount to forgery or affect the legality of the documents.

[6] Appellant's contentions were reconsidered by the trial court on motion for a new trial, which motion was denied. Notwithstanding the fact that appellant is able to point out certain testimony tending to support the contentions made, this in no wise alters the rule that where the record discloses any substantial evidence in support of the findings, the trial court's decision must be sustained. That there is such evidence in the instant case cannot be doubted.

No reversible error either in the admission of the alleged forged instruments or in respect to any other matter connected with the trial, can be discovered. Nor can it be said that the trial court disregarded any testimony or otherwise deprived the appellant from having a fair and impartial trial.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

134 Cal.App.2d 452

Marla MEDEIROS, Plaintiff and Appellant,
v.

Mamie P. COTTA, as Special Administratrix of the Estate of Manuel Medeiros, deceased, Bank of Newman, a corporation, and Bank of America National Trust and Savings Association, a National Banking Association, Defendants and Respondents.

BANK OF NEWMAN, a corporation, Cross-Complainant and Respondent,
v.

Marla MEDEIROS, Cross-Defendant and Appellant,
and

Mamie P. Cotta, as Special Administratrix of the Estate of Manuel Medeiros, Deceased, John F. Medeiros, as Executor of the Estate of Manuel Medeiros, Deceased, Mamie P. Cotta, John F. Medeiros, Manuel Medeiros, Jr., and Annie Silva, Cross-Defendants.

Mamie P. COTTA, as Special Administratrix of the Estate of Manuel Medeiros, Deceased, Cross-Complainant and Respondent,
v.

Marla MEDEIROS, Cross-Defendant and Appellant.
Civ. 8578.

District Court of Appeal, Third District,
California.

July 20, 1955.

Rehearing Denied Aug. 17, 1955.

Widow's action against bank, executor of deceased's estate and others to establish her right as surviving joint tenant of deceased's bank account. The Superior Court, Stanislaus County, B. C. Hawkins, J., rendered judgment against widow and widow appealed. The District Court of Appeal, Van Dyke, P. J., held that where deceased had bank strike out name of his son as joint tenant with him on savings account and substitute his wife's name therefor, but upon deceased's death bank turned account over to special administratrix of his estate, wife as surviving joint tenant was entitled to a money judgment against bank for balance of account on date of deceased's death.

Reversed and remanded.

1. Joint Tenancy ⚡3

Statute respecting joint bank deposits creates a presumption that a deposit in the names of depositor and another person "in form to be paid to" either or the survivor of them becomes the property of such persons as joint tenants, but such presumption is not conclusive and may be overcome by proof that owner-depositor when making deposit had no intention to create a true joint tenancy. West's Ann.Financial Code, § 852.

2. Joint Tenancy ⚡3

Statute providing that bank deposits in the name of the depositor and another payable to either or survivor becomes property of such persons as joint tenants creates a conclusive presumption that in absence of fraud or undue influence it was intention of depositors to vest title in the survivor. West's Ann.Financial Code, § 852.

3. Joint Tenancy ⚡3

Conclusive presumption that depositor when making deposit in name of himself and another payable to either or survivor intended to vest title in survivor is applicable only in favor of a survivor and only as to money still remaining in account at time of death. West's Ann.Financial Code, § 852.

4. Joint Tenancy ⚡3

Statute respecting effect of placing bank deposit in name of two persons payable to either or survivor, by its term becomes a part of contract between bank and depositors of such an account. West's Ann. Financial Code, § 852.

5. Joint Tenancy ⚡8

Where depositor placed account in name of himself and his son, either he or his son at any time during the lifetime of both could withdraw a part or whole of the balance. West's Ann.Financial Code, § 852.

6. Joint Tenancy ⚡8

Where one depositor withdraws the whole or any part of joint bank deposit in which other depositor has a real interest, the other depositor may follow the fund and protect his interest.

7. Banks and Banking ⇨133**Husband and Wife** ⇨14(3)

Where deceased created bank deposit, had his son's name added thereto and later had bank strike his son's name and substitute his wife's, upon deceased's death wife became the sole owner as surviving joint tenant of the balance in such account, and bank's payment of balance of account to special administratrix of deceased's estate was without authority and in violation of bank's contractual duty to wife. West's Ann.Financial Code, § 852.

8. Estoppel ⇨110**Pleading** ⇨78

Where complaint alleges no facts from which either estoppel or laches could be inferred, one who relies upon estoppel or laches as a defense must plead facts constituting such estoppel or laches.

9. Banks and Banking ⇨154(1)

Even though the surviving joint tenant of a bank deposit knows of the bank's wrongful payment of the balance thereof to the deceased's depositor's estate, surviving joint tenant may ignore unauthorized disbursement and hold bank to its contractual obligation by an action brought at any time within statute of limitations.

John H. Machado, San Jose, for appellant.

Francis Halley of Zeff & Halley, Modesto, for respondent Cotta.

George G. Murry, Gustine, for respondent Bank of Newman.

VAN DYKE, Presiding Justice.

While plaintiff and appellant Maria Medeiros and Manuel Medeiros, now deceased, were husband and wife, Manuel, on October 29, 1940, opened a savings account in the Bank of Newman, defendant and respondent. This account stood solely in the name of Manuel. Shortly thereafter Manuel requested that the name of his son John be added to the account. He supplied a signature card signed by himself and John, which contained substantially the contract referred to in Section 852 of the Finance Code. At all times material herein

that statute stated that when a deposit is made in a bank by a person in the name of such depositor and another person and in form to be paid to either or the survivor, the deposit and any additions thereto become the property of such persons as joint tenants; and that the making of the deposit in that form, in the absence of fraud or undue influence, is conclusive evidence in any action or proceeding, to which either such bank or the surviving depositor is a party, of the intention of the depositors to vest title to the deposit and the additions thereto in such survivor. No new account in form was opened at the time John's name was added to the account and no new number was assigned to it. During 1945 Manuel again went to the bank and orally requested an official thereof to strike the name of John from the records of the account and to substitute therefor the name of his wife Maria. This was done and a new signature card signed by Manuel and Maria was filed in the bank, containing in substance the same matter contained in the first signature card. Again no new number was given to the account and no new account in form was set up in the records of the bank. However, as to both transactions an official of the bank testified as follows: Since the first deposit by Manuel the bank had had only one account on its records; upon Manuel's request that John's name be entered on the account and upon receipt of the signature card signed by Manuel and John they had made the requested changes; they had taken John's name off at the request of Manuel and had put Maria's name on in its place when they had received the signature card of Manuel and Maria; the second transaction was supposed to have canceled out the first; the second joint signature card canceled out the first and the method followed was the way they generally handled such transactions in the bank. Manuel died on March 20, 1949. He was survived by Maria, his widow, and by two daughters and two sons by a former wife. On June 4, 1949 his daughter, Mamie Cotta, was appointed special administratrix of his estate. A few days after her letters were granted she went to

the bank and at her request the bank turned over to her the sum of \$5,000, that sum being the balance in the account when Manuel died. She placed the money in her account as administratrix. Shortly thereafter she expended a considerable amount of the money in the payment of funeral expenses and the like. Manuel's will was admitted to probate August 17, 1950, letters being granted to John. Mamie filed her final account as special administratrix which was settled August 21, 1950, and under the order of the court she turned over to John, as executor, all moneys then in her hands, including what remained of the money she had obtained from the bank. On August 14, 1950, plaintiff and appellant filed this action against the bank and Mamie, as special administratrix, asking that she be decreed to have been the owner, as survivor, of the balance on hand in the bank account at the time of Manuel's death and that she have judgment against the bank for said sum, together with interest from the date of death. She alleged Mamie, as administratrix, claimed some interest for the estate of Manuel and asked judgment that such interest did not exist.

As to the transaction whereby the name of Maria was added to the account and the name of John was stricken off, the court found: "that there was a transfer of the joint tenancy bank account between Manuel Medeiros, deceased, and John F. Medeiros to a joint tenancy bank account between plaintiff and Manuel Medeiros, deceased, which was legal although not in accordance with the usual procedure. That the [savings account] provisions requiring an agreement in writing and the presentation of the passbook were for the protection of the Bank of Newman and probably were waived when an officer of the Bank of Newman 'short-cut' the procedure, and, with the consent and direction of Manuel Medeiros, simply accomplished the ultimate result by striking out the name of John F. Medeiros and substituting the name of Maria Medeiros, the plaintiff herein." Nevertheless, the court found: "That it is not true that upon the death of Manuel Medeiros the plaintiff, Maria Medeiros,

became the sole owner of said money on deposit in said account"; that Maria had no interest in the money on deposit at the date of Manuel's death except such interest as she received under Manuel's will, which interest, a devise to her of decedent's bank accounts, was subject to the payment therefrom of debts, expenses of last illness and probate costs as paid therefrom by Mamie as special administratrix. The remainder had, so the court found, been ordered paid to appellant on final distribution of the estate of Manuel. The court concluded that in this action Maria could take nothing and further that she was estopped from recovering anything; that she had been guilty of laches for failure to prosecute this action within a reasonable time. Judgment accordingly was so entered and Maria appeals.

[1-7] The legislation referred to, as it existed when the transactions here in question occurred has been construed by the courts of this state as setting up two presumptions: First, that a deposit in the names of the depositor and another person "in form to be paid to" either or the survivor of them becomes the property of such persons as joint tenants. This presumption is not conclusive and may be overcome by proof that the owner depositor when making the deposit had no intention to create a true joint tenancy. The second presumption, that in the absence of fraud or undue influence it was the intention of the depositors to vest title in the survivor, is, however, conclusive. In order that the conclusive presumption may be applicable there must be a survivor, and even then the presumption applies only in favor of the survivor as to moneys still remaining in the account at the time of death. It does not apply in respect of money withdrawn by either of the depositors during life even if one of the depositors has subsequently died. *Paterson v. Comastri*, 39 Cal.2d 66, 71, 244 P.2d 902. When Manuel added John's name as a coowner with his own on the records of the bank the contract signed by himself and John and filed with the bank presumptively evidenced the creation of a joint tenancy between himself and John. However, by the terms of the statute which

became a part of the contract, Paterson v. Comastri, supra, 39 Cal.2d at page 72, 244 P.2d 902, either Manuel or John could draw a part or a whole of any balance in the account at any time during the lifetime of both, and the bank, upon honoring the withdrawal, would receive a statutory clearance. In practical effect Manuel did withdraw the whole balance when he requested the bank to take the name of John off the record of the account and to insert the name of his wife, Maria, in lieu thereof. The trial court aptly described the process as simply a "short-cut" adopted by the bank officer. Manuel could have withdrawn the entire sum and then redeposited it in a new account in joint form for the benefit of himself and Maria. To be sure, this would not have destroyed in any way the real interest of John, if any he had, and as to such interest as he did have he could follow the fund. Wallace v. Riley, 23 Cal. App.2d 654, 665, 74 P.2d 807. But neither the bank nor the personal representative of the deceased, Manuel, can claim the rights of John. John was a party to this proceeding as a cross-defendant and herein stipulated that he made no claim individually to any part of the money represented by the bank account that had stood in the names of Manuel and himself prior to the time when his name was taken from the records and that of Maria substituted therefor. When the account was changed the bank acquiesced and joined in a proceeding which amounted to a complete withdrawal of the balance in the account from the joint account of Manuel and John and a redeposit of the same sum in the joint account of Manuel and Maria. It had its statutory clearance and that clearance has not been challenged. When, therefore, Manuel died, a conclusive presumption arose as to any proceeding thereafter to which Maria and the bank were parties that she was the sole owner of the balance remaining in the account. No claim has been made in this proceeding that either fraud or undue influence was involved in setting up the joint account of herself and her husband. This conclusive presumption applied to any claim of Mamie or John as personal representative of Manuel's estate. The paying of the fund over

to Mamie as administratrix was wholly without authority and was a violation of the bank's contractual duty to Maria. For it the bank must be held responsible unless it can maintain other and affirmative defenses.

The trial court having found, and justifiably as we have said, that, by what occurred between Manuel, Maria and the bank when Maria's name was substituted for that of John, a transfer was made, its further finding that, upon the death of Manuel, Maria did not become the sole owner of the balance in the account, is against law and could have no support in any evidence attacking the conclusive presumption that as survivor she was such sole owner thereof. Kilfoy v. Fritz, 125 Cal.App.2d 291, 294-295, 270 P.2d 579.

The court found that Maria was estopped to claim anything as survivor of the joint account, and that she had been guilty of such laches in beginning her action that relief was barred to her. On these two additional grounds the court denied her any relief. We think the record fails to support these findings.

[8,9] To begin with, Maria's complaint alleged no facts from which either estoppel or laches could be inferred. Under such circumstances, it is a general rule that one who relies upon estoppel or laches as a defense must plead facts constituting such estoppel or laches where, as here, there is an opportunity to do so. Phoenix Mutual Life Ins. Co. v. Birkelund, 29 Cal.2d 352, 363, 175 P.2d 5. The bank did not plead either defense. True, the bank set up the history of the account as we have related it and pleaded that it had upon demand of Mamie as administratrix paid the balance into her hands and also pleaded the provisions in Manuel's will, a document to which of course it was not a party and which had not even been probated as Manuel's will when the funds were paid to Mamie. There was nothing in the pleaded history of the account or the transmittal of the funds to Mamie from which estoppel or laches in favor of the bank could be established. The bank was a party to the agreement which upon the death of Manuel vested in Maria sole ownership of the funds. It was the bank's duty to hold the

fund until paid upon her order. Even if Maria knew that the funds had been wrongfully paid to Mamie she could, so far as the bank was concerned, completely ignore the unauthorized disbursement and hold the bank to its contractual obligation by action brought at any time within the statute of limitations. After the money had been paid to Mamie it was demanded of the bank by Maria. The demand was refused. The bank must be charged with knowledge that it paid the funds without authority, as much as would be the case if it disbursed the credits in a checking account without the order of the depositor. At all times the bank knew that its purported disbursement of the funds to Mamie was completely nugatory and did not diminish one whit its obligation to Maria. Judgment must go for Maria against the bank.

We turn now to that part of the judgment which decrees that Maria was entitled to no relief against Mamie. The only cause of action pleaded against Mamie rested on allegations that as special administratrix of the estate of Manuel she (Mamie) claimed some interest in the balance of the account when Manuel died and that she had no such interest. Mamie answered and admitted that for the estate of Manuel she did claim an interest in the account. She then set up two affirmative defenses. The first defense was to the effect that on October 29, 1940 Manuel and his son John opened the account in the bank; that a deposit agreement was made; that thereafter, on oral request of Manuel, Maria's name was substituted for John's; and that the act of the bank in acceding to Manuel's request was wrongful; that Manuel neither withdrew any money from the account nor closed the account; that John never consented to the substitution of Maria's name for his and that the balance in the account on Manuel's death was \$5,000. What we have said heretofore disposes of this so-called affirmative defense. The second defense contained the following allegations: The fact and the date of Manuel's death, Mamie's appointment as special administratrix, Maria's dismissal of her will contest, Mamie's accounting as special administratrix, the settling of her account and her authorized delivery of the estate

assets to her successor, John, as executor of Manuel's will. The provisions of the will heretofore adverted to provided among other things that expenses of last illness, funeral expenses, claims against the estate of Manuel and expenses of administration should be paid out of the funds derived from a certain insurance policy of a fraternal order of which Manuel was a member and that if those funds were not enough then the payments were to be made out of Manuel's bank accounts in the Bank of Newnan. It was further alleged that the insurance funds were insufficient, that in any event Maria had succeeded in having the insurance money paid to her and had retained the sums so paid against the demand of Mamie as administratrix. It appears that by this pleading Mamie was claiming that she was justified in receiving and paying out the funds from the joint account between Manuel and Maria. What we have heretofore said disposes of this alleged affirmative defense. Mamie's pleading also contained a cross-complaint and again she pleaded as personal representative of the deceased Manuel. She alleged what she had said in the second affirmative defense and that Maria's receipt of the \$1,000 insurance payment was wrongful and that she owed the money to the estate of Manuel. Her prayer was that Maria take nothing as against her as administratrix and that in such capacity Mamie, for the benefit of the estate, received judgment in the sum of \$1,000. The only claim of money set up that has not been heretofore disposed of is that concerning insurance funds. The trial court found and adjudged that Maria rightfully received and kept the insurance money and neither Mamie as special administratrix nor John as executor has appealed.

The result of the foregoing is that Mamie failed to establish any interest in the balance of the joint account of Manuel and Maria and that Maria was entitled to judgment as against Mamie, quieting Maria's ownership of that balance. The judgment that Maria take nothing as against Mamie must be reversed.

The bank impleaded Mamie and John as personal representatives of Manuel's estate and also impleaded individually Manuel's

four children, Maria, Mamie, Manuel, Jr., and Annie Silva. By these pleadings the bank set up the history of the account, alleged the payment of the balance therein on Manuel's death to Mamie as his personal representative, the various claims being made against it in respect of those transactions, and asked that all the cross-defendants not then before the court be brought in and that if the court should decide that any cross-defendant other than the personal representatives be declared to be entitled to the funds in dispute that such person or persons receive only a judgment against the other cross-defendants and that no relief be given against the bank. We have already held that this prayer cannot be granted in so far as Maria is concerned and that she is entitled to a money judgment against the bank for the balance in the account when Manuel died. Because it had found that Maria was entitled to no relief whatever against any party to the action the trial court did not proceed further and made no decision of issues tendered by the cross-pleadings. The cause must, therefore, be returned for further proceedings in respect thereof. All that can be done now on this appeal is to declare the rights of Maria as survivor and as against the bank's unwarranted attempt to dispose of her funds by paying them over to Mamie as administratrix. The bank's claims that it is entitled to relief against those who have received or ultimately will receive any part of the funds it so paid over, through the administration of the estate of Manuel, are matters that must be left for further trial. In its brief the bank sets up its claim for alternative relief in the following manner:

"The trial Court found that the Bank of Newman turned over the funds in Account No. 10969 to Mamie P. Cotta, as Special Administratrix of the Estate of Manuel Medeiros, deceased, prior to the time that it had received a demand for said monies on behalf of appellant. [We have already held that Maria was not required in pursuit of her rights against the bank to make any demand that it turn the fund over to her after Manuel's death. By that event the

whole title was cast in her and from that time on the bank was without authority to disburse the funds except upon her order.] There is no evidence or allegation of bad faith on the part of the Bank in delivering said funds. Should this Court determine that appellant was entitled to said funds, the Bank would simply be guilty of a mistake in fact in assuming that decedent's estate was entitled to them.

"Mamie P. Cotta, after paying the funeral expenses and certain claims, turned over the balance of said funds to John F. Medeiros, on his qualification as executor of the Estate of Manuel Medeiros, deceased. The remainder of said monies is now held by the executor. It can be seen from the accounts of the estate, which were introduced into evidence, that both Mamie P. Cotta and John F. Medeiros, as individuals, were benefited by the payment of the above-mentioned items due to the fact that they would have been a charge against their respective interests in the estate.

"Mamie P. Cotta and John F. Medeiros, in either their individual or representative capacities failed to either plead or prove that they suffered any detriment by any mistake made by the Bank of Newman."

It would not be proper for this Court at this point to express any opinion on the matters thus urged by the bank. As to such issues we must remand the case for further trial.

Maria asks that we not only reverse the holding of the trial court as against her, but that we direct that court to enter judgment against all respondents to the effect that on the death of the deceased the money remaining in the account at said time vested in the appellant as surviving joint tenant. From what we have said it is clear that appellant is entitled to judgment to that effect and such a judgment is hereby directed. However, it is equally apparent that we cannot at this time direct a money judgment in her favor as the issues presented by the various cross-pleadings require that in order to do justice to

all parties involved the trial court must proceed to the resolution of issues which have not yet been resolved by it. For instance, with respect to Maria it appears that the court in probate treated the funds paid over to Mamie as assets of the estate of Manuel; that so treated they would come under the provisions of the will disposing of Manuel's accounts with the Bank of Newman to his wife after the payment of various claims and expenses in probate; that a considerable part of the funds which Mamie so received were not expended in probate and that the decree of distribution orders the unexpended balance distributed to Maria under the decedent's will. It is the bank's claim, in effect, by its cross-pleadings that Maria is not entitled to what would amount to a double recovery in part and that, therefore, in equity it is entitled to have the protection of a decree that will enable it to recoup to that extent the loss it has suffered through its unauthorized disbursement of Maria's funds to Mamie. All such matters must remain for settlement upon a further trial.

The judgment appealed from is reversed and the cause is remanded for further proceedings in accordance herewith.

FINLEY, Judge pro tem., concurs.



134 Cal.App.2d 823

Clinton A. BARR, Plaintiff and Appellant,
v.

Lester N. SCOTT, etc., et al., Defendants,

Faye M. Scott, Defendant and Respondent.
Civ. 5111.

District Court of Appeal, Fourth District,
California.

Aug. 5, 1955.

Rehearing Denied Aug. 30, 1955.

Action by tenant against landlord for injuries sustained by tenant in a fall down stairs, which were allegedly unlighted, while tenant was on way to his apartment. From adverse judgment of the Superior

Court, San Diego County, Joe L. Shell, J., the tenant appealed. The District Court of Appeal, Barnard, P. J., held that refusal to admit deposition of tenant pursuant to stipulation that it could be received in evidence and used by either party, subject to objection on proper ground to any question or answer, was not prejudicial error when there was nothing material in the offered deposition which had not fully been brought out in testimony of tenant.

Judgment affirmed.

1. Appeal and Error ⇨1050(1)

In action for injuries sustained by tenant when he fell down stairs in apartment house while on way to apartment of tenant, who did not recover consciousness until 24 to 48 hours later, admission of photostatic copy of hospital record containing statements that plaintiff had been drinking heavily prior to fall and that he had previously "blacked out" completely and that he had spells of alcoholism, based on information furnished by wife while husband was unconscious was not prejudicial error. West's Ann.Code Civ.Proc. § 1953f.

2. Landlord and Tenant ⇨169(10)

In action against landlord for injuries sustained by tenant when he fell down stairs while on way to his apartment, instruction that owner of property has duty to invitee to exercise reasonable care in maintaining his premises followed by instruction stating duty of landlord to maintain portions of building which are reserved for common use of different tenants, did not have effect of suggesting to jury that landlord was under no duty to properly light the stairs if tenant could observe the existing condition, and was not erroneous.

3. Trial ⇨260(8)

In action against landlord for injuries sustained when tenant fell down stairs while on way to his apartment wherein evidence disclosed that tenant was not in full possession of his faculties by reason of his intoxication, refusal of tenant's requested instruction to effect that if jury believed tenant was intoxicated such intoxication did not of itself constitute negligence, but was merely a circumstance to be considered in determining whether he was negligent

was not prejudicial error in view of other instructions.

4. Appeal and Error ⇐1043(6)

In action against landlord for injuries sustained in a fall by tenant, refusal to admit deposition of tenant pursuant to stipulation that it could be received in evidence and used by either party, subject to objection on proper ground to any question or answer, was not prejudicial error, when there was nothing material in the offered deposition which had not been fully brought out in testimony of tenant.

David W. Hardin, San Diego, for appellant.

Luce, Forward, Kunzel & Scripps, San Diego, Leland C. Nielsen, Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for injuries received by the plaintiff when he fell fell down some stairs in an apartment house. The accident happened about 1:00 P.M. on July 1, 1951. The plaintiff and his wife entered the lobby of the building on the way to their apartment, which was down one floor. The plaintiff testified that he observed some luggage in or near the elevator, which he usually used, and decided to go down the stairway. He had previously used this stairway on four or five occasions. This stairway had a wall on one side and a bannister and rail on the other. The carpet on the stairway was smooth and in good condition. After going down about three steps the plaintiff fell, coming to rest at the bottom. He received severe injuries and was taken to the hospital, accompanied by his wife. He was unconscious, and he testified that he did not recover consciousness until 24 to 48 hours later.

The complaint alleged that the defendants were negligent in failing to provide adequate lighting for this stairway, and in maintaining it in an unlighted condition. The answer denied negligence and, as an affirmative defense, alleged that the plaintiff failed to exercise due care, including the fact that he was in an intoxicated con-

dition; and that his failure to exercise due care proximately contributed to his injuries. Prior to trial the action was dismissed as to all defendants except Faye M. Scott. A jury, after being out 32 minutes, returned a unanimous verdict in favor of the defendant. The plaintiff has appealed from the judgment.

[1] It is not contended that the evidence is not sufficient to support the verdict. Strong evidence was produced in support of the conclusion that this stairway was well and adequately lighted; that the carpeted steps were smooth and in good condition; that there was a good handrail; and that the plaintiff was, at the time of his fall, not in full possession of his faculties by reason of his intoxication. While there was conflicting evidence, the testimony of the plaintiff's sole witness as to the actual occurrence, aside from himself and his wife, was rather thoroughly impeached; and plaintiff's own testimony, to the effect that this stairway was in a condition of absolute darkness, which was repeated many times and in various ways, was so obviously exaggerated that it is not surprising that the jury did not accept it. There was other evidence that this was a sunshiny day, that many open doors and windows afforded a very considerable natural light, and that electric lights were burning in three places which would light up this stairway.

It is first contended that the court erred in admitting a photostatic copy of the hospital record, without striking hearsay statements therein. This hospital record is dated July 1, 1951, and signed by the doctor in charge. It shows that the plaintiff was admitted to the hospital an hour after his fall. Under the heading "Circumstance of Admission" it stated: "Had been drinking heavily prior to fall (½ pint according to wife) and fell down 6-8 stairs and injured head." Under the heading of "History of Present Illness", it states: "This 39 year old waiter, after drinking ½-1 pint of liquor today, fell down stairs (6-8) and hit head on carpeted pavement. * * * He has had spells previously when he 'blacked out' completely and fell to the ground. The last episode was 6 Mos. ago and had

not been drinking heavily." Under the heading "Past History", "Has spells of alcoholism from 2-3 Mos. & will drink heavily for a week or 2 but usually can keep on working. Smokes 1 pack/ day, drugs unknown to wife." Under the heading "Initial Impression," and immediately above the doctor's signature, it states: "Acute alcoholism complicated by head injury." The plaintiff objects to all of the quoted statements, except the last, as being hearsay and argues that since the plaintiff was unconscious and did not give any information, and his wife denied she made the statements attributed to her in the hospital record, the document as a whole was not admissible under section 1953f of the Code of Civil Procedure and the court should have sustained his objection "or properly instructed the jury concerning the hearsay."

It was stipulated in advance that this hospital record might be introduced in evidence subject to the right of the plaintiff to object, on proper grounds, to any item contained therein. A doctor who subsequently treated the plaintiff had, in his testimony, expressed the opinion that the plaintiff's subsequent condition could have been caused by this fall, and had further testified that his opinion was based in part upon this hospital record. The defendant then offered the hospital record in evidence. The plaintiff's counsel objected "on the ground it contains hearsay", and then stated that there was no objection to the admission of the other parts. It was not pointed out what parts were claimed to be hearsay, and no instructions were offered limiting the use of the exhibit. Our attention is not called to any place in the record, and we have found none, disclosing that this hospital record was read to the jury or that the questioned portions were called to its attention. This was the usual hospital record, made on the same day as the accident and containing the usual information material to proper treatment. Some of the statements objected to were stated to have been furnished by plaintiff's wife, and the only reasonable inference is that all of such statements were based upon information furnished by her since the

plaintiff was unconscious and the information was otherwise unavailable. Moreover, there was otherwise ample evidence of plaintiff's intoxication on this occasion. Under the circumstances, it cannot be held that prejudicial error appears in this connection. *Loper v. Morrison*, 23 Cal.2d 600, 145 P.2d 1; *People v. Gorgol*, 122 Cal. App.2d 281, 265 P.2d 69; *Gunter v. Claggett*, 65 Cal.App.2d 636, 151 P.2d 271; *McDowd v. Pig'n Whistle Corp.*, 26 Cal.2d 696, 160 P.2d 797.

It is next contended that the court erred in giving an instruction on the doctrine of assumption of the risk. It is argued that this instruction would indicate to the jury that if the plaintiff knew that the stairway was not properly lighted he could not recover, and that this is not the law, citing *Sommerfield v. Miratti*, 49 Cal.App.2d 450, 121 P.2d 746 and *Harris v. Joffe*, 28 Cal. 2d 418, 170 P.2d 454. The instruction thus complained of was in language similar to that in BAJI numbers 213 and 213-C. The cases cited merely hold that the question thus suggested is one of fact for the jury, and to the effect that such knowledge would not show negligence as a matter of law. The question was here submitted to the jury as one of fact.

[2] It is next contended that the court erred in giving an instruction which told the jury that the owner of property is only required to refrain from active negligence with respect to one who goes upon the premises at the invitation of the owner. It is argued that since the plaintiff was a tenant in defendant's apartment house this instruction was inapplicable here, and the instruction "insinuated that defendant was under no duty to properly light the stairs if plaintiff could observe same." This instruction, after defining an invitee as one who goes upon property at the implied invitation of the owner or occupant and in connection with some mutual business interest, or with the business of the occupant or owner, stated in brief that the duty owed by an owner of property to an invitee is to exercise reasonable care in maintaining his premises in a safe condition so as not to injure the invitee; that if a danger exists from conditions not readily apparent to the

senses the owner has the duty to give reasonable warning if he has actual knowledge of such conditions, or could by the exercise of reasonable care have discovered them; and that in the absence of appearances that would caution him, or would caution a reasonable person in like position, to the contrary, an invitee has a right to assume that the premises are reasonably safe and to act on that assumption. That instruction was immediately followed by an instruction correctly stating the duty of a landlord to properly maintain the portions of a building which are reserved for the common use of different tenants, and ending "it is the landlord's duty to exercise ordinary care in the maintenance and repair of those parts of a building that are reserved for the common use of different tenants." The instructions could not have had the effect of suggesting to the jury that the defendant was under no duty to properly light the stairs if plaintiff could observe the existing condition, and we find no error in this regard.

[3] It is next contended that the court erred in refusing an instruction requested by the plaintiff, to the effect that if the jury believed that the plaintiff was intoxicated at the time of the accident, such "intoxication does not of itself constitute negligence, but is merely a circumstance to be considered by the jury in determining whether the intoxicated person was negligent." It is argued that this instruction was an accurate statement of the law as applicable to the evidence, and that the court should have given this instruction or some other instruction stating the same rule, citing *Emery v. Los Angeles Ry. Corp.*, 61 Cal.App.2d 455, 143 P.2d 112 and *Coakley v. Ajuria*, 209 Cal. 745, 290 P. 33. These cases merely hold that intoxication is not negligence as a matter of law, but is a circumstance to be considered in determining whether such intoxication was a contributing cause of an injury and is a question of fact for the jury. The court here instructed the jury that

"Whether or not a person involved in an accident was then intoxicated is a proper question for the jury to consider in determining his conduct and whether or not he was negligent." This instruction, with the other instructions given, sufficiently covered this matter and no prejudice appears.

[4] The final contention is that the court committed prejudicial error in refusing to admit the deposition of the plaintiff into evidence. It is argued that it had been stipulated that this deposition could be received in evidence and used by either party, subject to objection on proper ground to any question or answer, and that this stipulation precluded the judge from refusing to admit it in evidence. The plaintiff had testified, his testimony taking up 62 pages of the transcript. On cross-examination, defendant's counsel had asked him a few questions with respect to answers he had made in his deposition. Shortly before the plaintiff rested he offered this deposition in evidence. The court remarked that the plaintiff had already testified, and asked what the deposition could add to the information that the jury should have. Plaintiff's counsel stated that it would show the parts before and after the portions which defendant's counsel had referred to and "the nature of his questions and answers and things like that." The court ruled it was not admissible. The deposition, as offered in evidence, appears in the transcript, taking up 33 pages. There is nothing material in the offered deposition which was not fully brought out in the testimony of the plaintiff while on the stand. The plaintiff points to nothing in the deposition which would have added anything to his case, and we can find nothing therein which could in any way suggest that the refusal to admit the deposition into evidence could have conceivably affected the result. No prejudice appears. *Grigsby v. Shwarz*, 82 Cal. 278, 22 P. 1041.

The judgment is affirmed.

MUSSELL, J., concurs.

134 Cal.App.2d 433

Frances AGNEW, Plaintiff and Respondent,
v.

CITY OF LOS ANGELES, a Municipal Corporation; N. Edward Gourson: Edwin Larson and Orpha Cavender: Does One, Two, Three, Four, Five, Six,
Defendants,

Edwin Larson, Appellant.
Civ. 20238.

District Court of Appeal, Second District,
Division 2, California.

July 20, 1955.

Hearing Denied Sept. 15, 1955.

Action against doctor for malpractice in treating fractured femur. The Superior Court, Los Angeles County, Samuel R. Blake, J., entered judgment adverse to doctor, and he appealed. The District Court of Appeal, Moore, P. J., held that admission of testimony of pathologist who had 47 years of practice and was familiar with standard required of physicians in treatment of fractured femurs, and had daily consultations with doctors, assisted in operations, and was well-schooled on injury involved, was not prejudicial error.

Judgment affirmed.

1. Evidence ⚡536

Where witness has disclosed sufficient knowledge of subject to entitle his opinion to go to jury, question of degree of his knowledge goes more to weight of evidence than its admissibility.

2. Evidence ⚡538

In suit against doctor for malpractice in treating fractured femur, pathologist who had been in practice 47 years, was familiar with standard required of physicians in treatment of fractured femurs, and had daily consultations with doctors, assisted in operations and was well-schooled on injury involved, was qualified expert.

3. Appeal and Error ⚡1001(1)

A judgment supported by substantial evidence will not be disturbed on appeal.

4. Appeal and Error ⚡989

The power of the appellate court begins and ends with determination as to

whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury.

5. Appeal and Error ⚡930(1)

All legitimate and reasonable inferences must be indulged in to support verdict, and if there is reasonable doubt that evidence is sufficient, the reviewing court must resolve that doubt in favor of judgment.

6. Appeal and Error ⚡996

When two or more inferences can be reasonably deduced from facts, the appellate court is without power to substitute its deductions for those of the trial court.

7. Appeal and Error ⚡930(1)

In suit against doctor for malpractice in treating fractured femur, wherein jury found against doctor, it was incumbent upon the District Court of Appeal to accept as true evidence in favor of injured party and to resolve all conflicts in evidence in her favor.

8. Negligence ⚡61(1), 134(11)

The law requires only proof of reasonable probability to establish proximate cause, and negligence of defendant does not have to be sole proximate cause of injury so long as it is a proximate cause.

9. Physicians and Surgeons ⚡18(8)

In action against doctor for malpractice in treating fractured femur discovered only eight days after woman's accident, wherein evidence showed that because of movement and delay in setting, aseptic necrosis resulted and woman was crippled and required braces, evidence supported jury's finding that physician's negligent treatment was proximate cause of necrosis.

Harold B. Pool, Los Angeles, for appellant.

Betty & Campbell, Marion P. Betty and Lionel T. Campbell, Los Angeles, for respondent.

MOORE, Presiding Justice.

Here is an action for malpractice. This is the third appeal. The first resulted in the reversal of a judgment of nonsuit, 82 Cal. App.2d 616, 186 P.2d 450; the second, in the

reversal of judgment for defendant, 97 Cal. App.2d 557, 218 P.2d 66, by reason of errors in excluding the testimony of certain experts. The instant judgment authorized plaintiff's recovery of \$37,883.91 and costs.

Appellant is a licensed physician and surgeon. He had administered to respondent from time to time during the 23 years preceding her accident on March 3, 1943. At that time she was 51 years of age. While walking on Hollywood Boulevard she slipped and fell on some wet leaves. She was taken to the lobby of a nearby hotel where she telephoned appellant's office. She was advised of his absence and thereupon visited the Receiving Hospital where her injuries were examined and she was sent home in a conveyance.

Having suffered all night, the following morning she informed appellant of the circumstances of her fall and that she believed her right hip bone was broken. He told her the hospital report indicated that she had suffered only a bruise; that he did not have time to visit her then; that she should take doses of anacin and hot baths, and rest and keep a pillow under her knee. In three subsequent conversations she informed appellant that her pain was increasing, suggested that she should be in a hospital because of her inability to care for herself and pointed to the fact that her leg was turning out. Thereupon, appellant replied that a bruise is very painful; that she would be up and about in a few weeks and that it was not necessary for her to be confined in a hospital.

On the eighth day after her fall and before appellant examined her, while leaning against a table she heard her injured hip bone crack. She was promptly transported to the hospital where appellant commenced to administer to her and continued until December 10, 1943. The X-ray films disclosed that the unfortunate lady had suffered a displaced fracture of the right femur with rotation of the head. Late in October, her knee began to pain her with increasing pangs in her hip. Appellant advised continued activity and exercise as remedial measures. Displeased with her lack of progress toward recovery, respondent learned from other physicians that aseptic necrosis of the head

of the femur had developed and that permanent disability had set in.

In presenting her grievance to the trial court, respondent pleaded and successfully contended that appellant had been negligent in his failure to have X-rays made immediately after her fall on March 3rd; in advising her to bear her weight on the injured leg too soon after the setting of the fracture on March 11; in advising her to bear weight on the limb in October while she was complaining of pain. The jury having adopted the evidence in support of her contentions and having assessed her damage by their verdict, judgment was entered from which comes this appeal.

[1] Practically the only attack upon the judgment is that prejudicial error was committed in allowing two physicians to testify as experts on the aseptic necrosis, a condition allegedly caused by appellant's neglect of respondent after her fall on March 3, 1943. One of those experts was Dr. Vernon L. Andrews, the other was Dr. Wendell White. There was no disqualification of either. In the former trial, Dr. Andrews attempted to testify on behalf of plaintiff. The trial court rejected him as a witness on the ground that, although he was a specialist in pathology, he did not have the required professional knowledge and learning of, and skill with reference to the subject under inquiry and was not familiar with the standards required of physicians under similar circumstances. But on appeal, Division Three of this court declared that "his qualifications far exceed those of the average practicing physician. * * * The fact that Dr. Andrews was a specialist in pathology does not, in and of itself, render him incompetent as a medical expert * *. The basic medical question presented to Dr. Andrews related to the subject of aseptic necrosis * * * he was fully competent to give the jury his opinion as to the cause of aseptic necrosis generally and as to the cause in the present case. * * * Where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than its admissibil-

ity." *Agnew v. City of Los Angeles*, 97 Cal.App.2d 557, 565-566, 218 P.2d 66, 72.

[2] Therefore, the qualification of Dr. Andrews is determined by the law of the case and nothing has occurred to defeat its applicability. A rehearsal of all his testimony as to his learning or experience or of the arguments of counsel thereon could add nothing to the decision quoted from 97 Cal. App.2d. The doctor testified that he had done a general practice for 47 years; was familiar with the standard required of physicians under similar circumstances and with the standard of care in Los Angeles in the treatment of fractured femurs; had had daily experience, consultations with other doctors about their cases; had made tests, assisted at operations, observed and discussed fractures of the neck of the femur and aseptic necrosis of the head of the femur and various types of necrosis. In view of his vast learning and technical training and of the decision on the second appeal, it would be sheer folly now to disturb the finding of his qualification. Neither the arguments of appellant nor the contents of *Huffman v. Lindquist*, 37 Cal.2d 465, 234 P.2d 34, 29 A.L.R.2d 485 and *Sinz v. Owens*, 33 Cal.2d 749, 205 P.2d 3, 8 A.L.R.2d 757, reveal a good reason for disturbing the finding of the trial court. Contrary to appellant's contention, Dr. Andrews had not only his advanced learning and general experience, but he added to it a long "occupational experience" ¹ in daily serving, and collaborating with "physicians under circumstances similar to those which confronted" appellant herein. Dr. Andrews testified that he was familiar with the standard of care in vogue in Los Angeles at the time of respondent's injury, in regard to the treatment of fractured femurs and fractures of the neck of the femur.

The other expert witness called by respondent was Dr. Wendell White who has been a licensed physician in California since 1912 and has done a general practice. He has treated broken bones including more than 25 hip fractures, two of which were under his care at the time of his testimony in this action. He takes care of fractures

of the neck of the femur. He administered to respondent in 1951. He testified that it is common and necessary practice to utilize X-rays for the purpose of determining the condition of fractured bones; that he was familiar with the practice, in Los Angeles, of the treatment of fractured necks of femurs in 1943. He had examined the 1943 X-ray pictures of respondent's injured bone in the presence of the jury; showed there was a fracture of the neck of the femur within the capsule, the cartilaginous socket for the head of the femur; showed the external turning of the foot and leg; a shortening and over-lapping at the neck of the femur; the shaft was displaced upwards for about half an inch and rotated laterally; she suffered an intracapsular fracture of the neck of the femur; the blood supply to the fracture came from the blood vessels around the joint; the capsule has no circulation of its own.

Dr. White testified over the general objection that he had read all the X-rays and X-ray reports and had examined respondent; that she is a permanent cripple and will be compelled to wear a brace the rest of her life; that between March 4 and March 11, 1943, appellant did not exercise that degree of care, skill, knowledge and judgment ordinarily possessed and exercised by reputable physicians and surgeons practicing in Los Angeles in similar cases; he did not see the patient, but took the word of a doctor at the Receiving Hospital; although she complained of excruciating pain and of an eversion of her foot, he did not have X-ray pictures made or send her to the hospital and that such measures would have been standard care of reputable physicians. A personal examination should have been made. She had to move about in her room by holding onto furniture; she took baths and had massages over the hip on the doctor's advice, contrary to the standard of care maintained in Los Angeles. With infinite detail, Dr. White explained the significance of the reports and shadowgraphs of the injury and testified that appellant failed to use that degree of care and skill, learning and judgment of reputable doctors in Los Angeles

1. See 2 Wigmore on Evidence, 3rd Edition 556, 635.

at that time in the treatment of similar cases.

Therefore, if the testimony of Dr. Andrews were stricken from the record, here is a reservoir of intelligent proof of appellant's negligence. But no evidence is stricken. We have the positive proof from two learned and skillful physicians that appellant did not, in his care of respondent, observe the customary standard of practice required; that such neglect is the proximate medical cause of the development of aseptic necrosis and her crippled condition; that such necrosis would not have resulted had her limb been immobilized and the proper standard of care otherwise been observed by appellant. With that situation, what must be the decision of this court?

[3-7] On many features of the treatment of respondent and the appearance of aseptic necrosis, respondent's evidence is supported by the testimony of appellant's witnesses. But whether they were supported by other proof or not, it is the law that a judgment when supported by substantial evidence will not be disturbed on appeal. "The power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury." *Crawford v. Southern Pacific Company*, 3 Cal.2d 427, 429, 45 P.2d 183, 184. All legitimate and reasonable inferences must be indulged in support of the verdict. *Juchert v. California Water Service Company*, 16 Cal.2d 500, 503, 106 P.2d 886. If there is a reasonable doubt that the evidence is sufficient, the reviewing court must resolve that doubt in favor of the judgment. In *re Estate of Bristol*, 23 Cal.2d 221, 223, 143 P.2d 689. When two or more inferences can be reasonably deduced from the facts, the appellate court is without power to substitute its deductions for those of the trial court. *Treadwell v. Nickel*, 194 Cal. 243, 260, 228 P. 25. As triers of fact, it was necessary for the jury to determine which version of the conduct of appellant should be accepted as true; since they made their finding against appellant, it is incumbent upon this court to accept as true the

evidence in favor of respondent and to resolve all conflicts in the evidence in her favor. *Hinkle v. Southern Pacific Company*, 12 Cal.2d 691, 695, 87 P.2d 349.

Appellant's authorities are distinguishable. *Lippold v. Kidd*, 126 Or. 160, 269 P. 210, 215, 59 A.L.R. 875, concerns an eye injury where the foreign body imbedded in the eye was not discovered until seven months later. In deciding for defendant, the court stated that plaintiff's witnesses had given the jury no formula by which they could determine whether the injury to the eye would eventually destroy its usefulness. In the case at bar, Dr. Andrews laid out a comprehensive outline of the results that would follow if pressure should be applied to a broken femur. His expert medical knowledge was applied in detail to the facts before the jury and they chose to believe his explanation. The court further states in *Lippold v. Kidd*, supra, "as we have said before, certainty is not required; probability will suffice." Thus the issue of proximate cause is handled in such a way as to give no solace to appellant here.

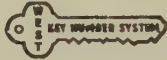
Huffman v. Lindquist, supra, involved a death where the deceased, while suffering a skull fracture, died of a blood clot in the lungs. It was contended that defendant's negligence in not properly diagnosing the hemorrhage caused by the fracture brought on the death. Evidence was introduced that "there was nothing to be done that was not being done." No evidence was produced in contradiction of this testimony." The situation there in no respects parallels those at bar. 37 Cal.2d at page 474, 234 P. 2d at page 40.

[8,9] The law is clear as to proximate cause. *Ross v. Baldwin*, 44 Cal.App.2d 433, 436, 112 P.2d 666. The jury here was given a basic simple formula by which they could judge the case before them. The law requires only proof of reasonable probability to establish proximate cause. The negligence of the appellant does not have to be the sole proximate cause of the injury so long as it is a proximate cause. The respondent proved to the satisfaction of the court and jury that appellant's negligence was the proximate cause of her

permanent disability and such a decision is solely within the province of the jury. *People v. Miller*, 51 Cal.App. 189, 190, 196 P. 283. The evidence proved that the negligence of appellant was a proximate cause of respondent's necrosis and that is sufficient to establish appellant's liability. *Ross v. Baldwin*, supra.

Judgment affirmed

McCOMB, J., concurs.



134 Cal.App.2d 829

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Arthur WARNER, Defendant and Appellant.
Cr. 5232.

District Court of Appeal, Second District,
Division 1, California.

Aug. 8, 1955.

Rehearing Denied Aug. 22, 1955.
Hearing Denied Sept. 7, 1955.

Prosecution for grand theft. The Superior Court, Los Angeles County, Joe Raycraft, J., entered judgment of conviction, and denied defendant's motion for a new trial and defendant appealed. The District Court of Appeal, Drapeau, J., held that where defendant was being represented by public defender there was no abuse of discretion in denial of defendant's motions, made several days after trial had begun, to excuse public defender or allowed defendant to become associated with public defender in conduct of trial and there was no error in refusing to give defendant's requested, repetitious instructions.

Affirmed.

1. Criminal Law §586

Where defendant was being prosecuted for grand theft and his trial was set on

October 27 for November 19, and public defender who served as counsel was assigned to case on October 28, there was no abuse of discretion in denying defendant's motion for continuance.

2. Criminal Law §640

Where defendant, being prosecuted for grand theft, was represented by public defender, and after trial had been going on for several days defendant moved to excuse public defender from further participation in case or to allow defendant to become associated with public defender in conduct of trial, there was abuse of discretion in denying such motions.

3. Criminal Law §1144(10)

There is a presumption that defendant's counsel has performed his duties.

4. Criminal Law §829(3)

In prosecution for grand theft, there was no error in refusing defendant's requested instruction that if both title and possession of property passed to defendant no embezzlement could be found, where court had previously instructed jury an essential element of crime of grand theft was that owner does not intend to transfer title to property to person obtaining its possession.

5. Criminal Law §829(1)

Where a jury is instructed as to a legal principle it is never necessary to reiterate the principle in another way.

6. Criminal Law §369(2)

If testimony tends logically or by reasonable inference to establish any fact material for the prosecution, or to overcome any material fact sought to be proved by defense, it is admissible, although it may also show other crimes of a defendant.

7. Criminal Law §372(8)

In prosecution for grand theft in connection with defendant's conduct in sales of automobiles, questions tending to show manner in which defendant conducted his business affairs and the use of a common plan to unlawfully secure property of others, were relevant.

Arthur Warner, in pro. per.

Edmund G. Brown, Atty. Gen., and James C. Maupin, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

Defendant, Arthur Warner, was convicted by a jury of six counts of grand theft. Without going into particular details of the several crimes, the evidence shows that he took money from individuals and promised to get them automobiles, kept the money, and never delivered the automobiles, or that he took automobiles from individuals to sell, did sell them, but did not pay the owners, or that he converted to his own use automobiles entrusted to him.

Defendant appeals from the judgment sentencing him to state's prison, and from the court's order denying his motion for a new trial.

His argument for reversal of the judgment may be stated under the following heads:

1. That it was error for the trial court to deny his motion for a continuance of the trial.

2. That it was error for the trial court to refuse to grant his motions to be substituted in person for, or to associate himself with the public defender.

3. Asserted errors in instructions given or refused.

4. Asserted errors in the admission of evidence.

5. Misconduct on the part of the deputy district attorney.

These matters will be discussed in order.

1. With reference to the requested continuance:

[1] Affidavits for continuance were filed, averring that because of the complexities of the case counsel for defendant required more time for preparation for trial. The court considered the affidavits, heard the argument, and denied the motion. There was no abuse of discretion.

On October 27, 1953, the case was set for trial for November 19th. The deputy public defender who tried the case was assign-

ed to it on October 28th. Nothing in the facts of the case as shown in the record is so complicated as to require longer time than that allowed to prepare for trial.

2. Referring to the rulings keeping the public defender as trial counsel:

[2] After the trial had been going on for several days, defendant moved the court to excuse the public defender from further participation in the case. After that motion was denied, he moved for an order allowing him to be associated with the public defender in the trial.

Defendant argues that it was prejudicial error to deny these two motions. In support of his argument he stresses the elementary proposition that a defendant in a criminal case is entitled to represent himself at all times.

But that was not the situation here. The jury had been impaneled, and the trial had been going on regularly, with duly appointed counsel representing the defendant. To have directed withdrawal of counsel while the trial was in progress, would have resulted in delay and confusion, and would have been unfair to the court and to the jury. Defendant was represented throughout the case by able counsel from the public defender's office. Despite his actions in embarrassing his own lawyer, a good presentation was made of a difficult defense. For even in his brief on appeal defendant concedes that he got the money, or the property, and didn't give his customers anything in return.

[3] The presumption is that counsel performed his duty. *People v. Gay*, 37 Cal. App.2d 246, 99 P.2d 371. There is nothing in these rulings that prejudiced defendant's case in the slightest degree. The rulings, moreover, were in the interest of orderly trial procedure, which it is the settled policy of the law to secure at all times. *People v. Northcott*, 209 Cal. 639, 289 P. 634, 70 A.L.R. 806.

3. With reference to the instructions:

Defendant contends that the jury should have been instructed:

(a) as to his defense that he was liable only under a civil contract;

(b) that the testimony of those who lost their money or their property should have been corroborated;

(c) as to circumstantial evidence;

(d) as to the power of the jury to convict for lesser offences than charged in the information; and

(e) knowledge by defendant of the "limiting instructions" of the "trust claimed."

This Court has read the instructions given and refused. As a whole, the instructions fully and fairly advised the jury as to the issues and the law of the case, and there was no error in giving or refusing any particular instruction. The specific complaints of defendant may all be answered by the statement that the subjects were covered by other instructions given, or the proposed instructions were immaterial to the issues in the case.

[4, 5] For example, defendant argues at length that it was error for the court to refuse to give an instruction that if both title and possession of property passed to defendant no embezzlement could be found. This would have been repetitious. The jury was instructed that an essential element in the crime of grand theft is that the owner does not intend to transfer his title to property to the person obtaining its possession. When a jury is instructed as to a legal principle it is never necessary to restate the principle in another way. *People v. Roche*, 68 Cal.App.2d 665, 157 P.2d 440.

[6, 7] No error appears in the reception or exclusion of evidence. Defendant complains that certain questions asked of him on cross-examination tended to show the commission by him of other felonies or misdemeanors. It is settled law that if the query tends logically or by reasonable inference to establish any fact material for the prosecution, or to overcome any material fact sought to be proved by the defense, it is admissible, although it may also show other crimes of a defendant. *People v. Woods*, 35 Cal.2d 504, 218 P.2d 981. The questions complained of tended to show the manner in which defendant conducted

his business affairs, and the use of a common plan to unlawfully secure property of others, and were relevant in the trial of the offenses of which he was charged.

5. There was no prejudicial misconduct of the deputy district attorney. The trial was lengthy. There are more than a thousand pages of typewritten transcript. Both counsel for the people and for the defendant were zealous and alert. At times remarks were made in the heat of the trial that, torn from their context in the record, lend some support to defendant's contentions. But the trial judge was diligent in advising the jury to disregard these passages at arms, whether by counsel for defendant or for the people. A review of the record shows that the case was fairly tried throughout.

Finally, although it may not be necessary to this opinion, inasmuch as this defendant appears as his own counsel on appeal, and has written his own brief, this Court desires to emphasize the fact that under Article 6, section 4½ of our state constitution, "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

A careful review of the record in this case shows that defendant had a fair trial, and that there was no reasonable, or even possible, doubt of his guilt. He took the money, or the property of others and converted it to his own use.

For the foregoing reasons the judgment and the order denying defendant's motion for a new trial are, and each of them is, affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

134 Cal.App.2d 639

Luciano ROSSI, Rose Rossi, Joseph A. Brown, Elios P. Anderlini, and Alfredo Rossi & Company, a corporation, Plaintiffs and Appellants,

v.

Narciso ROSSI, Defendant and Respondent.
Civ. 16481.

District Court of Appeal, First District,
Division 2, California.
July 29, 1955.

Action in equity seeking a rescission of transfer of fractional shares of stock wherein defendant filed a cross complaint seeking specific performance and an injunction to restrain plaintiff and directors, who had resigned and who had been superseded by election of other officers, from holding a directors' meeting. The Superior Court, City and County of San Francisco, Herman A. van der Zee, J., issued a restraining order on the cross complaint, and the plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that the trial court, having taken jurisdiction of original action in equity, was empowered to restrain cross defendants from illegally acting as directors during determination of dispute.

Order affirmed.

1. Injunction ⇐70

Under statute authorizing issuance of injunction when it appears, during litigation, that a party threatens to do some act in violation of rights of other party respecting subject of action, threat by directors, who had resigned and who had been superseded by other corporate directors, to hold a directors' meeting and to take action detrimental to interests of defendant in action for rescission of transfer by plaintiff and defendant of portions of their stock, was an act in violation of rights of defendant within contemplation of statutes, and court had jurisdiction to issue injunction. West's Ann.Code Civ.Proc. § 526, first subd. 3.

2. Injunction ⇐212

In action for rescission of transfer of fractional shares of stock by plaintiff and defendant, wherein defendant filed a cross

complaint seeking specific performance of contract and an injunction to restrain plaintiffs and directors, who had resigned and who had been superseded by other directors, from holding a directors' meeting, order granting injunction became final as to those cross-defendants who did not appeal from the order.

3. Injunction ⇐136(2)

In action in equity seeking rescission of transfer of fractional shares of stock, wherein defendant filed a cross complaint seeking specific performance and an injunction to restrain plaintiff and directors, who had resigned and who had been superseded by other directors, from holding a directors' meeting, trial court having taken jurisdiction of original action in equity was empowered to restrain cross defendants from illegally acting as directors during determination of dispute. West's Ann. Code Civ.Proc. § 526, first subd. 3.

Joseph A. Brown, San Francisco, for appellants.

Ferrari & Ferrari, San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for the rescission of an executed contract whereby he and Narciso relinquished and transferred fractional portions of their stockholdings in the corporation—Alfredo Rossi and Company. Respondent answered and filed a cross-complaint seeking specific performance of the contract and an injunction to restrain plaintiff and others from holding a directors' meeting. A restraining order was issued on the cross-complaint.

The plaintiff Luciano Rossi alone appeals from the order restraining him and certain others from acting as directors of the corporation. The injunction was based on the ground that the named defendants were not legally qualified directors.

Originally the shares of stock were divided—500½ to Luciano Rossi and 499½ to Narciso Rossi. Differences having arisen between these two an agreement was made whereby Luciano transferred 1½ of

his shares, and Narciso transferred $\frac{1}{2}$ of his shares to Dismo Scatena. Such transfer was duly recorded and Scatena was thereupon declared to be the owner of two shares. Whether Scatena actually accepted and received the two shares is disputed but positive it is that they did not revert to the original transferors. Thus they each retained 499 shares and Scatena was made a director.

At a meeting of the board of directors held on April 26, 1954, three of the directors—Louis Ferrari, Elois P. Anderlini, and Joseph A. Brown all tendered their resignations which were forthwith accepted. The vacancies were thereupon filled by the election and qualification of three others. Thereafter the president of the company gave notice of a stockholders' meeting to be held May 24, 1954, and of a special meeting of the directors to be held May 26. These notices were sent to Ferrari, Anderlini and Brown, all of whom had theretofore resigned and terminated their right to act. Thereupon the respondent obtained from the Superior Court an order permitting him to bring in, as additional parties to his cross-complaint, Brown, Anderlini and Rose Rossi another director. Upon this being done respondent had a temporary restraining order, and after full hearing, an injunction pendente lite was issued restraining the defendants to the cross-complaint from holding a directors' meeting or from interfering with the business of the corporation by the new directors elected at the meeting above noted held on April 26, 1954. The appeal is taken from this order.

[1] Manifestly, if the trial court had jurisdiction to issue the order, the only ground of attack which could be made here is that the order was a breach of discretion. Jurisdiction to issue the injunction is found in Section 526, subd. 3, of the Code of Civil Procedure, which reads: "3. When it appears, during the litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual".

The case made by respondent is simply this—directors who had resigned and who had been superseded by the election of others were shown to have threatened to hold a directors' meeting and to take action detrimental to the interests of the cross-complainant. This was an act "in violation of the rights" of the cross-complainant within the contemplation of the code section.

[2] Furthermore, since no one of the cross-defendants to the cross-complaint other than Luciano Rossi has appealed from the order of injunction, that order has become final as to them. We must assume therefore that the order was proper as to Rose Rossi, Brown and Anderlini. The status of Rose Rossi is not mentioned in the record, but it is certain that neither Brown nor Anderlini were qualified to sit as directors at the time designated in the notice of a directors' meeting. The injunction as to them merely barred admittedly unqualified parties from participating in a directors' meeting in which five fully qualified directors had the sole right to sit; i. e., the "directors duly elected as such on the 26th day of April, 1954." These were Rose Rossi in place of Ferrari, Dismo Scatena in place of Anderlini, and Elda Rossi in place of Brown.

For the reasons stated the case made by the cross-complainant is not one to prevent the exercise of a private office by one in possession as proscribed by Section 526, subd. 6 of the Code of Civil Procedure. It is one to prevent interlopers from interfering with the orderly procedure of the admittedly qualified directors.

Reference should be made to the confusion of the parties as appears from appellant's brief. Rose Rossi, Brown, Anderlini and the corporation are all listed as "Plaintiffs and appellants". They are neither plaintiffs nor appellants. The sole plaintiff and the sole appellant is Luciano Rossi. His status is clear. He is the sole plaintiff in an action in equity seeking a rescission of the transfer of fractional shares of stock. His associates are non-appealing cross-defendants in Narciso's cross-complaint to restrain ineligible persons from acting as directors of the corporation. This is also a proceeding in equity.

[3] The trial court having taken jurisdiction of the original action in equity it was empowered to restrain the cross-defendants from illegally acting as directors during the determination of the dispute. This conclusion is supported by *Sonnicksen v. Sonnicksen*, 45 Cal.App.2d 46, 52, 113 P.2d 495.

No other question requires discussion.

Order affirmed.

DOOLING and KAUFMAN, JJ., concur.



135 Cal.App.2d 11

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Jewell Edna FREEMAN, Defendant and
Appellant.

Cr. 988.

District Court of Appeal, Fourth District,
California.

Aug. 12, 1955.

Prosecution for arson for burning house that accused and her husband had equity in. From an adverse judgment of the Superior Court, Riverside County, John G. Gabbert, J., and from an order denying motion for new trial, the accused appealed. The District Court of Appeal, Shell, J. pro tem., held that evidence was sufficient to reasonably support verdict of guilty and also to justify order of trial judge denying accused motion for new trial.

Judgment and order denying new trial affirmed.

I. Criminal Law ⇨1144(13), 1159(2)

The District Court of Appeal must assume upon review in favor of the verdict and of the order denying the motion for new trial, the existence of every fact which the jury could have reasonably deduced

from the evidence, and then determine whether such facts are sufficient to support the verdict and order.

2. Arson ⇨37(1)

Evidence sustained conviction for arson for burning house that accused and her husband had equity in. Pen.Code, §§ 447a, 1237, subd. 1.

3. Criminal Law ⇨824(4)

Instruction upon the subject of alibi, not requested by accused at time of trial, need not be given.

Shaw & Barnett, Riverside, for appellant.

Edmund G. Brown, Atty. Gen., and Joan D. Gross, Deputy Atty. Gen., for respondent.

SHELL, Justice pro tem.

Appellant was convicted by a jury on a charge of arson (violation of section 447a, Penal Code). Her motion for a new trial was denied and she was granted probation. She appeals from the "judgment" (an order granting probation is deemed to be a final judgment. Penal Code section 1237, subd. 1, as amended in 1951.) And from the order denying her motion for a new trial.

In her opening brief the appellant concedes that "There was no room for doubt that the fire was of incendiary origin." Appellant urges, however, that the evidence was insufficient to justify the implied finding of the jury that appellant set the fires or participated therein. No other ground for reversal is presented on this appeal.

[1] It is our function to discover whether there is substantial evidence in the record to support the verdict of the jury, and the denial by the trial judge of the motion for new trial. We must assume in favor of the verdict and of the order denying the motion for new trial the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict and the order denying the motion for a new trial. *People v. Tedesco*, 1 Cal.2d 211, 219, 34

P.2d 467; *People v. Newland*, 15 Cal.2d 678, 104 P.2d 778; *People v. Wissenfeld*, 36 Cal.2d 758, 765, 227 P.2d 833.

From the record in this appeal we believe that the jury, from the evidence presented to them, could reasonably have deduced the facts which we recite.

The fire which damaged the house in which appellant was living located in Norco, Riverside county, and in which she and her husband had an equity, was the result of five different fires started by the agency of some person on the late afternoon or evening of June 22, 1954. There were two structures on the premises, the principal dwelling, having three bedrooms, living room, kitchen and bathroom, being on the front of the lot, and a structure containing one bedroom and a washroom on the rear of the lot. All of the five incendiary fires were set by the use of a petroleum product in the bedrooms and the living room of the front house, none being set in the structure in the rear.

The defendant was the last person shown by direct evidence to have been inside the front house before the fire. While there is a conflict in the evidence as to the time she left that house, there is ample evidence to support a finding that she left the front house between 6:00 p. m. and 6:30 p. m. The fire in the living room had thoroughly enveloped the living room by 10:00 o'clock p. m., when it was noticed by neighbors. One neighbor attempted to control it by the use of a garden hose, being unable to approach it closely because of the heat. The first fire officer, Frederick R. Cane of the State Forestry Service, reached the scene of the fire at about 10:10 p. m. He found that the fire involved the whole living room and that the ceiling had burned through. There was substantial evidence that a gallon jug and a five gallon can containing small amounts of kerosene or some other petroleum product were found in the kitchen. No fire was started in the kitchen. The odor of a petroleum product was noticed throughout the house and tests showed the presence of a petroleum product on some of the charred fabrics, including a bedspread, which was partially burned.

This spread was on one of the two beds in a back bedroom.

Samuel R. Waugh, an expert witness, for 25 years an investigator for the Arson Department of the National Board of Fire Underwriters, examined the premises on the morning following the fire and as a result of such examination testified that in his opinion the fire may have burned as long as three hours after being started.

The jury by its verdict made an implied finding that the appellant either personally set the fires herself, or induced Norman Hudson, a friend of the appellant, who had on at least one occasion stayed at appellant's home, to set the fires. Hudson had been seen on the afternoon of the fire at a service station at the same time appellant was there, and was observed by a defense witness, Edith Barklow, at the appellant's premises after appellant had driven away.

Other than the usual furniture, much of which was burned or damaged by the several fires, but few of appellant's clothing or personal effects were found in the front house. The chests of drawers and dresser drawers contained practically none of appellant's underclothing. Some old dresses were in the closets and an old pair of shoes were found in one bedroom. Most of the beds had no sheets on them. Only one towel was found in the house, but no other linens.

In the bedroom of the rear house, in which no fire was started, there were found a great many party dresses, the bed being half covered with them, others being found in the closet. About 20 pairs of ladies' shoes were found in the closet. A cedar chest containing lace tablecloths, a case of silverware and a number of pictures were also found in that bedroom. Most of the family pictures were in this bedroom. There was evidence to the effect that much of appellant's clothing had been moved by appellant's grown daughter into the back bedroom in March, about three months before the fire, at about the same time appellant obtained new insurance coverage.

A neighbor lady, who had never been an intimate friend of the appellant, had been told by appellant shortly before appellant

left the vicinity that she was driving to Long Beach; and the evidence is uncontradicted that appellant had never before informed this witness of an intended departure.

Upon receiving a telephone call at the home of Mrs. Opal Sommes, at Long Beach, on the night of the fire from her friend and neighbor, a Mrs. Edith Barklow, that there had been a fire at appellant's home, the friend, Mrs. Opal Sommes, heard appellant exclaim: "My God, no. What about my new chair. It isn't paid for. Maybe the T-V blew up." On the other hand, Betty, a grown daughter of appellant, testified that after that call her mother told her the house had burned; that Edith Barklow thought maybe the "T-V" burned up.

The foregoing illustrates one of the instances appearing in the record of variances in the testimony of the appellant and of her witnesses which justified the jury in treating such testimony with distrust.

The appellant stated to the first officer who asked her about her insurance on the morning after the fire that she had no insurance. The record shows that appellant later on the same morning stated to Mr. Waugh that she had about \$5,000 insurance on the house and \$2,000 or \$2,500 on the personal property. However, the appellant's property had been insured until the early spring of 1954 by the State Farm Insurance Company by a policy of \$4,000 on the front house, \$10,000 on the contents thereof, and \$1,500 on the rear house. The agent for that company notified appellant that the policy was being canceled for failure to pay the premium, and on March 16, 1954, appellant called by long distance from Norco in Riverside county to Stanley Asher, an insurance agent in Palm City, south of San Diego, told him her policy was running out and asked for coverage of \$5,000 on the front house, \$10,000 on its contents and \$2,000 on the rear house. This coverage was made by Mr. Asher as of March 16, 1954. An appraiser of 17 years experience testified that the value of the furnishings in the front house before the fire was about \$3,100.

The appellant was heavily in debt. About \$3,900 remained to be paid on the mortgage on her home and she had borrowed an additional \$1,900. Appellant admitted having numerous debts, among which was about \$14,000 owing to the State Board of Equalization. By reason of her failure to pay a balance of \$465.93 to the Pacific Telephone and Telegraph Company, that company had discontinued service to her, and had filed an action against her. These bills were the result of appellant's operation of a lumber brokerage business. She was also indebted to Walt's Service Station in an amount from \$100 to \$600.

There is substantial evidence that prior to the fire there had recently been living on the premises the appellant and her husband; an adult daughter, Betty Hornbach; an adult son, Robert Freeman, with his wife and two children; a minor son, Eddie; and a friend of the Freemans, Clifford Jackson and his wife and child. Appellant's husband had been in Texas for several days before the fire. Robert Freeman and his family had moved out about a week before the fire, and Clifford Jackson and his family had moved out a day or two before the fire, leaving residing there at the time of the fire only the appellant, her minor son and her adult daughter, all of whom left in the very late afternoon to go to Long Beach.

The circumstances relied upon by the People to sustain the verdict of the jury are the conceded incendiary character of the fires, the opportunity appellant had to set them, the removal of most of her clothing and personal effects from the front house to the rear house, evasiveness of appellant concerning insurance coverage, the overinsurance of the house and contents, the heavy indebtedness of the appellant, and the removal from the premises shortly before the fire of all occupants other than appellant and her minor son and adult daughter, all of whom left the premises on the evening of the fire, the appellant being the last to leave the house in which the fires occurred.

[2] The offense of arson is frequently one which is committed in stealth. In many cases in which the charge is arson, the

People must rely upon circumstantial evidence to establish the guilt of the accused. In the instant case the evidence pointing to the guilt of the appellant is circumstantial. The jury was accurately instructed by the court as to the value and effect of circumstantial evidence. We are of the opinion that the facts hereinbefore recited, which were impliedly found by the jury to be true, reasonably justify the verdict of the jury finding the appellant guilty, and further reasonably justify the order of the trial judge denying appellant's motion for a new trial.

[3] Appellant suggests, but apparently does not seriously contend, that the trial court should have instructed the jury upon the subject of alibi. No such instruction was requested by appellant at the time of trial and such instruction need not be given in the absence of a request therefor by the accused. *People v. Keilly*, 54 Cal.App.2d 764, 767, 129 P.2d 939, and cases cited therein.

It follows therefore that the judgment and order denying a new trial must be and the same hereby are affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



134 Cal.App.2d 518

Alyssee I. Riley GAGLIONE, Plaintiff and Appellant,

v.

Margaret W. COOLIDGE, Defendant and Respondent.
Civ. 16373.

**District Court of Appeal, First District,
Division 2, California.**

July 22, 1955.

Hearing Denied Sept. 15, 1955.

Action for specific performance of an oral contract to convey realty, or in the alternative, restitution of money paid thereunder. The Superior Court, City and County of San Francisco, Herman van der Zee,

J., entered judgment on order sustaining demurrer without leave to amend. Plaintiff appealed. The District Court of Appeal, Kaufman, J., held that where vendor represented that she would repay purchase price to purchaser and delay in commencing action for restitution was induced by such conduct of vendor, vendor could not avail herself of the defense of the statute of limitations.

Reversed.

1. Pleading ⚡417

Complainant who chose to amend complaint and filed another complaint waived any error in ruling on demurrer to prior complaint.

2. Declaratory Judgment ⚡313

A complaint states a good cause of action for declaratory relief if facts showing the existence of an actual controversy relating to the legal rights and duties of the parties are alleged, and the court is asked to adjudge these rights and duties. West's Ann.Code Civ.Proc. §§ 1060, 1061.

3. Declaratory Judgment ⚡148

Declaratory relief may be proper under an oral contract to convey realty. West's Ann.Code Civ.Proc. §§ 1060, 1061.

4. Declaratory Judgment ⚡394

Error by trial court in denying declaratory relief by sustaining a general demurrer to complaint rather than by deciding matter after answer has been filed is not prejudicial unless an abuse of discretion is affirmatively shown on appeal.

5. Pleading ⚡225(2)

If court can determine that a complaint may be amended to state a cause of action, it would be an abuse of discretion to sustain a demurrer to complaint without leave to amend.

6. Limitation of Actions ⚡180(2)

Statute of limitations is not available on demurrer unless all facts which defendant would be required to prove appear on face of complaint.

7. Pleading ⚡252(1, 2)

An amended pleading takes the place of the original, and thereafter the super-

seded complaint performs no function as a pleading but if in the prior verified complaint there are allegations destructive of the cause of action, defect cannot be remedied by simply omitting, in subsequently filed pleading, without proper explanation, such allegations.

8. Frauds, Statute of ⚡129(4, 5)

Possession will take an oral contract to convey real property out of the statute of frauds, but payment of money alone will not.

9. Specific Performance ⚡114(2)

Purchaser's complaint which disclosed that purchaser had moved out of possession of property failed to state cause of action for specific performance of oral contract to sell realty.

10. Limitation of Actions ⚡46(6)

Statute of limitations begins to run on contract when contract is repudiated.

11. Vendor and Purchaser ⚡33

Representation by vendor that oral contract to convey realty was void was a representation of law upon which purchaser was not entitled to rely, there being no confidential relationship, but representations that vendor would repay purchase price was a representation of fact on which purchaser could rely.

12. Limitation of Actions ⚡49(1) Vendor and Purchaser ⚡341(1)

Where oral agreement to convey realty was repudiated and on September 12, 1952 purchaser surrendered premises in reliance on vendor's promise that she would repay purchase price, any breach of final agreement to repay arose thereafter and purchaser's action instituted in August 1953 for restitution was not barred by statute of limitations or laches.

13. Limitation of Actions ⚡145(1)

Where vendor represented that she would repay purchase price and delay by purchaser in commencing action for restitution of money paid was induced by such conduct, vendor could not avail herself of defense of statute of limitations in action for restitution. West's Ann.Code Civ.Proc. § 339, subd. 1.

14. Pleading ⚡252(2)

Superseded complaint examined to reveal defense of statute of limitations on demurrer could be examined to determine whether defense of statute of limitations could not be availed of because of estoppel. West's Ann.Code Civ.Proc. § 339 subd. 1.

Joseph A. Brown, San Francisco, for appellant.

Frank J. Mahoney, San Francisco, for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment entered on an order sustaining respondent's demurrer without leave to amend to appellant's third amended complaint.

Four different complaints were filed by appellant. The original complaint filed on August 26, 1953, contained two counts, one to quiet title and one for specific performance of an oral contract to convey real property. Respondent Margaret Coolidge was sued individually and as executrix of the estate of her father David Kelly, deceased. A demurrer to this complaint having been sustained, appellant filed the first amended complaint which consisted of one count for specific performance. Following the sustaining of a demurrer to this complaint, the second amended complaint was filed. It contained three counts, one for specific performance; one for damages, actual and punitive, and one for money had and received. A demurrer to this complaint was also sustained with leave to amend and a motion to strike granted.

The third amended complaint was for declaratory relief seeking a declaration of appellant's rights and duties in respect to certain real property therein described. It was then alleged "That an actual controversy has arisen between plaintiff and said defendant, Margaret W. Coolidge, relating to the legal rights and duties of said parties, to wit, that plaintiff contends that plaintiff is entitled to the execution and delivery to plaintiff by said defendant, Margaret W. Coolidge, of a good and sufficient grant deed, granting and conveying the aforesaid

real property in fee simple absolute to plaintiff, or, in the alternative, to the recovery from said defendant of the sum of \$3,209.68, being the amount heretofore paid by plaintiff to said defendant pursuant to the terms of an oral contract wherein and whereby the said defendant agreed to sell and convey the said real property in fee simple to plaintiff; that said defendant, Margaret W. Coolidge, denies all and singular the aforesaid claims of defendant."

Respondent demurred to the third amended complaint on the grounds that (1) it did not state a cause of action; (2) that no cause of action was stated inasmuch as any claim for relief was barred by the provisions of section 339(1), Code of Civil Procedure; (2) that it was uncertain in several particulars, that it was ambiguous and unintelligible.

It may be observed that this complaint is certainly subject to numerous defects raised by the special demurrer, but if the special demurrer had been sustained, leave to amend should have been granted. Respondent contends, however, that the demurrer was properly sustained without leave to amend, since the action was barred by the Statute of Limitations, sec. 339(1), Code of Civil Procedure, and furthermore did not state a cause of action for declaratory relief under section 1060 of the Code of Civil Procedure.

[1] Appellant's first contention, that the trial court committed error in sustaining the demurrer to the second amended complaint, may be disposed of briefly. Appellant chose to amend and filed the third amended complaint. She therefore waived any error in these rulings if error had been committed by the court in sustaining the demurrers. *Metzenbaum v. Metzenbaum*, 86 Cal.App.2d 750, 195 P.2d 492; *Dalzell v. Kelly*, 104 Cal.App.2d 66, 230 P.2d 830; *Sheehy v. Roman Catholic Archbishop*, 49 Cal.App.2d 537, 540, 122 P.2d 60. Even if we assume that appellant could object at this stage of the proceedings to the sustaining of the demurrer to the second amended complaint with leave to amend, that complaint was subject to a great number of objections raised by special demurrer, and on that ground the ruling of the trial court may be upheld. Appellant has attacked this ruling

simply on the ground that the Statute of Limitations may not be resorted to by respondent, because that complaint shows facts concerning respondent's conduct which give rise to an estoppel to plead the bar of the statute.

[2] It is next contended that the third amended complaint stated a good cause of action for declaratory relief. Appellant stated that it has been held that a complaint for declaratory relief is sufficient where it shows the existence of an actual controversy, *Tolle v. Struve*, 124 Cal.App. 263, 12 P.2d 61; *Northwest Casualty Co. v. Legg*, 91 Cal.App.2d 19, 204 P.2d 106; *Dowd v. Glenn*, 54 Cal.App.2d 748, 129 P.2d 964, and that plaintiff need not allege facts showing that the adverse party has breached the terms of an agreement. *Pacific States Corp. v. Pan American Bank*, 213 Cal. 58, 1 P.2d 4, 981. It is sufficient if facts showing the existence of an actual controversy relating to the legal rights and duties of the parties are alleged, and the court is asked to adjudge these rights and duties. *Oldham v. Moodie*, 94 Cal.App. 88, 270 P. 688.

[3] While it is true that the third amended complaint states that a controversy exists in relation to the rights and duties of the parties under an oral contract to convey real property, and therefore would appear to state a case for declaratory relief under section 1060, Code of Civil Procedure, the court may refuse to exercise its power under that section in any case where its declaration or determination "is not necessary or proper at the time under all the circumstances." Sec. 1061, Code of Civil Procedure. That declaratory relief may be proper under an oral contract is now established. 15 Cal.Jur.2d 230, sec. 72.

[4] It is true that the action of a trial court in denying declaratory relief by sustaining a general demurrer to the complaint rather than by deciding the matter after answer has been filed has been criticized, *Moss v. Moss*, 20 Cal.2d 640, 128 P.2d 526, 141 A.L.R. 1422, still such error has not been considered prejudicial unless an abuse of discretion is affirmatively shown on appeal. 15 Cal.Jur.2d 166, sec. 37; *Lord v. Garland*, 27 Cal.2d 840, 168 P.2d 5.

[5] In the instant case the alleged controversy consists of plaintiff's contention that she is entitled to the execution of a deed to the property involved in the oral contract, in other words, specific performance of said contract, or in the alternative to the recovery of the money already paid pursuant to the terms of the contract. This was the fourth complaint filed in this action. The two prior complaints had demanded specific performance, and the second amended complaint sought specific performance, compensatory damages, and punitive damages for fraud. On the fourth attempt, appellant has switched to the theory of declaratory relief, but the complaint still discloses that she is seeking specific performance of an oral contract to convey real property, or in the alternative, restitution of the money paid thereunder. Appellant is therefore attempting to state the same causes of action set forth in the prior complaints. The court could properly conclude, therefore, that appellant had a sufficient remedy in a suit for specific performance or damages. If, however, the court can determine that the complaint may be amended to state a cause of action it would be an abuse of discretion to sustain the demurrer without leave to amend. *Wennerholm v. Stanford University School of Medicine*, 20 Cal.2d 713, 719, 128 P.2d 522, 141 A.L.R. 1358.

It is necessary to decide, therefore, whether a cause of action is stated in either specific performance of damages for money paid out pursuant to the oral contract. Respondent contends that these causes of action are barred by the Statute of Limitations, and that the second amended complaint shows on its face that such is the fact. Appellant argues that the second amended complaint has been completely superseded by the third amended complaint, and may not be referred to in order to disclose such a defense. She contends further, that if such defense is disclosed, the second amended complaint also contains allegations showing conduct and representations of respondent which give rise to an estoppel to assert such defense.

[6] It is true that the general rule is, as stated by appellant, that the Statute of Limitations is not available on demurrer unless

all the facts which defendant would be required to prove appear on the face of the complaint. *Stafford v. Russell*, 117 Cal.App. 2d 319, 255 P.2d 872; *Los Angeles County v. Security First National Bank*, 84 Cal.App. 2d 575, 191 P.2d 78. The cases cited by appellant, however, do not deal with the question now before us, that is whether the prior verified complaint can be resorted to in an attack on the later complaint.

[7] In *Owens v. Traverso*, 125 Cal.App. 2d 803, at page 804, 271 P.2d 164, at page 165, the court had before it this same problem: "When prior verified complaints contain allegations that are destructive of any cause of action, can the defect be cured by omitting such allegations in complaints subsequently filed, without a proper explanation as to why the prior allegations were omitted?" The court decided that "The answer must be that, although prior complaints are normally superseded by subsequent ones, and should be disregarded, a pleader cannot cure a defect in a verified complaint by simply, without legal explanation, omitting such allegations from subsequently filed pleadings. In such a case the original defect infects the subsequent pleading so as to render it vulnerable to a demurrer. * * * [125 Cal.App.2d 808, 271 P.2d 165]. It is undoubtedly the general rule of law that an amended pleading takes the place of the original, and that thereafter the superseded complaint performs no function as a pleading. (Citations.) But to this general rule there is an equally well settled exception. This exception is to the effect that if in the prior verified complaint there are allegations destructive of the cause of action, the defect cannot be remedied by simply omitting, in subsequently filed pleadings, without proper explanation, such allegations." And, see, *Lee v. Hensley*, 103 Cal.App.2d 697, 709, 230 P.2d 159.

Since appellant has omitted from the third amended complaint all of the dates and many other important facts alleged in the prior complaint, the second amended complaint may be referred to, to determine whether the Statute of Limitations has barred the causes of action alleged, or whether the complaint is otherwise fatally defective.

The second amended complaint alleged that respondent Margaret Coolidge, David Kelly and his wife, Inez, were on April 1, 1946, the owners in fee simple in joint tenancy of certain real property thereafter described; that the Kellys by themselves and through their duly authorized agent, respondent Margaret Coolidge, orally agreed to sell and convey to appellant said property for the sum of \$8,500, of which \$1,000 was to be paid upon the execution of the agreement and the balance thereafter at the rate of \$65 per month. It was alleged that the agreement was just, reasonable and equitable, and the consideration just and adequate.

The complaint then relates that Inez Kelly died on January 5, 1949, and her interest vested in David Kelly and respondent; that thereafter David Kelly and respondent became record owners of said property as tenants in common; that later, by virtue of the will of David Kelly, respondent became record owner in fee simple absolute of the said property which was distributed to her on April 20, 1953. It was further alleged that respondent and the Kellys at the time of the execution of the agreement represented that the terms and conditions thereof would be put in writing; that pursuant to the oral agreement appellant paid the sum of \$1000 and was let into possession of the property. Thereafter she paid \$65 per month thereon until September 1948.

Paragraph VIII of the complaint sets forth sums expended by appellant for taxes, repairs and improvements up till September 1948. Paragraph XI alleges that appellant remained in possession until September 12, 1952.

Paragraph XII and XIII read as follows:

"XII.

"That plaintiff ceased making the said payments of \$65.00 per month during the said month of September 1948 for the reason that said defendant Margaret W. Coolidge then and there stated, declared and represented to plaintiff that by the fact the aforesaid contract agreement was not in writing the same was invalid and unenforceable and that under the law plaintiff had not acquired in writing title or interest in or to

the said real property, or any part thereof, and that it would be necessary for plaintiff to remove from and vacate the said real property; the said defendant Margaret W. Coolidge then and there further falsely and fraudulently stated and represented to plaintiff that if the plaintiff would remove from and vacate the said real property she, the said defendant, would pay to plaintiff all monies paid by plaintiff under and by virtue of the said oral agreement, together with all sums expended by plaintiff in improving the said real property, and all monies expended by plaintiff for taxes, to and including the date that plaintiff vacated and removed from the said real property; that plaintiff was wholly unversed in and ignorant of the law and the said defendant Margaret W. Coolidge was well acquainted with the law in the premises and had the advice of counsel in respect thereto; that plaintiff was not then and there represented by counsel and had no advice of counsel concerning her rights in the premises, and that plaintiff absolutely and implicitly trusted and relied upon the statements of the said Margaret W. Coolidge with respect to her rights in the premises and further relied upon the aforesaid promises of said defendant to repay to plaintiff all of the aforesaid sums paid or expended by plaintiff toward the purchase price of the said real property and for the aforesaid improvements thereon; and that, in reliance thereon, plaintiff removed from and surrendered the possession of said real property on the 12th day of September, 1952.

"XIII.

"That during the entire period between the month of September 1948 and the day last aforesaid, to wit, the 12th day of September, 1952, the said defendant Margaret W. Coolidge repeatedly and continuously stated, declared and reiterated to plaintiff that plaintiff should say nothing concerning the premises to the father or the mother of said defendant Margaret W. Coolidge, and that when the said father and mother of said defendant had died, she, the said Margaret W. Coolidge, would settle and adjust the matter of the purchase of the said real property and the whole thereof, by the plaintiff to the complete satisfaction of said plaintiff; and that during all of said period of

time the said defendant Margaret W. Coolidge urged and requested plaintiff to pay all of the taxes upon the said real property; and that plaintiff, solely in reliance upon the said promises and assurances of said defendant, and not otherwise, paid all of the taxes on the said real property and the whole thereof during all of the period last aforesaid."

It was further alleged that in order to prevent appellant from taking any steps to protect her rights respondent presented to appellant a certain compromise agreement of appellant's claim in the estate of David Kelly, deceased, which recited the payments theretofore made on the property. The purported petition prayed for payment of this sum, half from the proceeds of the estate, and further ordered respondent individually to pay appellant a like sum to secure a release of the remaining one-half of the property. Said petition was, it is alleged, never filed by respondent, but she applied for and obtained a decree of the Superior Court distributing all of said property to respondent. Appellant alleged that she wholly relied upon respondent's representation and statements, and but for them would have continued making all payments required under the contract. In June 1953, she learned for the first time when she consulted an attorney after she failed to receive the money under the purported compromise agreement, that respondent's representations had been false in regard to the invalidity of the oral contract.

[8,9] Neither the second amended complaint nor the third, state a cause of action for specific performance nor can they be amended to state one, since appellant has disclosed that she moved out of possession of the property in 1952. Possession will take an oral contract to convey real property out of the Statute of Frauds, but payment of money alone will not. See, *Ham-bey v. Wise*, 181 Cal. 286, 184 P. 9; 23 Cal.Jur. 467-468, sec. 35; p. 470, sec. 37.

[10] The only question remaining, then, is whether there is a cause of action stated in the third amended complaint for restitution of the money paid by respondent

under the oral contract. Respondent contends that the second amended complaint clearly discloses that such cause of action is barred by the Statute of Limitations, Code of Civil Proc. sec. 339(1), since the oral contract to convey was repudiated by respondent in September 1948, and this repudiation was acknowledged by appellant, for at that time she ceased making the monthly payments under the contract. If respondent is correct in her interpretation that there was an absolute repudiation of the contract at that time, then the statute would commence to run from that time on both the breach and damages for the breach, and the action would be clearly barred unless respondent is estopped to plead the statute.

[11,12] However, Paragraphs XII and XIII of the complaint while somewhat uncertain and ambiguous, show a course of negotiations in regard to the repayment of the money which extended from September 1948 until September 1952, when in reliance on respondent's promises to repay, appellant finally surrendered the property. One of the vendors David Kelly had died in September 1951, and respondent was appointed executrix of his estate on June 27, 1952, and in this capacity she pretended to negotiate with appellant in regard to repayment of the purchase price. Throughout the years 1948 to 1952, appellant remained in possession of the property, paying the taxes thereon. It must be taken as true, that appellant removed from the property in September 1952, in reliance on the continuing promise of respondent that she would repay appellant. While the representation that the oral contract was void is a representation of law upon which appellant was not entitled to rely, there being here no confidential relationship, the representation that respondent would repay the purchase price is certainly a representation of fact. Any breach of the final agreement in regard to repayment arose sometime after September 12, 1952, and therefore cannot be said to have been barred at the time this action was brought by either the Statute of Limitations or by laches.

[13] If we view the pleadings as showing an absolute repudiation and breach of

the contract in September 1948 which would start the statute running against appellant's claim to a repayment of the purchase price, the same pleadings which disclose the breach also show that appellant was lulled into delaying the prosecution of her claim by a continuous course of misleading conduct on the part of respondent. It is well settled that where delay in commencing an action is induced by the conduct of the defendant, he cannot avail himself of the defense of the statute. *Adams v. California Mut. Bldg. & L. Ass'n*, 18 Cal.2d 487, 116 P.2d 75; *Langdon v. Langdon*, 47 Cal.App.2d 28, 117 P.2d 371; *Berkey v. Halm*, 101 Cal.App.2d 62, 224 P.2d 885; *Schaefer v. Kerber*, 105 Cal.App.2d 645, 234 P.2d 109. In *Industrial Indemnity Co. v. Industrial Accident Commission*, 115 Cal.App.2d 684, 690, 252 P.2d 649, 652, it is said that "Acts or conduct which wrongfully induce a party to believe an amicable adjustment of his claim will be made, may create an estoppel against pleading the statute. (Citations.) An insurer cannot hold out a hope of amicable adjustment of a claim and thus delay action against it, and then plead the delay caused by its own conduct as a defense to an action when brought."

[14] It would be absurd if the superseded second amended complaint could be examined to determine the date of the breach, as respondent apparently contends, in order to reveal the defense of the Statute of Limitations, but could not be examined as to the allegations in that same pleading which show that the defense may not be availed of because of estoppel. While it is settled that such a superseded pleading may not be examined to supply defects in the later complaint, *Cross v. Tustin*, 111 Cal.App.2d 395, 244 P.2d 731, the purpose of the examination here is not to aid the complaint, but to determine whether the defense of the Statute of Limitations may be taken advantage of by respondent.

We hold that the court was in error in sustaining the demurrer without leave to amend, inasmuch as appellant may be able to state a good cause of action for repayment of the money. It is suggested that

when another amendment is made, appellant will cure the ambiguities and uncertainties which are so prevalent in all the earlier pleadings.

Judgment reversed.

NOURSE, P. J., and DOOLING, J., concur.



Jack W. BRADSHAW, Petitioner and Appellant,

v.

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION, James G. Bryant, C. A. Herbage, Edward Cain, Michael B. Kunz, Glenn V. Walls, as the Members of said Commission, California Unemployment Insurance Appeals Board, Michael B. Kunz, Glenn V. Walls, and Edward Cain, as the Members of said Board, James G. Bryant, as Director of Employment of the State of California, and Chronicle Publishing Company, a corporation, Respondents.

Civ. 16457.

District Court of Appeal, First District, Division 1, California.

Aug. 3, 1955.

As Modified on Denial of Rehearing

Sept. 2, 1955.

Hearing Granted Sept. 28, 1955.

Proceeding for benefits under the Unemployment Insurance Act. From a judgment of the Superior Court, City & County of San Francisco, H. A. Van der Zee, J., on sustaining of respondents' general demurrer to the petition and petitioner's refusal to amend, petitioner appealed. The District Court of Appeal, Fred B. Wood, J., held that dismissal pay received by petitioner when discharged by respondent newspaper publishing company on reduction of its force was not allocable to a determinable period of time thereafter and did not constitute wages payable with respect to such period, during which he was unemployed and entitled to benefits.

* Opinion vacated 297 P.2d 970.

Judgment reversed and cause remanded with directions.

1. Constitutional Law ⇨70(3)

Dismissal pay received by newspaper publishing company's employee when discharged on reduction of force, under contract between newspaper publishers' association and newspaper guild, was not allocable to determinable period of time after such discharge and did not constitute wages payable with respect to such period, during which he was unemployed and hence entitled to benefits under Unemployment Insurance Act. Unemployment Insurance Code, §§ 926, 1252.

2. Constitutional Law ⇨70(1)

An argument that if dismissal payments to newspaper publishing company's discharged employees are not allocable to determinable period of time after their discharge, so as to characterize them as not unemployed during such period and hence not entitled to benefits under Unemployment Insurance Act, double burden will be imposed on employer and double benefits conferred on employees, should be addressed to legislature in support of recommendation that statute be amended, not to court in support of request that it rewrite statute. Unemployment Insurance Code, §§ 926, 1252.

Herbert Pothier, Marcel E. Cerf, Robinson & Leland, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., William L. Shaw and Vincent P. Lafferty, Deputy Attys. Gen., for respondents.

FRED B. WOOD, Justice.

The question upon this appeal is whether or not the "dismissal payment" received by each of certain employees of the Chronicle Publishing Company, when discharged upon reduction of the force, was allocable to a determinable period of time following his

discharge and constituted wages payable "with respect to" that period and thus characterized him as not "unemployed" during that period. If unemployed within the meaning of that term as used in section 9.2¹ of the Unemployment Insurance Act (now § 1252 of the Unemployment Insurance Code), he was entitled to benefits under that act during that period; otherwise, not.

In respect to the dismissal payment, section 7 of the applicable employer-employee contract provided: "(a) When an employee other than those exempted from the terms of this contract as herein provided is discharged, he shall receive a cash dismissal payment in a lump sum in accordance with the following schedule for years of continuous and uninterrupted employment:

"Less than six months employment	None
"Six months and less than one year	2 weeks
"One year and less than one and one-half years	3 weeks
* * * * *	*
"[The intervening schedule adds one week for each additional ½ year of service].....	
"Nineteen and one-half years and over	40 weeks

"(b) From the dismissal pay the Publisher may deduct any levy or tax to which the employee is subject under local, state or federal legislation.

"(c) Dismissal pay shall be computed at the highest weekly salary (exclusive of bonuses and payments for special work) for the fifty-two (52) weeks previous to discharge, except that, in the case of employees paid in whole or in part by commissions, dismissal pay shall be computed at the average weekly salary and commissions (exclusive of bonuses and payments for special work) for the fifty-two (52) weeks previous to discharge. * * *

1. "§ 9.2. An individual shall be deemed 'unemployed' in any week during which he performs no services *and with respect to which no wages are payable to him* * * *." (Emphasis added.)

The parties appear to be in agreement that the dismissal payments are "wages" as defined in § 11(a) (1) of the Act, § 926 of the code.

"(d) In the event of the death of any employee with six (6) or more months of service, the Publisher agrees that the beneficiaries of the deceased, designated by the employee in writing in advance, shall be paid a sum equivalent to that which the deceased would have been paid had he been discharged under the terms of his contract, but in no event less than five hundred dollars (\$500.00), less any legal costs or expenses caused the Publisher in making said payment.

"(e) Dismissal pay need not apply to an employee discharged for dishonesty or in the case of self-provoked discharge, for the purpose of collecting dismissal pay. * *"

Section 2 of the contract required the discharge of an employee if, for certain reasons, he lost good standing in the union, and provided that upon such a discharge the employee "shall receive no dismissal pay."

Section 5 provided that upon discharge other than for cause the "discharged persons shall be placed upon a rehiring list, without priority or seniority."

Section 13 related to the military leave of any employee who had been employed more than six months and provided that if he suffered incapacitating physical disability in the service "and if the Publisher is unable to place the employee in other acceptable employment, the Publisher shall pay the employee his dismissal pay as of the date he left the employment of the Publisher with additional credit for time served" in the armed forces. "If the employee dies while in" military service, "the Publisher shall * * * pay dismissal pay, calculated as of the time the employee left the employment of the Publisher with additional credit for time served * * * [in the armed forces] * * * to the employee's beneficiary previously designated in writing by the employee."

[1] Literally, the "cash dismissal payment" is not made "with respect to" any

period of time though computed by means of a formula which increases the amount in proportion to the number of year of prior service until the maximum is reached.

Upon the occurrence of any of the stated events (discharge, death while employed, death or physical incapacity while in military service), the amount thus ascertained becomes due as a debt without obligation of any kind running from the recipient to the debtor. Upon the discharge of an employee, he is free to take another job the very next day with his old or with a new employer and without abatement or refund of any of his dismissal pay. But in such a case it is a new job, a new employment without priority, seniority, retirement rights² or other benefits which were his and would have continued to be his under the contract but for the discharge. This loss of job security, we think, points up the true nature of this dismissal payment. It was a mutually advantageous arrangement: To the employee, reasonable assurance of tenure and the attendant benefits and privileges; to the employer, reasonable assurance of continuous service and the avoidance of disruptive labor turnover without preventing reduction of force when necessary because of changes in operating methods or for the sake of economy.

These factors were well expressed by the Supreme Court of Minnesota, concerning a similar severance pay plan, in *Ackerson v. Western Union Tel. Co.*, 234 Minn. 271, 48 N.W.2d 338, 342, 25 A.L.R.2d 1063: "Severance pay was in no way related to or dependent upon the employee's employment status after separation. She received the payment even though she might secure a job the next day. It is true that the amount was measured by the length of service, but there may have been many reasons for adopting the length of service as the yardstick in determining the amount of severance pay due a discharged employee. The type of work performed by claimants in this case was

2. Section 15 of the contract governing the employment provided that upon reaching age 65 or upon completion of 25 years of continuous and uninterrupted service or upon permanent physical incapacity, the employee may, at his option, terminate

his employment and receive a lump sum payment based upon length of service, in lieu of any other termination of employment payment elsewhere in the contract provided.

such that it was unlikely they could again procure work of a similar nature. Relator had virtually a national monopoly on the business. No other employer was likely to provide the discharged employees with an opportunity to use the skill acquired over these many years of service with relator. It is undoubtedly true that one of the objectives of dismissal or severance pay, such as we have to deal with here, is to ease the employee's financial burden while looking for a new job. However, there are other objectives which we must also keep in mind in considering the nature of such payment. Partial compensation for loss of seniority rights; loss of possible pension rights; compensation for retraining or acquiring new skills; and many others could be mentioned. Relator undoubtedly considered the desirability of retaining its trained personnel until the job of mechanization could be completed. It is reasonable to assume that in arriving at a contract by collective bargaining, under which relator became obligated to make such payments, it did so with full knowledge of the advantages to be gained by it in making such payments, without any strings tied to it, in return for the continued service of its employees until the time arrived when such services could be dispensed with."

The severance pay cases upon which respondents rely are not persuasive of a different view. Thus, in *Schenley Distillers v. Review Board of Ind. Emp. S. D.*, 123 Ind. App. 508, 112 N.E.2d 299, the court attached considerable significance to evidence that severance pay had there been provided for the purpose of tiding the employee over until he could find a new job and that it was the employer's practice not to reemploy one who had received severance pay unless he repaid "that portion which would otherwise be duplicated by subsequent salary payments." 112 N.E.2d at page 302. In *Krupa v. Western Union Tel. Co.*, 90 Ohio App. 90, 103 N.E.2d 784, 786, the majority of the court held that because of "some evidence from which it may be inferred that the sev-

erance pay was remuneration for the period of unemployment * * *, we can not find and determine that there was prejudicial error in the judgment of the Common Pleas Court * * *," holding the severance pay allocable to the period following discharge, 103 N.E.2d at page 786; cogently and convincingly criticised in a dissenting opinion, 103 N.E.2d at pages 786 to 788. In our case there is, quite properly, no such "evidence" in the record; nothing but the text of the contract itself.

In *Mooney v. Unemployment Compensation Comm.*, 336 Mich. 344, 58 N.W.2d 94, the Supreme Court of Michigan did not pass upon the merits of the question because it found that the trial court did not have jurisdiction to review the action of the state administrative agency involved. *Phillips v. Western Union Tel. Co.*, 234 N.C. 453, 67 S.E.2d 362, is a memorandum decision with no facts stated. It cites as authority *In re Mitchell*, 220 N.C. 65, 16 S.E.2d 476, which was a decision that the trial court's decree that the employers involved were not liable for compensation under the statute had become *res adjudicata* because the employee, the real party in interest, had not appealed.

Nor do we consider that pension cases are of precedential value, principally because in such cases the cessation of work is voluntary. See *Campbell Soup Co. v. Board of Review, etc.*, 24 N.J.Super. 311, 94 A.2d 514, 518.

Respondents invoke also a goodly number of cases in which it is held that payment to a discharged employee of the monetary equivalent of a vacation which he has earned but not yet enjoyed is paid "with respect to" a period of time (following discharge) equal to the accumulated vacation period. That ruling is sound in respect to that kind of payment but is not applicable to the "dismissal payment" here under consideration.

The administrative referee, as we read his decision herein, fell into the same error. He treated the dismissal payment as if it were truly analogous to the vacation pay³

3. Section 18 of the contract provided for one weeks' vacation with pay, after 6 months' employment; two weeks, after one year; three weeks, after three years

or more. It also declared that "any employee discharged or who resigns after six months' service shall receive pro rata vacation pay."

which each of the claimants herein received and to the in lieu of notice pay⁴ which all except two of them received. But they are not analogous.

As to the earned but not yet enjoyed vacation, the employer could keep the employee on the payroll, on vacation, for the required number of days and then discharge him, or he could discharge him at once and pay the amount of his wages for the vacation period. In the latter case it is clear that the wages are paid "with respect to" the ensuing period equal to the vacation period. Likewise, in respect to notice of discharge, the employer could give the notice and keep the employee on the payroll for two weeks, or discharge him immediately and pay him two weeks' salary. *Shand v. California Emp. Stab. Comm.*, 124 Cal.App2d 54, 55-57, 268 P.2d 193. As to vacation pay, see also *Jones v. California Emp. Stab. Comm.*, 120 Cal. App.2d 770, 774, 262 P.2d 91; *Cal. Unemp. Ins. App. Board Benefit Dec. No. 5578*. As to in lieu of notice pay, see also *McCloskey v. Division of Labor, etc.*, 9 Cir., 200 F.2d 402. The rationale of those holdings obviously does not apply to the "dismissal payment" here under consideration.

The latter, instead, bears considerable resemblance to the "bonus in lieu of vacation with pay." We refer to the case in which, pursuant to contract, the employee takes no vacation but earns and is paid each year the monetary equivalent of a vacation. Payment of so much of that as has accumulated at the time of discharge is considered a bonus and not a payment "with respect to" any period of time following discharge. *Cal. Unemp. Ins. App. Bd. Benefit Dec. No. 6047*; *Gilliam v. California Emp., etc., Comm.*, 130 Cal.App.2d 102, 278 P.2d 528; *Renown Stove Co. v. Michigan Unemploy. Comp. Comm'n*, 1950, 328 Mich. 436, 44 N.W.2d 1, 4; *Hubbard v. Mich. Unemployment Comp.*

Comm'n, 1950, 328 Mich. 444, 44 N.W.2d 4, 7.

It appears from the referee's decision that he attached considerable importance to the absence of "evidence showing that the allocations of the various types of pay was precluded by the contract." Seemingly, he assumed there was either a legal presumption or a permissible inference in fact of an intent to allocate to the period following the date of discharge unless expressly negated by "evidence." We are aware of no such presumption nor do we see a basis for any such inference. The contract, in this case, is the evidence and all of the evidence. Analysis of its provisions discloses the intent of the parties.

[2] Finally, respondents argue that if the dismissal payment is not allocated to a period of time after discharge, a double burden will be imposed upon the employer and a double benefit will be conferred upon the employee who will then receive unemployment compensation benefits chargeable to the employer's account. Such an argument should be addressed to the Legislature in support of a recommendation that the statute be amended, not to a court in support of a request that the court re-write the statute. See *Ackerson v. Western Union Tel. Co.*, supra, 234 Minn. 271, 48 N.W.2d 338, 342.

We conclude that the Unemployment Insurance Appeals Board, which affirmed the referee's decision, correctly determined that the "vacation pay in each case is allocable to the period immediately following the last day of work" and that "the notice of discharge or in lieu pay is allocated to the weeks next following"⁵ but erroneously decided that the "dismissal pay is allocated to the weeks occurring thereafter."

Accordingly, the judgment is reversed and the cause remanded with directions to overrule the demurrer to the petition and

4. Section 3 of the contract required, in respect to the discharge of a person employed 45 days or more, that the "employee shall be given two (2) weeks' notice (or two (2) weeks' pay in lieu thereof)" except in the case of a discharge for gross misconduct.

5. The referee also found that the weekly amounts thus allocated "in each instance exceeded the claimant's maximum possible weekly award" of unemployment compensation benefits.

proceed to a determination of the issues framed by the petition and the answer or answers thereto, not inconsistently with the views herein expressed.⁶

PETERS, P. J., and BRAY, J., concur.



135 Cal.App.2d 117

Aileen S. OLMSTEAD, formerly **Aileen S. Riley**, **Leland Bruce Riley**, **Ray Loren Riley** and **Dale Richard Riley**, by **Aileen S. Olmstead**, Guardian ad Litem, Appellants,
v.

Portia A. RILEY, in her individual capacity, and **Portia A. Riley**, as Executrix of the Estate of **Chester J. Riley**, Deceased, Respondent.

Civ. 5203.

District Court of Appeal, Fourth District,
California.

Aug. 17, 1955.

Action for reformation and enforcement as reformed of a property settlement agreement and trust indenture and an agreement terminating the trust. The Superior Court, Orange County, John Shea, J., granted defendant's motion for summary judgment and from judgment entered thereon, the plaintiffs appealed. The District Court of Appeal, Mussell, J., held that where court in previous action interpreted and construed language used in property settlement agreement entered into by husband and wife and

found that plaintiffs had no right, title or interest or claims in or to estate of deceased husband, matters presented by subsequent action by same plaintiffs seeking a decree adjudging the plaintiffs were owners of real property which was part of corpus of trust estate established as part of property settlement agreement were res judicata and plaintiffs were barred from maintaining present action.

Judgment affirmed.

See, also, 121 Cal.App.2d 303, 263 P.2d 47.

1. Judgment ¶540

The doctrine of res judicata rests upon ground that party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate, the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent.

2. Judgment ¶743(2)

Where court in previous action interpreted and construed language used in property settlement agreement entered into by husband and wife and found that plaintiffs had no right, title or interest or claims in or to estate of deceased husband, matters presented by subsequent action by same plaintiffs seeking a decree adjudging the plaintiffs were owners of real property which was part of corpus of trust estate established as part of property settlement agreement were res judicata and plaintiffs were barred from maintaining present action.

John N. Hurtt, Los Angeles, for appellants.

6. The judgment was rendered upon the sustaining of respondents' general demurrer to the petition and petitioner's refusal to amend.

During the hearing of the demurrer and pursuant to stipulation of the parties a certified copy of the administrative record, prepared with reference to the provisions of section 1094.5 of the Code of Civil Procedure, was filed with the court "for all purposes herein including reference by the court in determining the merits of the demurrer."

That brought before the court for consideration the evidence which had been presented to the referee.

The principal significant item of evidence was the text of the contract between the San Francisco Newspaper Publishers Association and the San Francisco-Oakland Newspaper Guild, which governed the claimants' employment relation during the period in question. The referee expressly excluded parol evidence of the intent of the parties when they negotiated the contract, saying "the contract speaks for itself" plays an important part in my decision."

Bertram H. Ross, Los Angeles, for respondent.

MUSSELL, Justice.

This is an action for reformation and enforcement as reformed of three instruments—a property settlement agreement and trust indenture, both executed on December 6, 1941, and an agreement terminating a trust executed May 26, 1947. After defendants filed their answer they filed a motion to dismiss the complaint for lack of merit under the provisions of section 437c of the Code of Civil Procedure. This motion for summary judgment was made upon the grounds that all of the matters set forth in the complaint are *res judicata* and that all of the matters therein were determined in an action theretofore tried in Orange county entitled “Ray Loren Riley and Dale Richard Riley, minors, by Aileen S. Riley, their guardian ad litem, and Leland Bruce Riley, plaintiffs, v. Portia A. Riley, defendant”, being numbered 57152 in the records of the Superior Court of Orange county. The motion was granted by the trial court and plaintiffs herein appeal from the judgment thereupon entered.

The principal question involved in this appeal is whether plaintiffs are barred from maintaining this action by reason of the findings and judgment in said action number 57152.

The facts relative to the material terms and the execution of the three instruments here involved are set forth in the opinion of this court in *Riley v. Riley*, 118 Cal.App. 2d 11, 256 P.2d 1056, decided May 20, 1953, in which the judgment of the trial court in action number 57152 was affirmed on appeal. In that action the trial court construed the provisions of the agreements here involved and rendered judgment that plaintiffs therein had no right to the estate of Chester J. Riley except to legacies of \$1,000 each as provided in Riley's will; that Portia Riley was entitled to said estate according to the terms of said will; and that the trust created on December 6, 1941, was terminated and revoked before any rights or benefits accrued to the three sons of Chester and Aileen Riley.

The present action was filed November 17, 1953, and plaintiffs contend, as alleged in their complaint, that prior to December 6, 1941, Aileen Olmstead and Chester J. Riley orally agreed to those matters set forth in the property settlement agreement excepting “That each of them would be obligated to execute, and at all times to keep in force, his and her will, whereby each of them devised and bequeathed to their said children not only an undivided one-third of his and her beneficial interests under said trust during the existence thereof, but also an undivided one-third of the property of said trust to be conveyed to him and to her on termination thereof”; that the insertion of the particular wording contained in paragraph ten of the property settlement agreement and contained in the portion of the declaration of trust relating to “rights and interests under the trust agreement” and relating to termination of the trust and the obligation of the “trustors” on termination thereof was due to a mistake on the part of Mr. Riley and that Mrs. Olmstead's acceptance of said instruments was due to her mistake in believing that the provisions thereof contained language obligating them to execute wills whereby each of them would devise and bequeath not only his and her beneficial rights under the trust created by them, during its existence, but also, as well, one-third of the property to be conveyed to him and to her by the trustees on termination of the trust as agreed and understood by them; that Aileen S. Olmstead and her counsel in the trial believed that the language of said instruments obligated Chester J. Riley to devise and bequeath to his children not only one-third of the property conveyed by him to the trustee on termination of the trust, but as well one-third of the property conveyed to him by the trustee on termination of the trust; that the holding of the court in action number 57152 constituted the first knowledge of the plaintiffs that the language of the property settlement agreement was such that it would not obligate Chester J. Riley to devise and bequeath to his children one-third of the property conveyed to him on termination of the trust; that Ailen

Olmstead executed the agreements and declaration of trust believing Riley's assurances to her that the instruments, as executed, conformed in every respect to their oral agreement; that the provisions of paragraph ten of the property settlement agreement and in the declaration of trust were inserted by Riley fraudulently and with intent to deceive plaintiff Aileen Olmstead and that defendant is estopped from denying the terms and provisions of the alleged oral agreement between Riley and Aileen Olmstead.

[1] The doctrine of *res judicata* rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation. *Panos v. Great Western Packing Co.*, 21 Cal.2d 636, 637, 134 P.2d 242; *Williams v. Krumsiek*, 131 Cal.App.2d 411, 280 P.2d 486. In *Krier v. Krier*, 28 Cal.2d 841, 843, 172 P.2d 681, 682, it is said:

"It is settled, however, that a judgment in a prior action between the same parties on the identical cause of action is *res judicata*, and a bar to a second suit thereon, not only as to issues actually determined therein but also as to issues necessarily involved. *Panos v. Great Western Packing Co.*, 21 Cal.2d 636, 134 P.2d 242; *Bernhard v. Bank of America, etc.*, 19 Cal.2d 807, 122 P.2d 892; see *Todhunter v. Smith*, 219 Cal. 690, 28 P.2d 916; *Rest.*, Judgments, § 63, comment (a); 2 *Freeman on Judgments*, 5th ed. § 676, p. 1425. And even though the causes of action be different, the prior determination of an issue is conclusive in a subsequent suit between the same parties as to that issue and every matter which might have been urged to sustain or defeat its determination. *Sutphin v. Speik*, 15 Cal.2d 195, 99 P.2d 652, 101 P.2d 497; see *Price v. Sixth Dist. Agricultural Ass'n*, 201 Cal. 502, 258 P. 387; 2 *Freeman on Judgments*, § 677, p. 1429."

Cal.Rep. 285-286 P.2d-53

See also *Shore v. Shore*, 43 Cal.2d 677, 681, 277 P.2d 4.

[2] In the instant case plaintiffs, in the prayer of their complaint, seek a decree adjudging, among other things, that the three children of Chester Riley are the owners of real property which was a part of the corpus of the trust estate and ask that the court make its decree that Portia Riley holds said interest in said real property in trust for said children. In action number 57152 the same plaintiffs, in an action for declaratory relief, sought to impress a trust on said claimed interest for the purpose of enforcing the provisions of the agreement here involved and to obtain a decree adjudging that the three sons of Chester Riley were entitled to a one-third interest in part of his estate. The trial court in said action number 57152 found that the trust created by the property settlement agreement and trust agreement of December 6, 1941, was terminated and revoked by the subsequent agreement of May 26, 1947, and concluded that plaintiffs had no right, title and interest or claim in and to the estate of Chester Riley, deceased, except as to the legacies of \$1,000 each as provided in Riley's will. The court interpreted and construed the language used in paragraph ten of the 1941 property settlement agreement and if, as contended by appellant, there was a mistake in the wording of the agreement, if there was some oral agreement contrary to its terms, and if the agreement was misunderstood by the plaintiffs, these matters could have been passed upon in that action and were issues necessarily involved therein.

In paragraph six of the complaint in action number 57152 plaintiffs alleged:

"By reference in paragraph X of the 1941 agreement to 'an undivided one-third interest of his or her rights and interests under said trust agreement and indenture' and also by the reference in said paragraph X to 'an undivided one-third interest * * * in and to his or her said interests and rights under said trust agreement Aileen and Chester meant and intended an undivided one-third of Chester's or Aileen's rights and interests under said trust agreement if it should be in effect,

and if its should be terminated an undivided one-third of any property of said trust which should be distributed to Chester or Aileen respectively upon such termination and of any proceeds from the sale or disposition of such property, and particularly but not exclusively, an undivided one-third of Chester's or Aileen's rights in the Riley building."

Paragraph three of defendant's answer is as follows:

"Answering paragraph VI of said complaint this defendant admits that paragraph X of the 1941 agreement provides: 'an undivided one-third interest of his or her rights and interests under said trust agreement and indenture' and this defendant further admits that paragraph X of said 1941 agreement also contains the language: 'an undivided one-third interest * * * in and to his or her said interests and rights under said trust agreement' but otherwise, denies generally and specifically each, every, all and singular, the other allegations in said paragraph contained."

The trial court in this connection found:

"IX. Referring to paragraph VI of plaintiffs' complaint it is provided in said trust agreement of December 6th, 1941, that: 'An undivided one-third interest of his or her rights and interests under said trust agreement and indenture' and it is also true that in said documents words appear as follows: 'an undivided one-third interest * * * in and to his or her said interests and right under said trust agreement,' but otherwise the allegations of said paragraph are untrue and that no evidence of any kind has been offered to this court other than the instruments themselves, as to the meaning and intent of the language above set forth."

It appears that plaintiffs, in action number 57152, presented the issue as to the intent of the parties as expressed in paragraph ten of the property settlement agreement and the court found that they did not offer any evidence other than the instru-

ments themselves on this issue. Plaintiffs were well aware of the provisions of the agreements here involved at the time of the trial of the first action and they are bound by the judgment therein decreeing that they have no right, title and interest or claims in or to the estate of Chester Riley, deceased, except as to the legacies of \$1,000 each as provided for in his will.

Plaintiffs are here seeking to relitigate the issue of their alleged interests in the property left by Chester Riley when their interests were determined in the former action. Under these circumstances the court properly granted the motion for summary judgment. *Crowley v. Modern Faucet Mfg. Co.*, 44 Cal.2d 321, 282 P.2d 33.

The judgment is affirmed.

BARNARD, P. J., and SHELL, J. pro tem., concur.



134 Cal.App.2d 594

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Fred William COLEMAN, Defendant and
Appellant.**

Cr. 5327.

**District Court of Appeal, Second District,
Division 2, California.**

July 27, 1955.

Hearing Denied Aug. 25, 1955.

Prosecution for unlawful possession of heroin. Defendant was convicted in Superior Court, Los Angeles County, Mildred L. Lillie, J., and appealed from the judgment and from order denying motion for new trial. The District Court of Appeal, Fox, J., held that evidence was sufficient, with respect to issues of knowledge and possession, to sustain the conviction.

Affirmed.

1. Criminal Law ⚖️1144(13)

A reviewing court must assume in favor of verdict the existence of every fact which jury could have reasonably deduced from evidence and determine whether such facts are sufficient to support the verdict.

2. Criminal Law ⚖️1160

Before jury verdict which has been approved by trial judge by denial of motion for new trial can be set aside on appeal upon ground of insufficiency of evidence, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in the court below.

3. Poisons ⚖️9

Evidence with respect to issues of knowledge and possession sustained conviction for unlawful possession of heroin. Health and Safety Code, § 11500.

4. Criminal Law ⚖️1159(4)

Conflicts and inconsistencies in testimony of an individual witness are to be resolved by the trier of facts.

5. Criminal Law ⚖️553

Judge or jury may accept as true a portion of the testimony of a witness and disbelieve the remainder or entertain reasonable doubt as to its correctness.

6. Criminal Law ⚖️698(1)

In prosecution for unlawful possession of heroin, wherein no objection or motion was made to strike testimony of a witness as having been given under duress, testimony was properly received in evidence and its voluntary character was for determination by the jury. Health and Safety Code, § 11500.

7. Arrest ⚖️63(4), 71

Where narcotics officers, after lawful entry into saloon, saw defendant, who was under their surveillance, reaching his hand over doorway of storeroom and then handing white object to unidentified person whom defendant directed out rear door and who left rapidly and eluded the pursuing officers, officers had reasonable cause to arrest defendant and search locked storeroom and office of establishment he was managing, so that arrest, search, and seiz-

ure of heroin were legal. Pen.Code, § 836, subd. 5; Health and Safety Code, § 11500.

8. Arrest ⚖️71

A search without a warrant is valid where it is incidental to a lawful arrest, if it is reasonable and made in good faith, and a seizure, during such a search, of evidence related to the crime is permissible. Pen.Code, § 836, subd. 5.

Albert S. Friedlander, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Marvin Gross, Joan D. Gross, Deputy Attys. Gen., for respondent.

FOX, Justice.

A jury found defendant guilty of possession of heroin in violation of Health and Safety Code, section 11500. He appeals from the judgment of conviction and the order denying his motion for a new trial.

Defendant was the manager of a cafe and cocktail bar at 5th and Stanford Streets in Los Angeles at the time of the events hereinafter enumerated, and had been such manager for some eleven months. He was virtually in exclusive control of the place since the owner was employed elsewhere.

Police officers searched the cafe on April 28, 1954, and found both heroin and marijuana in such places as under the cushions, in the booths, behind the juke box and in the cigarette machine. They again searched the premises the following night and found marijuana cigarettes. On that occasion defendant handed the officers four marijuana cigarettes which he assertedly found. The officers advised defendant of the bad reputation the place had for narcotics and warned him it had to be cleaned up and that they were going to book the narcotics they had found "as evidence against the place." In response to the complaints of the officers, defendant told them he put a sign on the wall, "No marijuana cigarettes allowed in the bar."

On the evening of April 30 Police Officers Clago and Starkey had the cafe and defendant under surveillance for about half

an hour starting at 10:45. Officer Clago observed defendant go to the rear of the cafe and unlock the door to the liquor storeroom. He entered, raised one hand up in the air and stepped right out again. He appeared to hand a white object—"a white piece of paper"—to a man nearby. The latter turned and started to leave by the front door. Defendant waved to him to leave by the rear door which opened on Stanford Street. He complied, leaving very rapidly. Officers attempted to apprehend him as he left the building, but he evaded them, ran and disappeared in the darkness. After defendant's arrest the officers asked him to open the liquor storeroom. He complied by taking a key out of his pocket and unlocking the door. He told the officers the day man had a key to this storeroom, but he was the only one there that night who had a key to it. There was testimony, however, that the owner had a key to this room; also, that a key was kept in the cash register for the use of employees in replenishing stock behind the bar and to enable delivery men to enter the stockroom. On searching that room Officer Starkey found a white object with a rubber band around it which consisted of nine bindles of heroin. This package was lying on a ledge above the entrance to the storeroom, in the approximate position that Officer Clago had observed defendant's hand disappear a few minutes earlier when he had unlocked this room and handed the person, whom he later directed to leave by the rear door, a package or white object. When these bindles were found one of the officers asked defendant, "What is this?" To which he replied that he did not know, and then added the observation that "someone must have pushed the bindles through the hole," referring to a small hole that went through the wall, and "hid them" there. The bindles, however, were about five inches from this hole. The ledge did not extend under the hole so that if the bindles were pushed through the hole they would fall directly to the floor; also, the officer noted the position they were in was farther from the hole than one could reach with his fingers, i. e., one could not put the

bindles through the hole and place them on the 1x4 ledge five inches from the hole. The officers also searched the office, to which they were admitted by defendant's producing a key from his pocket and unlocking the door. There they found ten white bindles wrapped with a rubber band in a cardboard box. These proved to contain heroin, too. Defendant disclaimed knowing what this package was and said "someone must have put it there." He acknowledged, however, that some tools, miscellaneous jewelry and Chinese novelties there in the office belonged to him.

A bartender who had worked for defendant testified that in January, 1954, just prior to his quitting, a person whom he did not know had approached him with what appeared to be bindles of heroin and asked him (the bartender) to keep the same for him. He refused the request. Defendant thereupon told the bartender that if he wanted to keep his job he would have to assist in giving protection to "pushers."¹

[1-3] Defendant contends that "the evidence is insufficient to sustain the verdict," on the ground that it fails to show that he had either knowledge or possession of the heroin. A reviewing court must, of course, assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict. Hence, before the verdict of a jury, which has been approved by the trial judge by the denial of a motion for a new trial, can be set aside on appeal upon the ground of the insufficiency of the evidence, "it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below." *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778, 780. Applying these principles to the instant case, it cannot be said that the evidence and the reasonable inferences to be drawn therefrom are not, as a matter of law, sufficient to support the judgment. As manager of the cafe and cocktail bar, defendant was virtually in exclusive charge of the premises since the owner was employed elsewhere.

1. "Pushers" are narcotic peddlers.

Defendant took pains to keep the liquor storeroom and the office locked even when he was on duty. While the day man and the owner had keys and there was apparently a key in the cash register to facilitate deliveries and the replenishment of the stock at the bar, it is clear that other employees had only limited access to either the supply room or the office, and that the public had no access to these portions of the premises. The testimony of Officer Clago that defendant unlocked the liquor storeroom, stepped inside, raised his hand in the air in the approximate position where a few minutes later nine bindles of heroin were found on the ledge, stepped out immediately and handed a white object or piece of paper to another person whom he directed to leave by the rear door, justifies the inference that defendant delivered a bindle of heroin to this unknown party. The hasty and elusive departure of this person is not without significance, too. Defendant's suggestion that someone must have hidden the bindles on this ledge by pushing them through the small hole in the wall was, under the physical facts, utterly absurd. Finally, the testimony of the bartender indicated a disposition on the part of defendant to cooperate with narcotic peddlers who frequented the place, even to the point of keeping their contraband merchandise for them, temporarily. Thus the jury could reasonably infer that the defendant had dominion and control over the bindles the officers found. *People v. Lama*, 129 Cal.App.2d 391, 393, 276 P.2d 816; *People v. Cuevas*, 131 Cal.App.2d 393, 280 P.2d 831, and had "knowledge of the narcotic character" thereof. *People v. Candiotto*, 128 Cal.App.2d 347, 350, 275 P.2d 500, 502.

[4,5] In this connection, defendant points out certain inconsistencies in the testimony of the officers and from that argues their testimony was untrue and should not have been believed by the jury. There is no substance to this point because "conflicts and inconsistencies in the testimony of an individual witness are to be resolved by the trier of facts." *People v. Frankfort*,

114 Cal.App.2d 680, 700, 251 P.2d 401, 413; *People v. White*, 115 Cal.App.2d 828, 831, 253 P.2d 108. The judge or jury may accept as true a portion of the testimony of a witness and disbelieve the remainder, or have a reasonable doubt as to its correctness. *People v. Hill*, 126 Cal.App.2d 378, 380, 272 P.2d 113.

[6] Defendant also claims that the testimony of the former bartender, Raleigh, was given under duress. Raleigh denied any duress as did Officer Clago, against whom the charge was made. No objection or motion to strike was made upon that ground. The evidence was properly received, and the voluntary character of this testimony was for the determination of the jury.

In a supplemental brief filed by court-appointed counsel,² it is argued that defendant's "constitutional rights and guarantees were violated in that evidence admitted and used against him was obtained as a result of an unlawful search and seizure." The recent case of *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905, is relied on. Counsel, however, fails to point to any specific facts which make the holding in the Cahan case applicable. This deficiency is understandable since the attempt to invoke the doctrine of the Cahan case in the instant matter is patently without merit. The Cahan case, reversing the tenor of California law, held that evidence obtained by police officers in violation of federal and state constitutional prohibitions against *unreasonable* search and seizure, is inadmissible. It does not purport to inhibit the right of law enforcement officers to conduct a *reasonable* search or seizure incident to a valid arrest.

[7,8] Penal Code, section 836, provides that: "A peace-officer * * * may, without a warrant, arrest a person: * * * (5) At night, when there is reasonable cause to believe that he has committed a felony." In view of what had transpired between defendant and the individual who subsequently fled detection on the night of April 30, when the officers had the premises under personal surveillance, the offi-

2. During the course of the appeal, defendant requested the court to appoint

counsel to represent him. Thereupon Mr. Friedlander was so appointed.

cers had reasonable cause for believing that defendant had committed a felony involving the sale or possession of narcotics. Hence, they were privileged to arrest defendant, at night, without a warrant, as was done. "Thereafter it was proper for them, as an incident to a lawful arrest, to search the premises and seize articles which they believed were being used by [him] * * in the commission of the crime for which he was arrested." In re Dixon, 41 Cal.2d 756, 761-762, 264 P.2d 513, 516. This was precisely the procedure followed in the case *sub judice*. The arrest was made upon probable cause following a lawful entry upon the premises; the search was made contemporaneously with the arrest; only the premises immediately involved were searched; and only contraband connected with the alleged crime was seized. There was thus a scrupulous avoidance of the unconstitutional transgressions on any fundamental individual right of defendant denounced by the Cahan case. It is well settled that a search without a warrant is valid where it is incident to a lawful arrest, if it is reasonable and made in good faith; and that a seizure, during such a search, of evidence related to the crime is permissible. In re Dixon, 41 Cal.2d 756, 761-762, 264 P.2d 513; Harris v. United States, 331 U.S. 145, 151, 67 S.Ct. 1098, 91 L.Ed. 1399; United States v. Rabinowitz, 339 U.S. 56, 61, 70 S.Ct. 430, 94 L.Ed. 653; McIntire v. United States, 10 Cir., 217 F.2d 663, 665; Agnello v. United States, 269 U.S. 20, 30, 46 S.Ct. 4, 5, 70 L.Ed. 145. In the case last cited, the court succinctly stated: "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime, and to search the place where the arrest is made in order to find and seize things connected with the crime * * * is not to be doubted." There is nothing in the language, logic or rationale of the Cahan case, where the search and seizure was accomplished in violation of constitutional guarantees, which is in conflict with the above principle, which has prevailed not only in California and the federal courts, but in our sister states. Annotations: 32 A.L.R.

680; 51 A.L.R. 424; 74 A.L.R. 1387; and 82 A.L.R. 782.

The judgment and the order denying motion for a new trial are affirmed.

MOORE, P. J., and McCOMB, J., concur.



134 Cal.App.2d 815

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Joe Ralph STRICKLAND, Jr., Defendant
and Appellant.**

Cr. 1014.

**District Court of Appeal, Fourth District,
California.**

Aug. 3, 1955.

Defendant was convicted of rape and assault by means of force likely to produce great bodily injury. The Superior Court of San Diego County, John A. Hewicker, J., entered judgment and defendant appealed. The District Court of Appeal, Mussell, J., held that evidence failed to show constructive filing of notice on appeal from conviction within ten day period and late filing could not be condoned.

Appeal dismissed.

1. Criminal Law ☞1081

Evidence failed to show constructive filing of notice on appeal from conviction within ten day period and late filing could not be condoned.

2. Rape ☞52(2)

Childish vocabulary of 10 year old complaining witness' descriptive details indicated sufficient penetration to support charge of rape. Pen.Code, § 263.

3. Assault and Battery $\S$ 92**Rape** $\S$ 51(1)

Evidence corroborated by evidence of complaining witness' physical condition after attack was sufficient to sustain conviction of rape and assault by means of force likely to produce great bodily injury. Pen.Code, $\S\S$ 245, 261, subd. 3, 263, 288.

4. Criminal Law $\S$ 29

Defendant committed two distinct crimes when he commenced to beat and choke complaining witness after accomplishing rape. Pen.Code $\S\S$ 245, 261, subd. 3, 288.

5. Criminal Law $\S$ 625**Jury** $\S$ 29(6)

Where record showed that defendant's counsel informed trial court in presence of defendant that defendant did not desire to go ahead with sanity hearing and when asked by trial court if there were any legal cause to show why judgment should not be pronounced defendant replied, through counsel, that there was none, defendant waived his rights to jury trial and his right to have separate trials on his guilt and sanity.

Harold F. Tebbetts, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant was charged in count one of an information with the crime of rape by force and violence, Pen.Code, sec. 261, subd. 3, alleged to have been committed on or about March 21, 1954, upon one Patty Guerra, a ten year old girl. In the second count he was charged with the crime of committing lewd and lascivious acts upon the body of said child, Pen.Code, sec. 288, and in count three defendant was charged with the crime of assault by means of force likely to produce great bodily injury. Pen. Code, sec. 245.

[1] The defendant entered pleas of not guilty and not guilty by reason of insanity as to said three counts. A jury trial was

waived by defendant, his counsel and by the district attorney. The trial court found defendant guilty as to counts one (Rape) and three (Assault by means of force likely to produce great bodily injury), and not guilty of the offense charged in count two. The court also found that the defendant was sane at the time the offenses were committed. Judgment was entered on July 27, 1954, and defendant was sentenced to the state prison. On August 9, 1954, he filed a notice of appeal from the judgment and "from the order denying motion for a new trial." No motion for a new trial was made. Therefore, the attempted appeal from the purported order denying the motion should be dismissed. Defendant's notice of appeal was not filed in time and the rule is that under such circumstances an appeal must be dismissed. *People v. Behrmann*, 34 Cal.2d 459, 461, 462, 211 P.2d 575. Appellant states in his closing brief that after entering the state institution at Chino he made every attempt possible to contact the legal officer of the institution to file a notice of appeal; that after many days with no interview by the legal officer, he wrote to the county clerk at San Diego; that this letter was returned with a notice to see the legal officer and on August 6th the legal officer interviewed him and permitted the filing of the notice of appeal. No motion was made by the attorney general to dismiss this appeal and the record does not contain proof of facts sufficient to show a constructive filing of the notice within the ten day period as was the case in *People v. Slobodion*, 30 Cal.2d 362, 367, 181 P.2d 868. See also *People v. Martiz*, 130 Cal.App.2d 602, 279 P.2d 568. The late filing cannot be condoned on the showing made by appellant and the notice of appeal having been filed too late, the appeal must be dismissed. However, the evidence is amply sufficient to sustain the findings and judgment and the judgment would have to be affirmed if the appeal were timely.

The evidence shows that Patty Guerra, on March 21, 1954, lived with her mother and stepfather in an apartment in San Diego. On that date Patty was left alone in the apartment with the defendant. He

picked her up and threw her on the bed and accomplished an act of sexual intercourse with her, after which he started to "pound" on her face with his fists and choked her. Defendant told her that if she told anyone he would kill her, and left the apartment.

Patty was examined by a physician the same afternoon, and he testified that she had two black eyes; that the left eye showed a subconjunctival hemorrhage; that there was a bruise on her forehead and minor abrasions inside the mouth and lips; that there were choke marks on the front of her neck and a small bruise on the left side of the rib cage. There were abrasions on both labia and small lacerations on the hymen. These lacerations were around a thirty-second or sixteenth-inch deep and were bleeding slightly.

Dottie Horton, the mother of the victim, testified that she left the girl and the defendant in the house about noon on March 21st and when she returned, Patty was at a neighbor's house; that her eyes were bloodshot; that there were bruises on her forehead, chin and throat, and finger marks on her mouth; that her private parts were reddish and there was blood on her clothes.

Arthur Elkins, a bartender who knew the defendant, testified that he saw him on March 21st; that defendant took a few of his clothes and said he was going to "take off"; that defendant said he had committed a crime worse than murder and that he "felt he could get the chair for it."

Defendant testified in his own behalf and stated that on March 21st he was "pretty well drunk"; that he did not remember the events that took place that day. Concerning the crimes charged, he said "I can't say that I am innocent. I can't say that I'm guilty."

[2, 3] Appellant argues that there was no showing of penetration as required by section 263 of the Penal Code. However, in view of the entire testimony in the record we conclude that the trial court could validly infer that defendant accomplished sexual penetration of the complaining witness. As is said in *People v. Vicencio*, 71 Cal.App.2d 361, 365, 162 P.2d 650, 652:

"The consummation of such an act may be shown by the circumstances and surroundings (*People v. Mayes*, 66 Cal. 597, 6 P. 691, 56 Am.Rep. 126), and may be proved by circumstantial as well as direct evidence. *People v. Preston*, 19 Cal.App. 675, 127 P. 660. The right to draw proper inferences from the evidence is a function of the jury; and as long as its conclusions do not do violence to reason, an appellate court is not permitted to substitute its findings of the ultimate fact for that reached by the jury (*People v. Kneiling*, 127 Cal.App. 151, 15 P.2d 561), and inasmuch as we cannot say that the conclusion reached by the jury does violence to reason we likewise cannot say that such conclusion was erroneous."

In the instant case, as in the case of *People v. Stangler*, 18 Cal.2d 688, 690, 117 P.2d 321, the childish vocabulary of the complaining witness' descriptive details indicated sufficient penetration to support the charge of rape. Her testimony, corroborated by evidence of her physical condition after the attack and by other circumstances shown, is amply sufficient to support a judgment of conviction.

[4] Appellant complains that he should have been found guilty only of "assault of attempt rape". There is no merit to this argument. There were two distinct crimes committed by defendant. After the rape, he commenced to beat and choke the complaining witness. This was a separate assault and separate acts were proved as the basis of each conviction. Multiple convictions have been affirmed in cases in which separate and divisible acts have been proved as the basis of each conviction, even though those acts were closely connected in time and were part of the same criminal venture. In *re Chapman*, 43 Cal. 2d 385, 389, 390, 273 P.2d 817.

[5] Appellant further complains that the trial court did not properly dispose of his insanity plea. This contention is likewise without merit. Defendant waived his rights to a jury trial and his right to have separate trials on his guilt and sanity. That

this may be done is held in *People v. Des-sauer*, 38 Cal.2d 547, 554, 241 P.2d 238. The reporter's transcript shows that defendant's counsel informed the trial court in the presence of the defendant that he had discussed the question of defendant's sanity with him and that defendant did not desire to go ahead with the sanity hearing. When asked by the court if there were any legal cause to show why judgment should not be pronounced defendant replied, through his counsel, that there was none. The trial court thereupon found that the defendant was sane and we see no prejudicial error in this finding.

The appeal is dismissed and the attempted appeal from the purported order is also dismissed.

BARNARD, P. J., concurs.



134 Cal.App.2d Supp. 917

Nicolas FERRARA, Plaintiff and Appellant,
v.

Orvin JORDAN et al., Defendants and
Respondents.

C. A. 8763.

Appellate Department, Superior Court,
Los Angeles County, California.

July 27, 1955.

Action for recovery of amount of former judgment rendered against defendant. From purported judgment of the Municipal Court of the Long Beach Judicial District, Charles T. Smith, J., the plaintiff appealed. The Superior Court, Appellate Department, held that instrument sent up in the record as being the judgment, stating that court ordered that defendants have and recover costs from plaintiff, was not a judgment from which an appeal could be taken.

Appeal dismissed.

Appeal and Error ¶119

Instrument sent up in the record as being the judgment, stating that court ordered that defendants have and recover costs from plaintiff, was not a judgment from which an appeal could be taken.

Nicolas Ferrara, Los Angeles, in pro. per.
Schiffman & Schiffman, Los Angeles, for respondents.

Before SHAW, P. J., and PATROSSO and SWAIN, JJ.

BY THE COURT.

This action went to trial upon a complaint seeking to recover from defendants the amount of a former judgment rendered against them and the answer of the defendants thereto. The plaintiff has appealed from what he denominates "the judgment in the above entitled action rendered in favor of defendants and against plaintiff."

The instrument sent up in the record as being the judgment, after reciting the trial of the action, states that "the Court ordered the following judgment:

"It is adjudged that the defendants Orvin Jordan and Eleanor Jordan have and recover from the plaintiff, Nicolas Ferrara, costs in the sum of \$8.25."

This is no judgment at all. After a trial of an action for money, it should appear either that plaintiff is entitled to an award of money in some amount, or that he take nothing. Neither of these possibilities is mentioned. There is here simply an award of costs. But costs would follow the judgment and not constitute it, for they go to the prevailing party by virtue of section 1031, C.C.P., and the judgment determines who is the prevailing party. We read in *Whitaker v. Title Ins. Co.*, 1918, 179 Cal. 111, 113, 175 P. 460, 461: "It is, of course, well settled that the right to recover costs exists solely by virtue of statutory provisions, and that when allowed by statute they are allowed solely as an incident of the judgment given upon the issues in the action. * * * They constitute no part of a judgment at the moment of its rendi-

tion, accruing only upon verified claim therefor * * *." In *Begbie v. Begbie*, 1900, 128 Cal. 154, 155, 60 P. 667, 49 L.R.A. 141, the court said: "Under section 1021 et seq., Code Civ.Proc., costs are not taxable or recoverable until a judicial determination is had in the action in which they have been incurred. There can be no judgment for costs except as a part of the judgment upon the issues in the action. They are but incident to the judgment * * *."

In *Barren v. Reliable Carpet Wks., Inc.*, 1932, 125 Cal.App. 489, 491, 13 P.2d 972, a "judgment" that "ordered, adjudged and decree that the said demurrer be sustained without leave to amend with costs of \$3.50," was held not to be anything more than an unappealable order.

Freeman on Judgments (5th ed., Vol. 2., p. 1512, para. 717) states: "A Judgment for Costs only without determining the case itself, is not final." The following cases agree that a judgment awarding costs, but making no other adjudication, is not appealable: *First Nat. Bank v. Landress*, 1931, 102 Fla. 840, 136 So. 469; *Board of Education of Grant v. Board of Education of Richmond*, 1939, 301 Ill.App. 228, 22 N.E.2d 400; *Secrest v. Ledbetter*, Tex.Civ. App.1937, 106 S.W.2d 740; *Baker v. Gas-kins*, 1942, 124 W.Va. 69, 19 S.E.2d 92, 93; *Adair County v. Bennett*, Mo.1944, 183 S.W.2d 319; *Pollack v. Theis*, 1952, 348 Ill.App. 594, 109 N.E.2d 642.

It may be contended that the trial judge in the case under review indicated that he intended that the plaintiff should recover nothing, with the result that the defendants would be entitled to their costs. Even so, his intention is not enough. Until there is a judgment giving his intention effect, there is no judgment from which an appeal may be taken. To hold otherwise is to condone carelessness and invite trouble. We have no final judgment.

We have, in various cases in which no opinions were published, dismissed appeals from judgments like this one, but the question recurs, and we deem it advisable to publish our views thereon.

The appeal from the purported judgment is dismissed.

**PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**John G. OPPENHEIMER, Defendant and
Appellant.**

Cr. A. 3292.

**Appellate Department, Superior Court,
Los Angeles County, California.**

July 12, 1955.

Motorist was charged with driving a vehicle in an unsafe condition, in that the brakes were defective and in an unsafe condition. The Municipal Court of the Los Angeles Judicial District entered judgment and orders adverse to motorist, and motorist appealed. The Appellate Department of the Superior Court held that where judgment rendered was unauthorized, the Appellate Department would reverse the judgment with directions to the Municipal Court to rearraign motorist for judgment.

Judgment reversed, and appeals from orders dismissed.

1. Criminal Law ⇨1083

Where appeal was taken by motorist from unauthorized judgment rendered by Municipal Court in prosecution for driving a vehicle in an unsafe condition, Municipal Court had no authority to correct the judgment, even though the judgment had not been entered. Vehicle Code, § 762.

2. Criminal Law ⇨1186(1)

Appellate Department of the Superior Court should not reverse judgment of Municipal Court in prosecution of motorist for driving a vehicle in an unsafe condition, on ground not fairly presented.

3. Automobiles ⇨357

In prosecution of motorist for driving a vehicle in unsafe condition, in that brakes were defective and in an unsafe condition, it was error to give instruction advising jury that it is unlawful to operate a vehicle that is in an unsafe condition, that is not equipped as required by the Vehicle Code, or that is not safely loaded.

4. Criminal Law ⇨1186(4)

On appeal by motorist from judgment in prosecution of motorist for driving a vehicle in an unsafe condition, in that brakes were defective and in an unsafe condition, Appellate Department of the Superior Court could not say, on scanty record brought before it, that error in giving of instruction that it is unlawful to operate a vehicle that is in an unsafe condition, that is not equipped as required by the Vehicle Code, and that is not safely loaded, was prejudicial. Const. art. 6, § 4½.

5. Automobiles ⇨360

Where judgment rendered by Municipal Court in prosecution of motorist for driving a vehicle in an unsafe condition, in that brakes were defective and in an unsafe condition, was unauthorized, the Appellate Department of the Superior Court would reverse the judgment with directions to Municipal Court to rearraign motorist for judgment. Vehicle Code, § 762.

Roger Arnebergh, City Atty., Donald M. Redwine, Asst. City Atty., Philip E. Grey, Deputy City Atty., Los Angeles, for appellant.

John G. Oppenheimer, in pro. per.

Before SHAW, P. J., and BISHOP and PATROSSO, JJ.

BY THE COURT.

[1] The judgment rendered March 17, 1955 was unauthorized, section 762, Vehicle Code. Because an appeal was taken, the trial court had no authority to correct its judgment, even though it had not been entered. (See *People v. Schneidman* (1944), C.R.A. 2575 and cases cited.)

We purposely refrained in our original decision from passing upon defendant's contentions that the evidence was insufficient and instructions were lacking, and we decline to do so now, because the record brought to us is so scanty. The defendant argues that on another appeal he will prob-

ably have a statement on appeal like the present one. He probably will, if he persists in disregarding the provisions of the rules that would secure a statement against which his contentions can be fairly judged.

[2] The defendant, for example, argues that the evidence does not show venue. True, the evidence now before us does not. But the absence of any evidence proving venue is as reasonably attributable to the fact that in his grounds of appeal the defendant made no point of lack of evidence respecting venue, as it is to the possibility that there was no evidence produced. We should not reverse a judgment on a ground not fairly presented.

[3, 4] A further example: An instruction was given advising the jury that it is unlawful to operate a vehicle (1) that is in an unsafe condition; (2) that is not equipped as required by this code; or (3) that is not safely loaded. In a case where the charge was that the defendant drove a vehicle in an unsafe condition in that the brakes were defective and in an unsafe condition, the instruction was too broad in that portion we have numbered (1) and portions (2) and (3) referred to matters not at all covered by the complaint. No doubt it was error to give this instruction, (see *People v. Roe*, 1922, 189 Cal. 548, 559, 209 P. 560; *People v. Jackson*, 1954, 42 Cal.2d 540, 546, 268 P.2d 6.) However, because of the mandate of section 4½, Article VI, of the Constitution, we cannot say, on the record brought to us, that the error was prejudicial.

[5] We are, therefore, reversing the judgment with directions to the trial court to rearraign the defendant for judgment. If he is so advised, the defendant may at that time move for a new trial. If such a motion is made and denied, and a new judgment rendered, the defendant may appeal, and, upon that appeal his contentions shall be considered on the basis of the record then before us. The appeals from all other matters are dismissed.

134 Cal.App.2d Supp. 883

Knoel L. CRAGIN et ux., Appellants,
v.

Rufus E. BROWN et al., Respondents.
C. A. 24.

Appellate Department, Superior Court,
Kern County, California.

June 23, 1955.

Action by purchasers for rescission of contract to purchase realty on ground of fraud and to recover amount paid to vendors on contract. From adverse judgment of Municipal Court of Bakersfield Judicial District, Frank Noriega, J., purchasers appealed. The Appellate Department, Superior Court, Lambert, P. J., held that finding that vendors' agent knew nothing about zoning restrictions on realty involved and never looked into zoning restrictions although he was in business of selling realty, was supported by evidence which was credible and not inherently improbable and could not be set aside on appeal.

Affirmed.

1. Courts ⚡190(8)

Where judgment of municipal court is attacked as unsupported by the evidence, Appellate Department of Superior Court need inquire only whether there was evidence of substantial nature to support judgment of court below, and where reasonable minds might differ on inferences to be drawn from particular state of facts, Appellate Department court will not substitute its conclusions for those reached by trial court.

2. Fraud ⚡17

Fraud can be predicated on concealment of facts which it would be duty of person to disclose.

3. Vendor and Purchaser ⚡44

In action by purchasers to rescind contract for purchase of realty on ground of fraud and recover amount paid to vendors on contract, finding that vendors' agent, whose statements to effect that property was zoned for business were allegedly relied on by purchasers, knew nothing about zon-

ing restrictions on realty involved, and that he never looked into zoning restrictions although he was in business of selling realty, was supported by evidence.

4. Appeal and Error ⚡994(3)

Only exception to rule that credibility of the witness is for trial judge and not reviewing court to determine is where evidence is inherently improbable.

Osborn & Hosking, Bakersfield, for appellants.

Morris B. Chain, Bakersfield, for respondents.

LAMBERT, Presiding Judge.

In this case the appellants (plaintiffs in the Court below), Knoel L. Cragin and Mary F. Cragin, brought an action against Rufus E. Brown, Alma L. Brown and Roy Downum, respondents here and defendants in the Court below. The action was brought to cancel the contract for the purchase of certain real property of which Rufus E. Brown and Alma L. Brown were the owners and Roy Downum was the real estate agent making the sale. The plaintiffs filed a notice of rescission and brought the action to rescind the contract and recover the amount which they had paid on the contract. The action was based on fraud.

It was alleged in paragraph 6 of the complaint, "That the defendant, Roy Downum, fraudulently and falsely represented to the plaintiffs that the aforesaid real property was zoned for business; that the said defendant, Roy Downum, well knew that the plaintiffs wished to establish a business on the aforesaid real property; that the defendant, Roy Downum, well knew that the said property was not zoned for business but was in truth and in fact zoned for residences only; that the plaintiffs relied upon the representations of the defendant, Roy Downum; that the plaintiffs could reasonably rely upon said representations; that relying upon said false and fraudulent representations of the defendant, Roy Downum, the plaintiffs were induced to enter into the aforesaid contract." This paragraph was denied by the defendants.

The Court made the following finding of fact: "That it is not true that Roy Downum fraudulently and falsely represented to the plaintiffs that the real property described in plaintiffs' amended complaint was zoned for business purposes nor is it true that defendant, Roy Downum knew that said property was not zoned for business or that the plaintiffs relied upon any false representations of the defendant, Roy Downum, nor that the plaintiffs were induced into executing the contract described in plaintiffs' amended complaint on file herein." The Court also found that Roy Downum was acting as agent of the defendants in obtaining the plaintiffs to purchase the property, and the Court also found "That all of the allegations pertaining to fraudulent representations, knowledge, reliance and damages alleged in plaintiffs' amended complaint are untrue."

It will be seen from the finding of the Court that the case presents nothing but a factual situation. The evidence that might have some bearing on the question is as follows as testified by the witness Knoel L. Cragin:

"Mr. Downum took us up to the house and he showed us the place. We asked him if we could have a business here and he didn't actually say yes; he didn't say no; he just waved his arm and said, 'I don't see why not, there are signs all up and down the street.' Well, there are. There is an insurance sign, there is upholstery sign and others there." "Well, the actual thing that was said was we asked Mr. Downum if there was any reason why we couldn't have a business and his words were: 'I don't see why not, there are signs all up and down the street.'"

Question by Mr. Hosking to same witness, "Now, Mr. Cragin, was there any further conversation concerning the house? A. Yes.

"Q. Can you repeat that? A. We went into the garage and he opened up the garage and showed us there was a two and a half car garage and we stood there and I told him, I said, 'Well, I can put a partition down through here and separate this into two halves, one for the shop and one for my workshop and storage,' and he said,

'Yes, that will be all right. The room leaks a little bit and you will have to patch a little bit here in the back quarter,' so I told him I had worked on roofing gangs years ago and that I could still repair the roof, and he said it shouldn't cost us over five or six dollars to repair that roof and it cost us over forty and it still leaks.

"Q. Was there any other conversations that you can recall? A. That distinctly pertained to the house, I do not."

The plaintiff, Mary F. Cragin, testified concerning the conversation preceding the contract that the " * * * particular discussion was made at the shop later when we were first introduced to Mr. Brown. Mr. Brown and Mr. Downum came into the shop after we saw the house and we asked Mr. Brown and Mr. Downum if we could have a business in that area. Mr. Downum said he saw no reason why we couldn't. We asked him if there was any ordinance or any law against it and he said he could see no reason why we couldn't have a business there."

Mr. David Leroy Downum, a defendant, concerning the transaction testified as follows:

"A. Well, there was something came up to that effect. I believe he said he was a musician; that he did a little bit of repair work.

"Q. That he was a musician? A. That he was a musician. But he said he did a little bit of repair work, worked on radios and amplifiers and stuff like that, and I warned him that if he was going to operate there that he should check, that he might have trouble with his neighbors, that it might be zoned, but we made no statement whatsoever as to the zoning of the property.

"Q. Did he at any time ask you if you knew that was zoned for business? A. I don't remember if he did.

"Q. Did you at any time express in words or directly mention or suggest that you did know that that particular property was zoned for business? A. No.

"Q. You did not? A. I didn't.

"Q. At the time this agreement of sale was entered into, did you have this agree-

ment of sale for real property on the 19th day of March, '52, prepared? A. Yes."

Rufus E. Brown, the owner, testified as follows:

"Q. What is your business and occupation, what was it on the 19th day of March, 1952? A. A grocery store.

"Q. You owned a grocery store? A. Owned and operated a grocery store.

"Q. Did you own a piece of property, a residential dwelling at 214 Francis Street? A. I did.

"Q. Did you place that for sale with any real estate agent? A. Roy Downum.

"Q. And did you have any conversation with the prospective purchasers of that property before they signed that particular contract as of the 19th day of May, '52? A. Yes.

"Q. Whom were you referring to—Mr. and Mrs. Cragin? A. Mr. and Mrs. Cragin.

"Q. Who else was present when you had that conversation? A. Roy Downum.

"Q. And how many days or weeks before this property, this agreement of sale of the 19th day of March, 1952, did that conversation take place? A. Oh, I don't know, just a day or two days or a short period of time.

"Q. Where did the conversation take place? A. It took place down in Riverview.

"Q. Riverview? A. Yes.

"Q. And in Mr. Downum's office? A. No, Mr. Cragin's place of business, residence.

"Q. Mr. Cragin's residence in Riverview. Is that right? A. That is right.

"Q. And what was said with regard to the issues before us, with regard to the sale and purchase of that real property or any conversations with regard to the zone state of the property which he owned? A. He went down there to interview them as a credit risk.

"Q. What was the conversation? A. The conversation was that they asked Mr. Downum could they move their business in there and he told them he didn't know,

that they had better check because if they didn't they might have some trouble with their neighbors. That is about all that was said. Our other conversation pertained to me accepting them as a credit risk."

[1] At most the evidence presents a conflict, so let us take a look at the evidence with respect to the law applicable. It should be observed here that this is an appeal from the Municipal Court to the Appellate Department of the Superior Court, and upon familiar principles this Court need inquire only whether there was evidence of a substantial nature to support the judgment of the Court below, and where reasonable minds might differ on the inferences to be drawn from a particular state of facts, the Appellate Department Court will not substitute its conclusions for those reached by the trial court. *Hamilton v. Pacific Electric Railway Co.*, 12 Cal.2d 598, at page 603, 86 P.2d 829; *In re Estate of Bristol*, 23 Cal.2d 221, at page 223, 143 P.2d 689. And, of course, the reason for this rule is grounded in the fact that the trial Judge observed the witnesses and has a better opportunity, in fact the only opportunity, to intelligently judge of the witnesses' credibility.

[2-4] The appellants' claim in their brief on appeal was that the real estate agent concealed the fact that the property was zoned, and, of course, it is elementary that fraud can be predicated on the concealment of facts which it would be the duty of a person to disclose; however, no such a pleading was presented in the amended complaint although the parties argued the question in the Municipal Court and also in this Court, but in view of the findings it is wholly immaterial. The appellant discloses the weakness of the appeal in the very first statement made in his brief, to wit: "The evidence does not sustain the finding of the trial court. 1. The findings of the trial court would necessitate the court assuming that the statement made by the Respondent, Roy Downum, was true to the effect that he knew nothing about the zoning restrictions in Bakersfield and its environs and that he never looked into the zoning restrictions although he was in the business of selling real estate. Since

the respondent, Roy Downum, was in the real estate business since 1944, it does not appear credible that the said respondent knew nothing about the zoning restrictions on a piece of property he was attempting to sell." In other words, he asks this Court to weigh the evidence that was given in the trial court when, of course, that is not the business of this Court. Whether a witness is credible or not is a matter for the trial Judge to determine. The only exception to that rule is where the evidence is inherently improbable, and there appears to be no basis for the claim of inherent improbability in the testimony of the witnesses who testified in this case. The matter is very clearly stated in the late case of *In re Estate of Reed*, 132 Cal.App.2d 732, 282 P.2d 935, at page 936: "A reviewing court will not hold unsupported the trial court's findings merely because it might reasonably draw different inferences from those the trial court reasonably drew. A reviewing court cannot reject testimony of a witness that has been believed by the trier of the fact unless it is a physical impossibility that it be true, or its falsity is apparent without resorting to inferences or deductions. In order to say that testimony is inherently improbable, it must appear that what was related or described could

not have occurred. Testimony which merely discloses unusual circumstances is not inherently improbable. Testimony which is subject to justifiable suspicion does not justify reversal of a judgment. The trier of fact may believe and accept a part of the testimony of a witness, and disbelieve the remainder or have a reasonable doubt as to its effect. On appeal that part which supports the judgment must be accepted, not that part which would defeat, or tend to defeat, the judgment. Unless it clearly appears that upon no hypothesis whatever is there substantial evidence to support a finding of the trier of fact, it cannot be set aside on appeal.'" *Murphy v. Ablow*, 123 Cal.App.2d 853, at page 858, 268 P.2d 80.

There is also substance to the defense that the rescission was not made promptly or within a reasonable time. The record herein fully supports the claim that the fraud, if any, was waived. See *Schied v. Bodinson Manufacturing Co.*, 79 Cal.App. 2d 134, 179 P.2d 380. However, there is no merit in the appeal on the ground first discussed. The judgment is affirmed; the respondent to recover his costs on appeal.

BRADSHAW and MAIN, JJ., concur.

45 Cal.2d 85

Nadine GIGLIOTTI, a minor, and Jean Gigliotti, a minor, by Tony A. Gigliotti, their guardian ad litem, Plaintiffs and Appellants,

v.

Joseph Ernest NUNES, Defendant and Respondent;

Rhoda Gigliotti, Cross-Defendant and Appellant.

Joseph Ernest NUNES, Cross-Complainant and Respondent,

v.

Nadine GIGLIOTTI, a minor, and Jean Gigliotti, a minor, by Tony A. Gigliotti, their guardian ad litem, Rhoda Gigliotti, Arthur Matts, a minor, by George Hafely, his guardian ad litem, and Shirley Bernal, a minor, by Eddie Bernal, her guardian ad litem, Cross-Defendants,

Rhoda Gigliotti, Cross-Defendant and Appellant.

Arthur MATTS, a minor, by George W. Hafely, his guardian ad litem, and Shirley Bernal, a minor, by Eddie Bernal, her guardian ad litem, Plaintiffs and Appellants,

v.

Joseph Ernest NUNES, Defendant and Respondent;

Rhoda Gigliotti, Cross-Defendant and Appellant.

Joseph Ernest NUNES, Cross-Complainant and Respondent,

v.

Arthur MATTS, a minor, by George W. Hafely, his guardian ad litem, Shirley Bernal, a minor, by Eddie Bernal, her guardian ad litem, Nadine Gigliotti, a minor, and Jean Gigliotti, a minor, by Tony A. Gigliotti, their guardian ad litem, Rhoda Gigliotti, Cross-Defendants,

Rhoda Gigliotti, Cross-Defendant and Appellant.

S. F. 19200, 19201.

**Supreme Court of California.
In Bank.**

Aug. 23, 1955.

Rehearing Denied Sept. 21, 1955.

Action arising out of collision between automobile in which minor plaintiffs were

286 P.2d—51½

riding and defendant's truck. Defendant cross-complained. The Superior Court, Santa Clara County, John D. Foley, J., rendered judgment on verdict for defendant, and plaintiffs appealed. The Supreme Court, Schauer, J., held, inter alia, that where minors' testimony was not irreconcilable with presumption of due care on part of their deceased driver, failure to give requested instruction on presumption of due care on part of deceased driver was prejudicial error.

Judgment reversed.

Traynor, J., dissented.

Opinion, 275 P.2d 136, vacated.

1. Automobiles ⇨245(61)

In action by minor automobile passengers against truck driver for injuries sustained when northbound automobile collided with defendant's southbound truck which was making left turn at intersection, question whether accident had been caused by defendant's negligence was for jury.

2. Evidence ⇨5(2)

It is common knowledge that one of the most hazardous of all highway traffic maneuvers is a left turn by a ponderous, slow moving vehicle in the face of oncoming traffic.

3. Negligence ⇨138(2)

Where alleged negligent acts and conduct of a deceased are in issue and testimony respecting such acts and conduct necessarily must be produced by witnesses other than deceased, an instruction that deceased is presumed to have exercised ordinary care for his own concerns is proper unless uncontradicted testimony produced by party seeking to invoke presumption, under circumstances affording no condition that testimony is product of mistake or inadvertence, is wholly irreconcilable with presumption. West's Ann.Code Civ. Proc. § 1963, subd. 4.

4. Negligence ⇨121(1)

If a person is deceased or unable to testify by reason of loss of memory, fact that other witnesses for parties testify fully as to acts and conduct of allegedly

negligent person does not deprive party relying on presumption of due care of benefit thereof unless testimony which he himself produces is wholly irreconcilable with presumption sought to be invoked and affords no indication that testimony is product of mistake or inadvertence.

5. Automobiles ⇨242(1)

In action by minor automobile passengers against truck driver for injuries sustained in collision in intersection, plaintiffs' evidence was not irreconcilable with presumption that plaintiffs' driver had exercised due care.

6. Automobiles ⇨242(1)

In an automobile collision case, presumption of due care on part of a deceased driver does not carry with it presumption of negligence on part of other driver.

7. Appeal and Error ⇨1067

Automobiles ⇨246(60)

In action by minor automobile passengers for injuries sustained in collision with defendant's truck, wherein minors' testimony was not irreconcilable with presumption of due care on part of their deceased driver, failure to give requested instruction on presumption of due care on part of deceased driver was prejudicial error. West's Ann.Code Civ.Proc. § 1963.

8. Appeal and Error ⇨1067

Automobiles ⇨246(60)

In truck driver's action for damage sustained in collision with automobile, wherein truck driver based case against defendant on defendant's alleged relationship of principal to deceased automobile driver, failure to give instruction, proper under evidence, on presumption that deceased driver had exercised due care was prejudicial error. West's Ann.Code Civ. Proc. § 1963.

9. Automobiles ⇨246(60)

In automobile accident case arising out of collision in which plaintiffs' driver was killed, plaintiffs' requested instruction on presumption that deceased driver had exercised due care was not erroneous in respect to tending to confuse jury on matter of burden of proof.

10. Pleading ⇨236(6)

In automobile accident case, wherein defendant counterclaimed for damages, and wherein plaintiff had once objected to introduction of file of prior action between plaintiff and defendant and wherein, after trial court had commented that introduction of such evidence might deny defendant recovery on cross-complaint, omitted to amend answer, denying plaintiff permission to amend answer to cross-complaint so as to plead that decision in prior action was res judicata as to issue raised in cross-complaint was not abuse of discretion. West's Ann.Code Civ.Proc. § 439.

James F. Boccardo and Edward J. Niland, San Jose, for appellants.

Campbell, Custer, Warburton & Britton, Frank L. Custer, San Jose, and W. R. Dunn, Burlingame, for respondent.

SCHAUER, Justice.

In these two personal injury actions, arising out of a motor vehicle accident and consolidated for trial, the four plaintiffs as well as the cross-defendant Mrs. Rhoda Gigliotti appeal from a judgment entered on a verdict denying recovery against defendant, Joseph Edward Nunes, for the personal injuries and awarding him judgment against Mrs. Gigliotti on his cross-complaint for damages to his truck. We have concluded that plaintiffs and Mrs. Gigliotti are correct in their contention that the trial court committed error prejudicial to them in refusing to give a requested instruction on the presumption of due care and that the judgment must therefore be reversed, and, further, that no abuse of discretion is shown in the court's refusal to permit Mrs. Gigliotti to file a proffered amendment to her answer to the cross-complaint.

In November, 1947, a 1946 Dodge sedan in which plaintiffs (minors at the time) were riding as guests collided with a truck owned and operated by defendant and cross-complainant, Joseph Nunes. The Dodge was being driven by one Walters who died as a result of injuries received. Nunes' answer

to plaintiffs' amended complaints denied negligence generally, and pleaded affirmative defenses of contributory negligence, assumption of risk, imputed negligence of the driver of the Dodge, unavoidable accident, *res judicata* and estoppel. Plaintiffs' motions to strike the latter two defenses were granted. Nunes also filed a cross-complaint for damages to his truck against the minor plaintiffs in both actions and brought in as an additional cross-defendant Rhoda Gigliotti, mother of two of the plaintiffs. In the cross-complaint it is alleged that Walters, driver of the Dodge, operated it negligently while acting as the servant, agent and employe of the cross-defendants.¹

At the conclusion of the trial motions for nonsuit on the cross-complaint were granted as to the minor cross-defendants but denied as to Mrs. Gigliotti. Verdict and judgment followed in favor of defendant Nunes and against plaintiffs as to the causes of action alleged in the complaint, and also in favor of Nunes for \$300 on his cross-complaint against Mrs. Gigliotti. Motions of plaintiffs and Mrs. Gigliotti for a new trial were denied.

As grounds for reversal plaintiffs² urge error in the instructions, and prejudicial misconduct of defendants' counsel. Mrs. Gigliotti also contends that the court should have permitted her to plead or prove that the cause of action stated in the cross-complaint against her was barred by reason of defendant's failure to plead it in a prior action she had brought against him (see Code Civ.Proc., § 439).

The accident occurred about 3 p. m. at the intersection of Bayshore Highway and Berryessa Road in San Jose. At this point Bayshore runs north and south and is divided into three lanes, each 11 feet wide. On each side is an asphalt shoulder 9 feet wide. Berryessa Road crosses Bay-

shore at about a 45 degree angle, running from southeast to northwest, and is divided into two lanes, each 9 feet wide. Berryessa widens out into a curve on each side where it joins the shoulders of Bayshore. Approximately 40 feet south of the center of the intersection, railroad tracks cross Bayshore at an angle, running parallel to Berryessa. On each side of the tracks, about 10 or 12 feet distant therefrom, and parallel thereto, are double white lines extending across the center and right lanes of each approach on Bayshore to the railroad crossing.

Defendant Nunes was driving his truck and trailer south on Bayshore, intending to turn left into Berryessa. The truck was about 32 feet in length, and attached to it by a tiebar was a trailer, 23 feet 10 inches in length, equipped with cattle racks. The overall length of the equipment was 59 feet 10 inches, and it weighed more than 19,500 pounds. The Dodge sedan driven by Walters, in which plaintiffs and Mrs. Gigliotti were riding and with an empty horse trailer attached, was proceeding north on Bayshore. Mrs. Gigliotti and one of the plaintiffs were in the front seat beside Walters and the other three plaintiffs were in the back seat. As defendant's truck turned left onto Berryessa it and the Dodge collided. As a result Mrs. Gigliotti and the plaintiffs suffered personal injuries and, as already noted, Walters was fatally injured.

Evidence as to the circumstances of the accident is in sharp conflict. Defendant testified that he had been driving between 12 and 15 miles an hour, in the center lane of Bayshore, and slowed down as he reached the Berryessa intersection. A "good block" from Berryessa he put the mechanical arm signal of his truck out for a left turn, and left it there. He saw two groups of automobiles approaching from the south,

1. The record indicates that the Dodge was owned by neither Walters nor Mrs. Gigliotti, but by a third person who is not a party to these actions. The basis of Nunes' recovery against Mrs. Gigliotti on his cross-complaint is his claim that Walters was acting as her agent in driving the Dodge.

2. In discussing the contentions made on appeal the word "plaintiffs" will also refer to cross-defendant Mrs. Gigliotti unless otherwise indicated in the text of the opinion.

the first consisting of two or three cars traveling at an "ordinary speed" of 40 to 50 miles an hour; they were an "ordinary driving distance" apart. The second group consisted of three cars, the first of which was 700 to 800 feet behind the last car of the first group. Defendant paid no attention to the speed of the cars in the second group. He was 200 or 300 feet from the intersection when the first car of the first group reached it. He stopped or nearly stopped when he reached the intersection just as the last car of the first group passed through it. The first car of the second group was then about 800 feet from the intersection. Defendant put his truck in gear to begin the left turn; just before he started it he saw the Dodge pulling the horse trailer come out from behind the first two northbound cars and pass them in the middle lane; defendant paid no attention to the speed of the Dodge at that time. At a previous trial he testified that he had already made part of the turn before looking to the right again. The Dodge, 600 or 700 feet from Berryessa when it passed the two cars, pulled back into the east lane. When defendant was in the center of the east lane he saw the Dodge about 300 to 350 feet away and estimated its speed at 65 miles an hour. Defendant started to apply his brakes; he knew he could not get out of the way in time. The Dodge did not diminish its speed, but at about the railroad tracks swerved to the right in an attempt to go in front of defendant's truck. The vehicles collided when the front of the truck was about 2 feet east of the Bayshore pavement. Defendant did not know whether his truck was moving or stopped at that moment, but if moving it was at no more than 3 miles an hour. From the time he had seen the Dodge 300 to 350 feet down Bayshore the truck had gone about 8 feet, and from the point where it had commenced the left turn into the east lane it had traveled from 12 to 15 feet at 3 miles an hour to the point of impact. The truck was moved 3 or 4 feet sideways by the impact, and the vehicles came to rest with about three-quarters of the left side of the truck's bumper imbedded in the Dodge.

Defendant denied that he had told any one that he had never seen the Dodge.

One Fowler, testifying for defendant, stated that he was in his car at the stop sign on Berryessa on the east side of Bayshore when he saw defendant's equipment approaching. The left turn signaling arm was straight out, indicating a left turn, although it was pointing downward after the accident. The witness first saw the Dodge about 500 feet south, going about 55 miles an hour, and saw no cars go through the intersection before the Dodge. Defendant's truck was traveling 10 to 12 miles an hour and started to turn with no change in speed. The Dodge was then 150 to 200 feet from the intersection and still traveling at the same speed. As soon as the truck started to turn the witness knew the accident was going to happen because the Dodge was so close that defendant could not get his sixty-foot truck and trailer across in front of it. As the truck reached the east lane the witness saw the Dodge start to swerve to its right; when the front of the truck was in the middle of the east lane the Dodge was 150 or 200 feet from the intersection. A highway patrol officer testified, however, that the witness Fowler told him at the scene of the accident that he, Fowler, could give no information because he had been watching the truck make its turn and had not seen the Dodge; Fowler denied this.

Other witnesses for defendant testified that his signaling device was out for a left turn, that the Dodge had been traveling about 45 miles an hour possibly a block or half a block from Berryessa, and that its speed at the moment of impact was about 50 miles an hour.

Truck driver Whittaker testified, for plaintiffs, that he had been driving east on Berryessa, toward Bayshore, and first saw defendant's truck north of the intersection and traveling at 20 to 25 miles an hour. Defendant's truck slowed down and meanwhile two northbound cars on Bayshore went through the intersection. Just after the second car passed, the truck began to turn left right in front of the Dodge; the Dodge was then about 80 feet south of the

intersection, near the railroad tracks, and moving between 40 and 45 miles an hour. The truck, which was going 4 to 5 miles an hour when it began the left turn, picked up speed until it was traveling 8 to 10 miles an hour at the moment of impact. The Dodge veered to the right when the truck began to turn and traveled about 64 feet to the point of impact; it was then going 35 to 40 miles an hour. The left front bumper of the truck hit the left front side of the car and moved the car sideways 4 or 5 feet. The Dodge left tire marks 4 to 5 feet long extending easterly from the point of impact; it also left "skid marks" behind it to the south. After the collision the witness asked defendant why he had pulled out in front of the Dodge and defendant replied that he didn't see it.

Two other witnesses testified that they heard defendant state, at the scene of the accident, that he had let two other cars go by but had not seen the Dodge. The witness Penny, also testifying for plaintiffs, stated he was driving behind defendant, was still behind him when defendant's truck started to turn left, and saw no mechanical or arm signal indicating an intent to turn left; just before the truck started the left turn the witness saw the Dodge at about the railroad tracks traveling 40 to 45 miles an hour; he noticed the Dodge because he "knew it was awful close for the truck to try to turn"; the left-hand side of the truck hit the Dodge, pushing the car sideways about 3 feet.

Plaintiff Arthur Matts, who was riding in the front seat of the Dodge, testified that the Dodge had been traveling about 40 miles an hour a block or two before the accident; he estimated that the truck was about 150 feet north of the intersection when he first saw it and the Dodge some 150 or more feet south of the intersection; when the Dodge reached the railroad tracks the truck began to turn left right in front of the Dodge; he felt the Dodge swerve to the right and felt the application of the brakes; he was knocked out by the collision and did not see the two vehicles come together or know where the impact occurred. Mrs.

Gigliotti placed the speed of the Dodge at about 35 to 40 miles an hour along Bayshore, and also testified that the truck turned left when the Dodge was about 50 feet south of it, near the railroad tracks, and Walters then applied the brakes of the Dodge. Of the other three minor plaintiffs two had no memory concerning the happening of the accident, and the third testified the Dodge was going about 35 miles an hour and was about at the middle of Berryessa Road when the truck turned in front of it.

[1,2] Although other evidence also favors each of the parties, it is apparent from that summarized above that while the jury's verdict for defendant is not as a matter of law unsupported by the evidence, a verdict in favor of plaintiffs and of Mrs. Gigliotti would find substantial support in the testimonies of defendant, himself, and his witnesses and in the physical circumstances as well as in the evidence produced by and on behalf of the plaintiffs. It bears mention as a matter of common knowledge that one of the most hazardous of all highway traffic maneuvers is a left turn by a ponderous, slow moving vehicle in the face of oncoming traffic.

[3] As ground for reversal, it is first contended that the court erred in refusing to give plaintiffs' requested instruction on the presumption of due care (Code Civ. Proc., § 1963, subd. 4) on the part of Walters, the deceased driver of the Dodge. As expressed in *Scott v. Burke* (1952), 39 Cal.2d 388, 394, 247 P.2d 313, it is settled law that where alleged negligent acts and conduct of a decedent are at issue before the court and the "testimony respecting such acts and conduct necessarily must be produced by witnesses other than the deceased, * * * an instruction that the deceased is presumed to have exercised ordinary care for his own concerns is * * * proper" except that if the fact proved by uncontradicted testimony produced by the party seeking to invoke the presumption, "under circumstances which afford no indication that the testimony is the product of mistake or inadvertence

* * * is wholly irreconcilable with the presumption * * * the latter is dispelled and disappears from the case."

[4, 5] Although there is no room for the presumption where the driver or other person whose claimed negligence is at issue himself testifies to his actions at the time involved (see *Speck v. Sarver* (1942), 20 Cal.2d 585, 587-588, 128 P.2d 16), the rule is established that if such person be deceased or unable to testify by reason of loss of memory, the fact that other witnesses for the parties testify fully as to the acts and conduct of the allegedly negligent person does not deprive the party relying on the presumption of the benefit thereof unless the testimony which he himself produces "under circumstances which afford no indication that the testimony is the product of mistake or inadvertence * * * is wholly irreconcilable with the presumption sought to be invoked." (*Westberg v. Willde* (1939), 14 Cal.2d 360, 365-368, 94 P.2d 590; *Mar Shee v. Maryland Assurance Corp.* (1922), 190 Cal. 1, 9, 210 P. 269; *Chakmakjian v. Lowe* (1949), 33 Cal.2d 308, 313, 201 P.2d 801.) Plaintiffs' evidence in the present case is not irreconcilable with the presumption.

[6] The benefit of the presumption has frequently been held available to plaintiffs in wrongful death actions (see *Anthony v. Hobbie* (1945), 25 Cal.2d 814, 819-820, 155 P.2d 826; *Westberg v. Willde* (1939), supra, 14 Cal.2d 360, 94 P.2d 590; *Ellison v. Lang Transportation Co.* (1938), 12 Cal. 2d 355, 358-360, 84 P.2d 510; *Mundy v. Marshall* (1937), 8 Cal.2d 294, 65 P.2d 65; *Smellie v. Southern Pac. Co.* (1931), 212 Cal. 540, 299 P. 529; see also *Mar Shee v. Maryland Assurance Corp.* (1922), supra, 190 Cal. 1, 210 P. 269), as well as to one who by reason of loss of memory is unable to testify concerning his conduct at and immediately before the time of the accident. (See *Scott v. Burke* (1952), supra, 39 Cal.2d 388, 394, 247 P.2d 313, and cases there cited.) In an action brought to recover for the wrongful death of Walters the presumption plainly would apply if contributory negligence by Walters were made an issue. Since, however, it likewise is the

rule that no presumption of due care on the part of the deceased driver Walters would carry with it the presumption of negligence on the part of defendant Nunes (see *Greene v. Atchison, T. & S. F. Ry. Co.* (1953), 120 Cal.App.2d 135, 139-141, 260 P.2d 834), and since in the present case the jury were instructed that any negligence of Walters could not be imputed to plaintiffs, defendant argues that there was no issue of negligence of Walters so far as concerns the minor plaintiffs.

Plaintiffs urge that the conduct of Walters was important, nevertheless, in determining whether defendant's conduct was negligent (i.e., the speed and distance away of the Dodge driven by Walters and what defendant should have observed with respect to it before turning the truck left in front of the Dodge), and that if the due care presumption had been before the jury they might have concluded that Walters was not driving at an excessive or negligent speed, that he was observing the speed limit of 45 miles an hour for a passenger motor vehicle drawing a trailer (established by § 515.5 of the Vehicle Code, as to which an instruction was given), and (in view of the evidence that the Dodge left tire marks some 30 or 40 feet before the point of impact) that Walters must have been less than 100 feet from the point of impact when defendant began his left turn. Hence the jury could have further concluded that defendant was negligent in attempting a left turn of his ponderous and slow moving equipment, approximately 60 feet in length, in front of another vehicle approaching the intersection so closely as to constitute an immediate hazard, and that defendant's negligence in thus violating section 551 of the Vehicle Code (as to which an instruction was given) would be a proximate cause of plaintiffs' injuries.

[7] Although no case has been cited or discovered wherein applicability of the presumption has been affirmed or denied upon a congeries of circumstances exactly the same as those here present, we are convinced that plaintiffs' position accords with the principles which have governed or underlain application of the rule in the cases cited.

Certainly nothing in section 1963 of the Code of Civil Procedure refutes that view. Because the evidence, as already shown, was in such sharp conflict as to some of the circumstances of the accident, and would have amply supported a different verdict, the error in refusing to give the due care presumption instruction is prejudicial.

[8] With respect to the cross-defendant, Mrs. Gigliotti, defendant's recovery against her was based upon alleged negligence of Walters, imputed to her, and consequently the presumption was likewise applicable and prejudicial error resulted from refusal to give it.

[9] Defendant, however, urges that the due care instruction offered by plaintiffs was erroneous in that it would have tended to confuse the jury on the matter of burden of proof.³

Defendant argues that although admittedly the court correctly instructed the jury that the plaintiffs had the burden of proving the allegations of the complaint by a preponderance of evidence, nevertheless by the statement in plaintiffs' proposed instruction that the presumption of ordinary care on the part of Walters "shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence" the jury would have understood that defendant had the burden of "overcoming" the presumption and that "overcome" could only mean by a preponderance of evidence. The due care instruction, however, does not mention either "burden of proof" or "preponderance of evidence," and, further,

3. The instruction as offered reads as follows: "I instruct you that there is a legal presumption that the deceased, Leonard Walters, was obeying the law at the time and place of the accident in question and that he was exercising ordinary care for his own concerns at the time and place of said accident. This presumption is in itself a species of evidence, and it shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence. This presumption is disputable, but unless it is adequately and sufficiently controverted, you, the jury, are bound to find in accordance with the presumption that the deceased, Leonard Walters, was

the language attacked by defendant was expressly approved by this court in *Westberg v. Wilde* (1939), supra, 14 Cal.2d 360, 364-365, 94 P.2d 590 (see also cases there cited). Thus the failure to give the instruction cannot be excused because of its form.

Other alleged errors urged by plaintiffs as to jury instructions as well as asserted prejudicial misconduct on the part of counsel for defendant may not occur on a new trial and therefore need not be discussed here.

Finally, cross-defendant Mrs. Gigliotti contends that the trial court erred to her prejudice in refusing to permit her to plead or prove that the cross-complaint against her was barred by section 439 of the Code of Civil Procedure.⁴ After all parties had rested Mrs. Gigliotti asked leave to file an amendment to her answer to the cross-complaint to set forth a second defense alleging that the "Cross-Complainant is estopped from asserting the matters set forth in said Cross-Complaint under the provisions of Section 439 of the Code of Civil Procedure * * *; that the issues and matters set forth in said Cross-Complaint arise out of the same transaction and accident as was litigated in a prior action entitled, 'Rhoda Gigliotti * * *, Plaintiffs, versus Joseph Ernest Nunes * * *, Defendants,' and numbered 69532 in the files of this Court, and that in said prior action said Cross-Complainant was entitled to, but failed to, assert the matters now set forth in said Cross-Complaint." Counsel for Mrs. Gigliotti in offering the amendment stated his

obeying the law and was exercising ordinary care for his own concerns and was not negligent at the time and place of the accident. It is evidence in the case and is sufficient in and of itself to support a verdict of finding on your part that the said deceased was careful at the time and place of the accident in question."

4. Section 439: "If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor."

recognition that "it lies within the Court's discretion to permit an amendment of the pleadings, of course," and at the same time stated that "in support of the proof under the amendment, if allowed, I would like to introduce for the limited purpose of this defense and for no other purpose, the action filed, Action No. 69532, which establishes the prior * * * failure of the * * * Cross-Complainant to set up any Cross-Complaint in that action * * *" The court denied leave to file the amendment.

[10] No abuse of the court's discretion in so ruling appears. The record shows that on two occasions during the trial counsel for Nunes offered the file of the prior action between Mrs. Gigliotti and Nunes in evidence in an attempt to prove that the judgment in Nunes' favor therein was res judicata on the issue of Nunes' negligence and actually adjudicated negligence on the part of Walters, driver of the Dodge. On both occasions counsel for Mrs. Gigliotti objected vigorously on the ground that the files or "anything in connection with the previous trial * * * is incompetent, irrelevant and immaterial * * *" On the first occasion the court pointed out that the prior judgment was likewise consistent with no negligence on the part of either Nunes or Walters and denied the offer of proof. On the second occasion the court reserved its ruling, with the comment that if it allowed the records of the prior action in evidence it might force Nunes out of court on his cross-complaint, "as apparently it is conceded" that the prior action arose out of the same accident. Counsel for Mrs. Gigliotti did not then take advantage of the court's comment to attempt to promptly amend her answer to the cross-complaint, but instead waited until all of the evidence was in and both sides had rested. Even if we assume that if the file had been permitted in evidence Mrs. Gigliotti could have taken advantage of it to establish that Nunes' cross-complaint against her was within the scope of the issues in the prior action and so was barred (see *Blumenthal v. Liebman* (1952), 109 Cal.App.2d 374, 378-379,

240 P.2d 699), nevertheless, under the circumstances we cannot hold that as a matter of law the trial court transgressed the broad area of its discretion in refusing permission to file the amendment.

For the reasons above stated the judgment is reversed.

GIBSON, C. J., and SHENK and CARTER, JJ., concur.

TRAYNOR, Justice,

I dissent.

Defendant Nunes had the burden of proving that the deceased driver Walters was negligent. Accordingly, there is no basis for invoking a presumption against defendant that Walters was exercising due care. (See, *Speck v. Sarver*, 20 Cal.2d 585, 590, 128 P.2d 16, dissenting opinion; *Scott v. Burke*, 39 Cal.2d 388, 402, 247 P.2d 313, dissenting opinion.)

Rehearing denied; EDMONDS and TRAYNOR, JJ., dissenting.



45 Cal.2d 81

Irving ARENSON, Plaintiff and Appellant,
v.

NATIONAL AUTOMOBILE AND CASUALTY INSURANCE CO. (a Corporation),
Defendant and Respondent.

L. A. 23232.

Supreme Court of California,
In Bank.

Aug. 15, 1955.

Action by insured for declaration of rights and determination of insurer's liability under personal liability policy. The Superior Court, Los Angeles County, Wallace L. Ware, J., rendered judgment for the insurer and the insured appealed. The Supreme Court, Gibson, C. J., held that although policy contained exclusion provision as to injury or destruction caused intentionally by or at direction of the insured, the insurer was liable for amount insured had

paid to school district for fire damage as result of fire started by insured's son.

Reversed.

Opinion, 276 P.2d 140, vacated.

1. Insurance ⇨146(1)

The understanding of an ordinary person is the standard used in construing a contract of insurance.

2. Insurance ⇨146(3)

Any ambiguity in language of liability policy must be resolved against insurer.

3. Insurance ⇨435

Exceptions and exclusions of liability policy are construed strongly against insurer and liberally in favor of insured.

4. Insurance ⇨437

Provision of personal liability policy excluding coverage as to injury or destruction caused intentionally by or at direction of the insured is designed to prevent indemnifying one against loss from his own wrongful acts and does not exclude coverage for willful acts of another in absence of clear expression showing such intent.

5. Insurance ⇨437

Clause of personal liability policy defining additional insured persons was intended to benefit named insured by broadening coverage and that purpose would be defeated if coverage was restricted by using the clause to construe favorably to insurer provision excluding coverage for destruction caused intentionally by or at direction of the insured.

6. Insurance ⇨437

Statutory provision that insurance policy indemnifying insured against liability due to his own willful wrong is void as against public policy has no application to situation where the insured is not personally at fault. Insurance Code, § 533.

7. Insurance ⇨437

Although personal liability policy contained provision defining additional insured persons and provision excluding coverage as to destruction caused intentionally by insured, policy protected named insured

against liability for intentional injury committed by an additional insured.

8. Insurance ⇨437, 514½, 598

Named insured was entitled to recover from liability insurer principal amount of judgment against him for damage to school property caused by fire started by the named insured's minor son together with interest, court cost and attorneys' fees properly incurred by the named insured in defense of the school district's claim. West's Ann. Education Code, § 16074; West's Ann. Civ. Code, § 2778; Insurance Code, § 533.

William Katz, Los Angeles, for appellant.

Parker, Stanbury, Reese & McGee, Los Angeles, and Charles Agor Harrison, South Pasadena, for respondent.

GIBSON, Chief Justice.

Plaintiff, holder of a personal liability insurance policy issued by defendant company, brought this action for a declaration of his rights and a determination of defendant's liability under the policy. The court concluded that defendant was not liable, and judgment was entered accordingly.

The policy was issued to plaintiff as the named insured, and stated that "The unqualified word 'insured' includes (a) the named insured, (b) if residents of his household, his spouse, the relatives of either, and any other person under the age of twenty-one in the care of an insured * * *." Defendant agreed to pay all sums up to \$10,000 which the insured should become obligated to pay by reason of liability imposed upon him by law, including damages for injury to property, and to defend any suit brought against him in which such injury was alleged. One exclusion provision read, "This policy does not apply: * * * (c) to injury, sickness, disease, death or destruction caused intentionally by or at the direction of the insured * * *."

Plaintiff's minor son started a fire which injured school property, and the school district obtained a judgment against plain-

tiff for the amount of the damage.¹ The insurance company refused to defend the suit or to pay the amount of the judgment, claiming that the injury was caused intentionally by an insured and therefore came within the exclusion provision.

The company takes the position that the words "the insured," appearing in the provision which excludes liability for injuries "caused intentionally by or at the direction of the insured," refer to a class composed of all those covered by the policy, so that none of them may recover where an injury is caused intentionally by any member of the class. Plaintiff, on the other hand, contends that the exclusion provision does not preclude an insured who has not participated in an intentional injury from being indemnified against liability for an injury intentionally committed by another insured and, furthermore, that there is nothing in the record here which discloses that the son's act was intentional. We have concluded that the policy protects the named insured against liability for intentional injury committed by another insured, and, accordingly, it will be unnecessary to consider whether the son's act was in fact intentional.

[1-3] The understanding of an ordinary person is the standard used in construing a contract of insurance, and any ambiguity in language must be resolved against the insurer. *Ransom v. Penn Mutual Life Ins. Co.*, 43 Cal.2d 420, 424-425, 274 P.2d 633. It is also the rule that exceptions and exclusions are construed strictly against the insurer and liberally in favor of the insured. *Mah See v. North American Acc. Ins. Co.*, 190 Cal. 421, 424-425, 213 P. 42, 26 A.L.R. 123; *Pacific Heating & Ventilating Co. v. Williamsburg*, 158 Cal. 367, 369-370, 111 P. 4.

[4] It has been held that an exclusion provision similar to the one involved here

is reasonably understood as designed to prevent indemnifying one against loss from his own wrongful acts and cannot be construed to exclude coverage for the wilful acts of another in the absence of a clear expression showing such intent. *Western Casualty & Surety Co. v. Aponaug Mfg. Co.*, 5 Cir., 197 F.2d 673, 674; *Morgan v. Greater New York Taxpayers Mut. Ins. Ass'n*, 305 N.Y. 243, 112 N.E.2d 273, 275. This construction is further supported by decisions which hold that a policy extending coverage to several persons creates several obligations on the part of the insurer, so that a particular insured is not precluded from recovering merely because the claim of another insured is barred under the terms of an exclusion provision. *Hoyt v. New Hampshire Fire Ins. Co.*, 92 N.H. 242, 29 A.2d 121, 123, 148 A.L.R. 484; *Wenig v. Glens Falls Indemnity Co.*, 294 N.Y. 195, 61 N.E.2d 442, 444-445; *Pratt v. Hanover Fire Ins. Co.*, 50 R.I. 203, 146 A. 763, 764-765.

[5] Plaintiff, the named insured, would obviously not be excluded from coverage for the wilful acts of his son if the clause defining additional insured persons did not appear in the policy. That clause was intended to benefit plaintiff by broadening coverage, and its purpose would be defeated if coverage were restricted by using the clause to construe the exclusion provision favorably to defendant company. Cf. *Western Casualty & Surety Co. v. Aponaug Mfg. Co.*, 5 Cir., 197 F.2d 673, 674; *Morgan v. Greater New York Taxpayers Mut. Ins. Ass'n*, 305 N.Y. 243, 112 N.E.2d 273, 275.

[6] Section 533 of the Insurance Code,² which codifies the general rule that an insurance policy indemnifying the insured against liability due to his own wilful wrong is void as against public policy, has no application to a situation where the plaintiff is not personally at fault.

1. Section 16074 of the Education Code provides in part: "Any pupil who wilfully cuts, defaces, or otherwise injures in any way any property, real or personal, belonging to a school district is liable to suspension or expulsion, and the parent or guardian shall be liable for all damages so caused by the pupil. * * *

2. Section 533 of the Insurance Code provides: "An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others."

[7, 8] Plaintiff is entitled to recover the principal amount of the judgment against him with interest together with court costs and attorneys' fees properly incurred by him in defense of the school district's claim. Civ.Code, § 2778; see Security B. & L. Ass'n v. Maryland C. Co., 6 Cal.App.2d 77, 79-80, 44 P.2d 370; United States F. & G. Co. v. Smith, 97 Cal.App. 492, 497-498, 275 P. 878.

The judgment is reversed.

SHENK, EDMONDS, CARTER,
TRAYNOR and SCHAUER, JJ., concur.



Ray A. BAILEY et al., Plaintiffs and
Appellants,

v.

COUNTY OF LOS ANGELES et al.,
Defendants and Respondents.

Civ. 20938.

District Court of Appeal, Second District,
Division 1, California.

Aug. 15, 1955.

Rehearing Denied Sept. 12, 1955.

Hearing Granted Oct. 13, 1955. *

Action to declare certain amendments to a Los Angeles County zoning ordinance invalid. From an order of the Superior Court of Los Angeles County, Arnold Praeger, J., vacating an order temporarily restraining the Regional Planning Commission from holding a public hearing on the County's application for a special permit to use certain land as a site for a juvenile detention hall after the Board of Supervisors passed the amendments, which authorized location of such a hall in any zone by special permit, denying a preliminary injunction, and discharging an order to show cause, plaintiffs appealed. The District Court of Appeal, Doran, J., held that adoption of the amendments by the Board after approval thereof by the Plan-

ning Commission without a public hearing was illegal.

Amendatory ordinance declared null and void, order appealed from reversed, and cause remanded to the Superior Court.

1. Counties $\hookrightarrow$ 21½

Adoption of county zoning ordinance amendments, authorizing county, by special permit, to erect juvenile detention hall in any zone, by County Board of Supervisors after approval of amendments by Regional Planning Commission without public hearing on same day prior to scheduled morning hour for consideration of other proposed amendments permitting use of property in any zone for governmental purposes after obtaining permit from Planning Commission, was invalid as not meeting legal requirements. West's Ann.Gov.Code, §§ 65655-65657.

2. Counties $\hookrightarrow$ 21½

The requirement that County Board of Supervisors follow procedure set forth in county zoning ordinance for issuance of use permits cannot be disregarded on ground that Board can modify procedure by amending ordinance, as statute requires that changes in ordinance be submitted to local planning commission for public hearings as means of protecting interested citizens and property owners. West's Ann. Gov.Code, § 65657.

3. Statutes $\hookrightarrow$ 212.1

The legislature, in re-enacting statutory language identically as previously interpreted by Supreme Court, must be assumed to have acted with such interpretation in mind.

4. Counties $\hookrightarrow$ 21½

Reference of proposed county zoning ordinance amendments, authorizing county to erect juvenile detention hall in any zone by special permit, to Regional Planning Commission by County Board of Supervisors, and Commission's prompt approval of amendments, without public hearing, and return thereof to Board on same day before scheduled morning hour for Board's consideration of original amendment author-

* Opinion vacated 293 P.2d 449.

izing use of property in any zone for governmental purposes after obtaining permit therefor from Commission, was not authorized on ground that subject of juvenile halls was included in greater subject of original amendment; change being material and important. West's Ann.Gov. Code, §§ 65656, 65657.

5. Counties ⇨21½

The authority and jurisdiction of Los Angeles County Regional Planning Commission and Board of Supervisors being closely prescribed and limited by applicable laws on strict adherence to provisions of which validity of such bodies' acts depends, Superior Court, as between two possible interpretations of such laws, must adopt that which favors sovereign people, for whose benefit limitations were imposed.

6. Counties ⇨21½

As definition of word "person" in Los Angeles County Zoning Ordinance includes county itself, thereby making it subject to its own zoning ordinance, no violation of any terms thereof, either by county bodies having charge of matter or by reviewing court to which matter is referred, should be countenanced.

Holbrook, Tarr, Carter & O'Neill, W. Sumner Holbrook, Jr., Francis H. O'Neill, Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, Edward H. Gaylord, Deputy County Counsel, Los Angeles, for respondents.

DORAN, Justice.

The appeal herein is from an order vacating a temporary restraining order, denying preliminary injunction, and discharging an order to show cause in an action brought to declare invalid amendment to a Los Angeles County Zoning Ordinance.

The facts are not in dispute. As stated in appellant's brief, "Los Angeles County officials decided *prior to July, 1954*, to utilize Rancho Los Amigos land for a juvenile detention facility. The land in question was zoned R-1 (single family residential use) as was the *surrounding property*. This surrounding property was com-

pletely developed with a single family (R-1) residential type of development *except for two areas* immediately adjacent to the proposed juvenile hall. These *two areas* were owned by the Old River School and Downey Union High School Districts, *both of which were then constructing thereon substantial buildings for use respectively as an elementary and junior high school*". (Appellants' italics.)

When the county began to consider the choosing of an appropriate site, states respondents' brief, "it was found that the only territory under the Zoning Ordinance where a Juvenile Hall was permitted as of course was in territory so zoned as to permit heavy manufacturing, hog ranches, and other obnoxious uses, locations which were obviously unsuited. In order to place the Juvenile Hall in an appropriate location, it was necessary, therefore, that the county obtain for itself an exception or that the Zoning Ordinance be amended. * * * We concede that at the site chosen it would have been difficult to make the showing required for an exception * * *".

On July 16, 1954, the Regional Planning Commission, a county department, published a notice of a public hearing to be held on July 27, 1954, "relative to recommending to the Board of Supervisors for hearing and adoption of certain amendments to Ordinance No. 1494 (Zoning Ordinance) which * * * will permit the use of property in any zone for governmental purposes if a permit has first been obtained as provided in Article 1 of Chapter 5 of said Ordinance No. 1494".

At the advertised hearing on July 27, 1954, the opposition of various local civic organizations in the Downey area was made known to the Commission, and several persons spoke concerning the matter. According to the affidavit of Roland A. Bargeman, Mr. John L. Commons, Assistant Director of Planning, stated that "they were not then considering or would they consider, and no testimony would be received by the Commission concerning the desirability of the changes so far as the same might affect, or be related to in any way, a juvenile hall location". It is to be noted that the

zoning amendment then proposed, made no mention of juvenile hall facilities.

On August 18, 1954, the Planning Commission advised the Board of Supervisors that the "proposed amendments" had been approved. In support of this recommendation the following documents were transmitted to the Board: (1) copies of the "proposed amendments"; (2) "Notice of Public Hearing"; and (3) a list of persons who testified before the Planning Commission. No findings or summary were included, although Section 65653 of the Government Code requires that the approved amendment "shall be accompanied by a report of findings, summaries of hearings".

On August 24, 1954, the Board of Supervisors ordered a public hearing to be held at 10:00 a. m. on September 23, 1954, and notice thereof was duly published. At this meeting, according to the record, "Various communications protesting the proposed amendments are presented; and the Board is addressed by John B. Kingsley of the Los Angeles County Grand Jury, William B. McKesson, Presiding Judge of the Juvenile Court, Roy C. Seeley of the Los Angeles Realty Board, Leland M. Ford, and Francis O'Neill. * * * it is ordered that the Chief Administrative Officer * * meet immediately with the Downey group advocating the placing of the Juvenile Hall Building at a site other than Rancho Los Amigos and to report to the Board in two weeks if another site is found that is suitable for the need and is acceptable to the Superior Court Juvenile Judge and the 1954 County Grand Jury". The matter was then continued until October 5, 1954 at 11:00 a.m., and the matter referred back to the Planning Commission with the recommendation that "those portions of the proposed amendments that would allow a permit to be granted for governmental uses without a public hearing be eliminated." The record is apparently silent as to whether any such conferences were had with the Downey group, or whether any other location was considered.

The following appears from the affidavit of Mary E. Hollis who was present at the October 5, 1954 meeting of the Board of

Supervisors, at 9:00 a.m.: "at which time Harold W. Kennedy, County Counsel, did propose an entirely new ordinance, * * * enacting new Sections 518 and 519 and relating only to juvenile halls; that Mr. Kennedy advised * * * that this matter would have to be referred to the Regional Planning Commission for recommendation and, without throwing the matter open for discussion or hearing to the public present, the Board of Supervisors did then pass a resolution for unanimous action, referring the matter to the Regional Planning Commission; that this occurred at about 9:30 a.m. on said date; that at about 10:15 a.m. on said date, * * * a representative of the Regional Planning Commission, Mr. John L. Clemmons * * * advised the Board that the Regional Planning Commission had met and approved the recommendation".

Mr. Kennedy, the County Counsel, "then read to the people present the proposed ordinance together with a purported 'urgency clause' * * *, (making the new ordinance immediately effective) that affiant, together with several other members of the public present, did state their opposition to the proposed change by reason of the fact that the same had never been noticed for hearing before the Regional Planning Commission, that no discussion had been had concerning the propriety of it * * * and that the proposed legislation constituted a 'railroading' of the legislation", and urged the Board not to pass the legislation but to refer the matter back to the Regional Planning Commission for action in accordance with law; "that the Board thereafter * * * did pass the ordinance as proposed over the objection of the people present at said hearing". The "urgency clause" had not been submitted to the Planning Commission.

The Board of Supervisors then ordered "that public hearing in the matter of the proposed amendments to the Zoning Ordinance to permit governmental use of property in any zone after a permit has been obtained, be closed". Having passed the new amendments or additions relating only to juvenile halls, application was

made to the Regional Planning Commission for a special permit to use the Rancho Los Amigos site for a Juvenile Hall, and the Commission then caused notice to be published of a public hearing thereon to be held November 9, 1954. On November 3, 1954 the Superior Court issued an order restraining the holding of said meeting pending hearing of an order to show cause in this case. At the hearing of the order to show cause, the restraining order was vacated and a preliminary injunction denied. This action was followed by the present appeal.

The trial court held that the Board of Supervisors did have jurisdiction "to adopt the Ordinance amending the Zoning Ordinance by adding thereto Sections 518 and 519 without Regional Planning Commission holding a public hearing before recommending the passage of the Ordinance to the Board of Supervisors * * * for the following reasons:

"1. The Regional Planning Commission did hold one public hearing in connection with a proposed amendment to the Zoning Ordinance which would permit the use of the property in any zone for governmental purposes if a permit was obtained from the Planning Commission.

"2. The Regional Planning Commission submitted its recommendation to the Board of Supervisors for an Ordinance to accomplish this purpose.

"3. The Board of Supervisors held at least one public hearing.

"4. The Board of Supervisors submitted to the Regional Planning Commission its proposed changes in the Ordinance which the Planning Commission had submitted to it. The changes suggested by the Board restricted the right of the County with respect to governmental use in any zone to juvenile halls or juvenile hall facilities and required a public hearing before the Regional Planning Commission before a permit for such use could be granted and placed the burden of proof on the applicant for the permit to show that such use would not be detrimental to the public welfare. * * * Thus the Ordinance

was well within the purview of the subject submitted to the public hearing.

"5. The Regional Planning Commission approved the changes made by the Board.

"6. It was not necessary for the Regional Planning Commission to hold a public hearing in connection with said changes for the reasons heretofore given.

"7. The Board of Supervisors held a public hearing on the amendment which had been approved by the Planning Commission. * * * No public hearing is required to be held by the Planning Commission under Section 65655 (Government Code.) This must be especially so when the changes made by the legislative body is less of an invasion of private rights than the Commission was willing to grant.

"It therefore appears that the proceedings taken in connection with the Ordinance in question complied with the State law."

Appellants' brief presents two basic issues: "1. Has the County of Los Angeles complied with jurisdictional and statutory requirements, set forth in the Government Code, in enactment of its purported amendatory ordinance authorizing by 'special permit' a juvenile hall facility in any zone? 2. Is the purported amendatory ordinance valid, in view of the requirement of Government Code Section 65802 that all regulations shall be uniform for the use of land in such zone?"

It is the respondents' contention that no further public hearing was required in respect to the final proposed amendment since "The ordinance finally enacted may encompass less if its subject matter was within the hearings before the board and commission".

In *Schofield v. City of Los Angeles*, 120 Cal.App. 240, 244, 7 P.2d 1076, 1077, cited by both parties, the reviewing court had before it a similar argument that "the legislative intent was, not that the zone ordinance should be submitted to the city planning commissioners for their report and recommendation, but only that the *subject-matter* of the ordinance was required to be submitted". (Italics added.)

The court refused to sanction such an interpretation, and held that the requirement in question "was mandatory, and any such ordinance passed in violation of the charter provision is void".

[1] An examination of the case law on the subject and a consideration of the purposes of the zoning regulations in question, lead to the conclusion that the trial court was in error and that the procedure utilized in adopting the final amendments without a further public hearing before the Planning Commission does not meet with the requirements of law.

[2] As said in *Johnston v. Board of Supervisors*, 31 Cal.2d 66, 76, 187 P.2d 686, 693, "The procedure set forth in the ordinance is designed to protect interested citizens and property owners. The requirement that the Board of Supervisors follow this procedure cannot be disregarded on the ground that the board can modify the procedure by amending the ordinance. The State Planning Act prescribes a definite procedure for amending the local planning ordinance. It provides for public hearings before the local planning commission before adoption of the ordinance and before any amendments may be made to the ordinance after its adoption, as a means of protecting interested citizens and property owners. * * * *Any change in the proposed ordinance must be submitted to the commission for additional public hearings*". (Italics added.)

The *Johnston* case further states: "The Board of Supervisors does not now have unlimited power to make any change in the ordinance. Substantially the same procedure used in adopting the ordinance must be followed in making changes. The board has no power to make changes until it has submitted them to the commission for public hearings, where interested parties may appear and present arguments in opposition thereto. * * * If the Board of Supervisors, in an administrative capacity can ignore the clear provisions of the ordinance, it was idle to prescribe the procedure for amendments".

The same principle is expressed in *Simpson v. Hite*, 36 Cal.2d 125, 134, 222 P.2d

225, 231, where the court says: "The legislative body shall not change the plan without referring the proposed change to the planning commission for a report * * * and the planning commission must hold public hearings on such proposed changes".

[3] That the facts in the cited cases are not identical with those involved in the present litigation in no manner detracts from the salutary, basic principle there expressed and clearly applicable in the present case. And, as said in appellants' brief, "It is difficult to conceive of a situation where language, even if dictum, should be more persuasive or more controlling on this Court. In view of the fact that since the *Simpson* case the legislature has twice more reenacted this language identically as there interpreted, only reaffirms appellants' position as it must be assumed that the legislature reenacted the language with those interpretations in mind".

Under Section 65656 of the Government Code, the Board of Supervisors, as the legislative body, "may initiate and adopt an ordinance" when deemed "for the public interest". Where this is done, Section 65657 requires that "The legislative body shall first refer such proposal * * * to the planning commission for a report. Before making a report the planning commission shall hold at least one public hearing in the same manner as heretofore prescribed in this article".

[4] In effect, if not in fact, when the Board of Supervisors for the first time on October 5, 1954, presented the amendment which added two new sections relating only to juvenile halls, it did "initiate" a new proposal, and with notable speed and dispatch, referred this new enactment to the Planning Commission which in turn approved the same forthwith and returned it to the Board. All this occurred prior to the 11:00 a.m. hour at which was scheduled the original ordinance relating only to "the use of property in any zone for governmental purposes". The necessity for such haste is not apparent.

The respondents' argument that this procedure was proper because the lesser subject, juvenile halls, was included in the

greater subject of the original ordinance relating to governmental use, is not convincing. The change was material and important. As said in the appellants' brief, "Material injury could as easily occur by slight change in wording as by completely new subject matter". If a loose and unrealistic interpretation be approved, the basic protection which is supposed to be afforded by zoning regulations is effectually destroyed, and the matter left to the discretion of the Board of Supervisors.

The importance of the difference between the first and second proposed amendments becomes more manifest when it is considered that at the public hearing before the Planning Commission on the first ordinance the matter of juvenile halls was not specifically involved, and according to the Bargeman affidavit, no discussion of that subject was permitted. Then, when the second amendment directly relating to juvenile halls was brought up, this was apparently hurried through the legislative mill within the space of about an hour, without any public hearing before the Planning Commission, thus becoming a *fait accompli* before the 11:00 a.m. hour to which time the previous ordinance had been set for hearing.

That the Downing district was strongly opposed to the location of juvenile home facilities in its residential district was well known to both the Board of Supervisors and the Planning Commission. And, as said in appellants' brief, "it is obvious that in a county as large as Los Angeles County, there must necessarily be * * * property zoned for use not inconsistent with the institutional use here intended to be provided. Appellants are reluctant to believe that the County is suggesting that there is no land suitable and available for a juvenile hall elsewhere than in the center of a completely developed, utilized and zoned single family residential area." Such being the situation, these residents and business men whose interests were about to be affected by this intrusion,

should have been accorded every opportunity to present their views, as well in relation to the second proposed ordinance as to the first.

[5] Both the Regional Planning Commission and the Board of Supervisors are, it may here be said, the representatives and servants of the people of Los Angeles County. The authority and jurisdiction of these public bodies are closely prescribed and limited by the applicable law; the validity of their acts depends upon strict adherence to the provisions of such laws. And, as between two possible interpretations, that which favors the sovereign people for whose benefit such limitations were imposed, must be adopted.

[6] Important as the matter of juvenile facilities undoubtedly is, the preservation of zoning regulations and the protection of those who have placed their reliance upon such regulations, is of equal or paramount importance. It is conceded by respondents that the County Zoning Ordinance "includes the county itself within the definition of the word 'person' and thereby makes the county subject to its own Zoning Ordinance". It therefore follows that no violation of any of the terms of such ordinance should be countenanced either by the county bodies having charge of the matter or by a reviewing court to which the matter has been referred. It becomes unnecessary to consider the other contentions made by appellants.

For the reasons hereinbefore mentioned, the amendatory ordinance presented for the first time on October 5, 1954 and on that date referred to and approved by the Regional Planning Commission without a public hearing before the Planning Commission, is hereby declared null and void; the order appealed from is reversed, and the cause remanded to the Superior Court for appropriate action in conformity with this decision.

WHITE, P. J., and DRAPEAU, J., concur.

135 Cal.App.2d 40

**ASSOCIATED LATHING and PLASTER-
ING CO., a corporation, Plaintiff
and Appellant,**

v.

**LOUIS C. DUNN, Inc., a corporation,
Defendant and Respondent.
Civ. 16455.**

**District Court of Appeal, First District,
Division 1, California.**

Aug. 15, 1955.

Rehearing Denied Sept. 14, 1955.

Hearing Denied Oct. 13, 1955.

'Action against general contractor for construction of hospital by lathing and plastering subcontractor, who had failed to give requested price information on changes suggested by architects, who had failed to give priority information and to install hangers from which suspended ceilings were to be hung, wherein general contractor filed a cross-complaint for breach of contract by subcontractor. From judgment of the Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., in favor of general contractor on its cross-complaint, the subcontractor appealed. The District Court of Appeal, Peters, P. J., held that evidence sustained finding that there had been a material breach of the contract by subcontractor warranting a rescission by general contractor.

Judgment affirmed.

1. Evidence ⇨457

In action by subcontractor for lathing and plastering against general and cement contractor for construction of hospital, the phrase "building into concrete" all inserts, anchors, ties, etc., required to secure work of other trades, was sufficiently ambiguous to permit the admissibility of parol evidence to explain it. West's Ann.Civ.Code, § 1645.

2. Appeal and Error ⇨996

Once it appears that parol evidence is admissible, reviewing court is bound by finding of trial court adopting one of two or more reasonable interpretations.

3. Customs and Usages ⇨18

In action for breach of contract by subcontractor for lathing and plastering

against general contractor for construction of hospital, evidence concerning a custom and usage with respect to a certain phrase which had acquired a specialized and definite meaning in building industry was admissible even though a defense based on custom and usage had not been pleaded.

4. Contracts ⇨155

Building contract, which had been prepared by general and cement contractor except for several important provisions which had been prepared by subcontractor, would not be construed against the contractor because he prepared most of the contract. West's Ann.Civ.Code, § 1654.

5. Contracts ⇨350(3)

In action for breach of contract against general and cement contractor for construction of hospital by subcontractor for lathing and plastering, who had failed to give price information requested on changes suggested by architects, failed to give priority information, and who had failed to install hangers from which suspended ceilings were to be hung, evidence was sufficient to support finding that there had been a material breach of contract by subcontractor warranting a rescission by general contractor.

6. Contracts ⇨261(2)

Fact that no actual damage was sustained by general contractor by failure of subcontractor to furnish certain requested information necessary for satisfactory completion of construction project did not preclude general contractor from rescinding the contract for breach thereof by subcontractor.

7. Contracts ⇨323(1)

Materiality of breach of a contract is primarily a factual question.

8. Damages ⇨120(3), 175

In action by subcontractor for lathing and plastering for breach of contract, wherein general contractor filed a cross-complaint for breach of contract by subcontractor, general contractor was entitled to recover as damages the difference between price for which subcontractor agreed to do work and the reasonable cost of completing the job, and contract price contained in sec-

ond subcontract was properly admitted as evidence of reasonableness of the cost of the work.

9. Damages $\Rightarrow$ 62(4)

General contractor could not be charged with failing to minimize damages by accepting second highest bid for lathing and plastering subcontract instead of soliciting new bids following breach by subcontractor, when solicitation of new bids would have unreasonably delayed the entire construction project.

John V. Lewis and John G. Evans, San Francisco, for appellant.

Landels & Weigel, Stanley A. Weigel, San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, Associated Lathing and Plastering Co., brought this action against defendant, Louis C. Dunn, Inc., for breach of contract. Defendant denied that it had breached the contract, and by cross-complaint charged plaintiff with a breach, and sought damages for it. The trial court found that plaintiff in fact had breached the contract, and awarded defendant on its cross-complaint the sum of \$1,678. Plaintiff and cross-defendant appeals.

Respondent, who was the general and the cement contractor for the construction of a hospital, solicited bids for the lathing and plastering work. Appellant, about the middle of April, 1952, was notified that it was the successful bidder. On May 1, 1952, respondent prepared the subcontract, and Mr. DeAngelis, president of appellant, was notified to come to respondent's office to sign it. Mr. DeAngelis failed to do so. On May 22, 1952, respondent mailed the contract to appellant. The appellant made certain modifications, and the contract as modified was finally signed by both parties late in June of 1952.

Not only in securing appellant's signature on the contract, but in other ways respondent had difficulty in securing appellant's cooperation. On May 8, 1952, respondent, by letter, requested from appellant certain priority materials information required by

the federal government, requesting an immediate reply so that appellant could be issued a job priority rating. Receiving no reply over a period of time, an officer of respondent telephoned to appellant at least six times unsuccessfully seeking the information. The requested information was not received until October 22, 1952, in a letter dated October 20, 1952, but postmarked 7:30 p. m., October 21st. These dates are important, because, as will later appear, respondent terminated the contract during the day of October 21, 1952.

On September 10, 1952, respondent by letter requested appellant to send it, not later than September 15th, certain price information on the cost of some changes contemplated by the architects. This information was not furnished to respondent prior to the date respondent terminated the contract, October 21, 1952.

The dispute that finally led to the termination of the contract was over the installation of certain wire hangers from which the suspended ceilings were to be hung. On October 14, 1952, respondent notified appellant to install these hangers so as not to delay the pouring of the concrete, scheduled for October 21, 1952. On October 17, 1952, appellant, by letter, took the position that, under the contract, these hangers were to be installed by the cement contractor. On October 20th an officer of respondent phoned DeAngelis, and the two had an argument over whose duty it was to install the hangers. DeAngelis promised to give a definite answer the next day. He did not do so, and, on October 21, 1952, the officer of respondent phoned DeAngelis and requested an answer. DeAngelis stated that appellant would not install the hangers because that was the duty of the concrete contractor. DeAngelis then talked to the president of respondent who asked DeAngelis if he was going to install the hangers. When DeAngelis stated that appellant would not do so, the president of respondent stated: "All right, if that is your attitude, or if that is the way it is, your contract is hereby cancelled."

The refusal of DeAngelis was apparently not absolute. He testified that he told the

officers of respondent that even though it was not his job he was willing to install the hangers if the parties could discuss later whether appellant would be entitled to extra compensation for the work. With some qualifications, this conversation is admitted by respondent.

On the same date as the oral termination, October 21, 1952, respondent sent appellant a registered letter, stating, in part:

"* * * Since the start of the job we have had no cooperation from your office. We have tried in vain to obtain the following information.

"1. Priority data.

"2. Prices on change orders as listed in letter of September 10, 1952.

"Recently we informed you to start your work on the hanging wires, but have been informed that you do not intend to do the work. We are, therefore, giving you notice that your contract has been broken and is now void. We are making arrangements to have this work performed by others."

Two days later, on October 23, 1952, appellant wrote to respondent, in part, as follows:

"Realizing that an authoritative ruling on this disputed question cannot be had immediately, we propose that you furnish us with a letter permitting us to do this work without prejudice to our rights to recover, in addition to the contract price, the reasonable value of the labor and materials required to take care of the disputed work.

"By so doing, you, of course, would not waive the right to make the same contention that you now make and we would not waive our rights under the contract.
* * *

"If you will * * * agree * * * we will proceed forthwith with the disputed work."

On October 22, 1952, respondent had entered into a contract with the lathing contractor who had submitted the second lowest bid, which contract provided for a price \$1,678 higher than appellant's contract. Accordingly, on October 25, 1952, respondent's attorneys answered appellant's

letter of October 23, 1952, by stating that, because appellant had repeatedly breached its contract, it had caused respondent to incur substantial damages because of the delay, and had caused additional expense in that respondent, to avoid further damage, had been compelled to make other arrangements at increased cost for the lathing and plastering work. The letter notified appellant that respondent intended to hold appellant strictly accountable for these damages.

DeAngelis testified that the cost of installing the hangers would be about \$3,500. The total lathing subcontract was for nearly \$140,000.

Appellant thereupon brought this action for breach of contract and respondent cross-complained for its damages caused by the alleged breach by appellant. The trial court, in substance, found that under the contract the obligation of installing the hangers was that of appellant; that appellant had failed to install the hangers, and had repudiated its contract; that appellant had repeatedly neglected, failed and refused to comply with its duty as a subcontractor to cooperate with the general contractor, a duty found to exist by custom and usage in this area; that respondent as a result of these breaches by appellant was compelled to enter into a contract with another plasterer at a higher price to respondent's damage in the sum of \$1,678.

The first question presented is whether the subcontract imposed on appellant the obligation to install the challenged hangers. The trial court permitted parol testimony on this issue and based thereon, and on the terms of the contract, ruled that the obligation was that of appellant. It is urged by appellant that the contract in clear and unambiguous terms imposes the duty to install the hangers on the cement contractor (that is, the respondent, who was also the general contractor) and, therefore, parol evidence was not admissible.

The subcontract contained the following provision relating to the appellant: "First. The Sub-contractor agrees to furnish all materials and perform all work necessary to complete the furnishing and installation

of the lathing and plastering work for the construction of the seven-story Kaiser Permanente Hospital, Geary Blvd. and Lyon St., San Francisco, in accordance with plans and specifications No. 5161 (more specifically Div. X. pp. 46-50, incl.) and adenda 1-6, inclusive, all prepared by Wolff & Phillips, 509 Pearson Bldg., Portland, Oregon."

Appellant contends that the following provision of the specifications relating to the obligations of the cement contractor imposed the duty to install the hangers on the cement contractor. "Insets, Anchors, Ties, Hangers, Etc. Building into concrete all inserts, anchors, ties, rails, hangers, bolts, nailing blocks, etc., required to secure work of other trades."

These specifications provided also that appellant, as the lathing and plastering subcontractor, should furnish "Runner channels shall be supported 4'-0" — o.c. with No. 8 galvanized wire or 1" x 3/16" flat bars." This is the material of which the hangers were to be made. Another provision of the specifications required appellant to "Check all ground, nailing blocks, anchors, etc., installed by other contractors and do not plaster until all is straight and true * * *."

The trial court, over appellant's objections, permitted expert testimony to the effect that the phrase "building into concrete" as used in reference to the obligations of the cement contractor, according to custom and usage in the building trades in San Francisco, meant that the cement contractor should pour the concrete to encase fixtures previously installed by other contractors. This was the meaning given to the phrase by the trial court. There was also testimony and an admission that the installation of hangers for suspended ceilings is within the jurisdiction of the lathers' and plasterers' union, and that respondent, as the cement contractor, hired no men authorized to install such hangers.

Appellant also contends that the provision of the specifications requiring it to "check" certain things "installed by other contractors" clearly indicates that it was not required to install the hangers. Over

objection, evidence was admitted, and believed by the trial court, that this clause did not relieve the appellant of the duty to install the hangers because "ground, nailing blocks, anchors, etc." did not apply to the hangers.

[1] Appellant relies on the so-called "plain meaning" rule, that is, that parol is not admissible when the contract is clear or unambiguous, and cannot be used to itself create the ambiguity. There are many cases discussing this subject. For this rule to be applicable it must be held, as a matter of law, that the phrase "building into concrete" is so clear that reasonable minds cannot differ as to its interpretation, and that it means only one thing, that is, that the cement contractor must install hangers in the forms so that they can be encased in concrete. But it is quite apparent that, even to a layman, the phrase can also reasonably mean that the cement contractor is simply required to encase the hangers installed by others when he pours the concrete. Since the phrase is capable of two meanings, parol evidence is admissible to explain it. As this court stated in *Bartel v. Associated Dental Supply Co.*, 114 Cal.App.2d 750, 752, 251 P.2d 16, 17: "Unless a court can 'to a certainty and with sureness, by a mere reading of the document, determine which is the correct interpretation * * * extrinsic evidence becomes admissible as an aid to interpretation * * *.' *MacIntyre v. Angel*, 109 Cal.App.2d 425, 429, 240 P.2d 1047, 1050."

The same rule was expressed in *Barham v. Barham*, 33 Cal.2d 416, at page 422, 202 P.2d 289, at page 293, in the following language: "When the language used is fairly susceptible to one of two constructions, extrinsic evidence may be considered, not to vary or modify the terms of the agreement but to aid the court in ascertaining the true intent of the parties [citation], not to show that 'the parties meant something other than what they said' but to show 'what they meant by what they said.'" See also *Schmidt v. Macco Construction Co.*, 119 Cal.App.2d 717, 260 P.2d 230; *Sweeney v. Earle C. Anthony, Inc.*, 128 Cal. App.2d 232, 275 P.2d 56; *Norton v. Farm-*

ers Automobile Inter-Insurance Exchange, 40 Cal.App.2d 556, 105 P.2d 136; Ferris v. Emmons, 214 Cal. 501, 6 P.2d 950; Jegen v. Berger, 77 Cal.App.2d 1, 174 P.2d 489; Walsh v. Walsh, 18 Cal.2d 439, 116 P.2d 62; Coughlin v. Blair, 41 Cal.2d 587, 262 P.2d 305; Barnhart Aircraft, Inc., v. Preston, 212 Cal. 19, 297 P. 20.

But even if to a layman the phrase were clear and unambiguous, we are here dealing with a contract relating to the building industry, a specialized business, and it appears that the phrase in question has acquired a specialized and definite meaning to those in that business. This being so, the parol evidence was admissible to explain that specialized meaning. This rule was clearly stated by the Supreme Court in *Ermolieff v. R. K. O. Radio Pictures*, 19 Cal.2d 543, 122 P.2d 3. In that case the court held that, although the phrase "United Kingdom" was clear and unambiguous to a layman, parol evidence was admissible to show that by custom and usage in the movie industry the phrase was used to include "Eire," although that country is, of course, independent of the "United Kingdom." At page 550 of 19 Cal.2d, at page 6 of 122 P. 2d the court stated: "The correct rule with reference to the admissibility of evidence as to trade usage under the circumstances here presented is that while words in a contract are ordinarily to be construed according to their plain, ordinary, popular or legal meaning, as the case may be, yet if in reference to the subject matter of the contract, particular expressions have by trade usage acquired a different meaning, and both parties are engaged in that trade, the parties to the contract are deemed to have used them according to their different and peculiar sense as shown by such trade usage. Parol evidence is admissible to establish the trade usage, and that is true even though the words are in their ordinary or legal meaning entirely unambiguous, inasmuch as by reason of the usage the words are used by the parties in a different sense. [Citations.] The basis of this rule is that to accomplish a purpose of paramount importance in interpretation of documents, namely, to ascertain the true intent of the parties, it may well be said that the usage evidence does not

alter the contract of the parties, but on the contrary gives the effect to the words there used as intended by the parties. The usage becomes a part of the contract in aid of its correct interpretation."

The basis for this rule is to be found in section 1645 of the Civil Code which provides: "Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense."

This rule has been applied in many cases. See *Watson Land Co. v. Rio Grande Oil Co.*, 61 Cal.App.2d 269, 142 P.2d 950; *Ross v. Frank W. Dunne Co.*, 119 Cal.App.2d 690, 260 P.2d 104; *Body-Steffner Co. v. Flotill Products*, 63 Cal.App.2d 555, 147 P. 2d 84; *Alta Planing Mill Co. v. Garland*, 167 Cal. 179, 138 P. 738; *Myers v. Tibbals*, 72 Cal. 278, 13 P. 695; *Coughlin v. Blair*, 41 Cal.2d 587, 262 P.2d 305.

[2] Once it appears that the parol evidence is admissible the appellate court is bound by the finding of the trial court adopting one of two or more reasonable interpretations. *Pendell v. Westland Life Ins. Co.*, 95 Cal.App.2d 766, 214 P.2d 392; *Schmidt v. Macco Construction Co.*, 119 Cal.App.2d 717, 260 P.2d 230.

[3] Appellant contends that the trial court should have interpreted the contract against the respondent, because respondent prepared the contract. That rule only applies "in cases of uncertainty not removed by the preceding rules." § 1654, Civ.Code. Moreover, the real problem involves the specifications incorporated into the subcontract, and these were drafted by the architects, not respondent. It should also be mentioned that, as far as the subcontract is concerned, appellant drafted several of its important provisions, so that appellant as well as respondent joined in the draftmanship.

[4] Appellant contends that a defense based on custom and usage must be pleaded, and, because it was not pleaded here, the evidence was not admissible. Two cases have directly held that evidence of usage is admissible whether or not it has been pleaded, on the theory that it must be presumed

that the parties, being specialists in the field, knew of the trade usage or custom. *Todd v. Meserve*, 93 Cal.App. 370, 381, 269 P. 710; *Covely v. C. A. B. Construction Co.*, 110 Cal.App.2d 30, 33, 242 P.2d 87; see also dicta in *Watson Land Co. v. Rio Grande Oil Co.*, 61 Cal.App.2d 269, 272, 142 P.2d 950.

[5] Appellant next contends that the sole evidence of a repudiation by appellant related to the hangers; that this was a debatable issue; that it was not a sufficient cause for termination of the contract, and that there was no evidence of any other breach by appellants. This contention is not in accord with the facts. The letter from respondent to appellant notifying appellant of the termination specifically set forth the failure of appellant to furnish the priority data, and prices on the changes suggested by the architects as grounds for the rescission, as well as the failure to install the hangers. The priority information was not furnished until after the rescission, and the price information requested was never furnished.

[6] Appellant offers various excuses for its failure to supply the requested information, and contends its failure to comply caused no actual damage to respondent. Such argument misses the point. Respondent, as general contractor, was required to coordinate the work of all the subcontractors. He was entitled to the cooperation of all subcontractors. Instead, in violation of this responsibility, appellant harassed and embarrassed respondent by failing to give the requested information. If a shortage of materials had developed, which was possible, such failure would have had most serious results. Respondent had the duty of guarding the construction from such a danger, and was entitled to the cooperation of all subcontractors in the performance of this duty. This was essential to the satisfactory completion of the contract. This cooperation it did not receive from appellant. This was a serious breach of duty. The fact that severe damages did not result from the breach bears only on the quantum of liability.

[7] Appellant next contends that the three breaches committed by it—the failure to give price information, the failure to give priority information, and the failure to install the hangers—were not material breaches warranting respondent in cancelling a contract. The materiality of a breach is, of course, primarily a factual question. *Smith v. Empire Sanitary Dist.*, 127 Cal.App.2d 63, 273 P.2d 37; *Gold Mining & Water Co. v. Swinerton*, 23 Cal.2d 19, 142 P.2d 22. Moreover, the trial court was entitled to consider the timing of the breaches in determining their materiality. A breach prior to or at the outset of performance may justify rescission when the same breach late in performance would not be significant. This thought is expressed in comment (a) to section 275 of the Restatement of Contracts in the following language: "Where the failure is at the outset, a very slight failure is often sufficient to discharge the injured party * * * the question becomes one of degree. * * * Will it be more conformable to justice in a particular case to free the injured party, or, on the other hand, to require him to perform his promise, in both cases giving him a right of action if the failure to perform was wrongful."

In the instant case the circumstances that the trial court was entitled to consider were these: The contract provided that time was of the essence. All of the subcontractors knew that respondent was the general contractor of an expensive and complex construction job, and was required to integrate and schedule the work of many subcontractors. Such an arrangement requires teamwork and cooperation. Up to the very day that the concrete was to be poured on October 21, 1952, there had been nothing but delay on the part of appellant. From all appearances, that delay was going to continue. The trial court was justified in believing that the facts showed that appellant was not going to cooperate. Cooperation was an implied term of the contract. *Brogdex Co. v. Walcott*, 123 Cal.App.2d 575, 581, 267 P.2d 28.

It may be that the findings that appellant expressly repudiated the contract are un-

supported. The evidence shows that the refusal to install the hangers was a conditional refusal, conditioned upon appellant's right to recover the reasonable value of the work should it later be determined that appellant was not obligated to perform it. But it is not necessary to rely on a repudiation as a basis for the rescission. The trial court was justified in basing the rescission upon the fact of a material breach. As already pointed out, this was primarily a factual question. *Medico-Dental, etc., Co. v. Horton & Converse*, 21 Cal.2d 411, 132 P.2d 457.

In determining the materiality of the breach the trial court was entitled to consider all the factors above mentioned. As was said in *Coughlin v. Blair*, 41 Cal.2d 587, 599, 262 P.2d 305, 311:

"* * * The circumstances of each case determine whether an injured party may treat a breach of contract as total. [Citations.] * * *

"* * * there is a limit to the time a promisee must thereafter await performance. The trial court could reasonably conclude that that limit was reached here. * * * Although defendants had not expressly repudiated the contract, their conduct clearly justified plaintiffs' belief that performance was either unlikely or would be forthcoming only when it suited defendants' convenience. Plaintiffs were not required to endure that uncertainty or to await that convenience and were therefore justified in treating defendants' nonperformance as a total breach of the contract. [Citations.]"

The argument that the failure to install the hangers was a minor breach because the cost of installing them was only \$3,500, while the total lathing contract was for \$139,808, is not persuasive. The materiality of a breach does not depend upon the amount of money involved. In a complex construction contract a general contractor is not required to speculate as to whether a subcontractor is going to perform, where such subcontractor has already indicated

that he intends to delay, hedge and refuse to cooperate. Under these circumstances, regardless of the findings of repudiation, there was substantial evidence to justify the trial court in finding a material breach warranting rescission.

[8] Appellant challenges in several respects the award against it for \$1,678. It is urged that because the person who was awarded the lathing and plastering contract had not finished the job at the time of trial, and had not yet been paid, respondent was not legally damaged. The assertion is untenable. Respondent was entitled to recover as damages the difference between the price for which appellant agreed to do the work, and the reasonable cost of completing the job. *Richmond Wharf & Dock Co. v. Blake*, 39 Cal.App. 1, 177 P. 508; *Growall v. Pacific Surety Co.*, 21 Cal.App. 185, 131 P. 73. The contract price contained in the second contract was properly admitted as evidence of the reasonableness of the cost of this work. An expert testified that the second bid contained a reasonable price. This was sufficient.

Equally untenable is the contention that the second bid called for more expensive materials than appellant's bid. This refers to the substitution of metal for rock lath. The evidence shows that the second contractor assumed this added cost. Both bids were based on the same specifications. Thus, the two contracts substantially corresponded. *Milwaukee Bldg. Co. v. Wetzel*, 93 Cal.App. 775, 270 P. 382.

[9] The last contention on this issue is that respondent failed to minimize damages by accepting the second highest bid, and by not soliciting new bids. Such contention ignores the very time element that justified respondent in canceling the contract. The solicitation of new bids would have unreasonably delayed the entire construction.

The other contentions of appellant are so unsubstantial as not to require comment.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

135 Cal.App.2d 109

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Arthur BAIRD, Defendant and Appellant.
Cr. 5288.

District Court of Appeal, Second District,
Division 3, California.

Aug. 17, 1955.

Defendant was found guilty of grand theft. The Superior Court of Los Angeles County, Clement D. Nye, J., imposed sentence and defendant appealed. The District Court of Appeal, Parker Wood, Acting P. J., held that evidence that defendant, at the time of entering into joint venture with prosecuting witness, made false representations regarding the acceptance of a bid for surplus machine-gun cases, the amount of the bid and amount of money invested by him, was sufficient to sustain finding that defendant was guilty of grand theft in that he obtained \$3,000 from prosecuting witness by false pretenses.

Affirmed.

1. False Pretenses ☞4

The elements of the crime of grand theft on the theory of obtaining money by false pretenses are an intent to defraud, an actual fraud committed, the use of false pretenses to perpetrate the fraud, and reliance upon the fraudulent representations in parting with the money or other property.

2. False Pretenses ☞49(1)

Evidence that defendant, at the time of entering into joint venture with prosecuting witness, made false representations regarding the acceptance of a bid for surplus machine-gun cases, the amount of the bid, and amount of money invested by him, was sufficient to sustain finding that defendant was guilty of grand theft in that he obtained \$3,000 from prosecuting witness by false pretenses.

3. False Pretenses ☞5

Whether defendant in a criminal prosecution for grand theft on the theory of obtaining money by false pretenses obtained

money with intent to defraud was question to be determined from evidence of entire transaction.

4. Witnesses ☞255(5)

Where witness in criminal prosecution for grand theft used summary of his original notes to refresh his memory as to dates, places, and figures, and to facilitate the use of his original notes which were underneath and attached to the summary, such use was not improper after a foundation had been laid. West's Ann.Code Civ.Proc. § 2047.

5. Criminal Law ☞338(1)

Where defendant was prosecuted for obtaining \$3,000 by false pretenses from prosecuting witness with whom he entered into a joint venture, defendant's offer of letter pertaining to a subsequent joint venture with third party was properly excluded at trial.

Eugene V. McPherson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., and John S. McInerny, Deputy Atty. Gen., for respondent.

PARKER WOOD, Acting Presiding Justice.

Defendant was charged with grand theft in that on or about September 28, 1953, he unlawfully took \$3,000 from Vladimir Weinstein. Defendant admitted allegations of the information that he had been convicted previously of two felonies (forgery and arson). In a trial by jury, defendant was found guilty as charged. He appeals from the judgment.

Appellant contends that the evidence is insufficient to support the judgment; and that the court's rulings upon certain objections were erroneous.

In 1953 appellant operated a salvage business under the name of Compton Surplus and Salvage Company. Surplus property of the Marine Corps was for sale by the disposal section of the Marine Supply (hereinafter referred to as the Marine Corps). About August 10, 1953, the Marine Corps in San Francisco requested bids on

37,876 steel chests that were used for machine-gun ammunition. Appellant submitted a bid of $5\frac{3}{4}$ cents each for the chests, —the total amount stated in his bid was \$2,272.56. He attached thereto, as the required 25 per cent deposit, his personal check for \$568.14. The bid, which was the only one received, was opened by the Marine Corps on September 9, 1953. The bid was forwarded to Washington, D. C., for consideration. The check was "deposited," but was returned on account of insufficient funds. On September 22, 1953, the bank notified appellant that his funds were "short." On September 25, 1953, appellant wrote a letter to the Marine Corps in which he stated that if the Marine Corps would notify him that he was the successful bidder for the chests, he would forward payment in full by money order. In reply thereto, the Marine Corps wrote a letter to appellant in which it stated that appellant's bid was still under consideration by higher authority, and that it was advisable that a "depository check" or money order be forwarded immediately if appellant still desired to purchase the material.

On September 27, 1953, according to the testimony of Erwin G. Resnick, appellant went to Resnick's home and told him that he (appellant) had a chance to make a lot of money on war surplus machine-gun cases; he had been awarded the bid on approximately 38,000 cases at $12\frac{1}{2}$ cents each; the deal had to be closed and he required money immediately; Resnick stated that he did not have any money available but he thought he could "have someone come in with us that could furnish the money"; Resnick and appellant made an appointment to meet the next day at 2:30 p. m. at the Union Bank.

The next day, September 28, Resnick told Vladimir Weinstein "about the deal." About 2:30 p. m. on that day, Resnick and Weinstein went to the Union Bank where Resnick introduced Weinstein to appellant, and the three of them had a conversation.

Weinstein, called as a witness by the People, testified that Resnick said in the conversation that appellant had bought

some ammunition chests from the Marine Corps and that that day, September 28, was the last day appellant had to "put in the balance of the money"; appellant showed Weinstein a "form" which was like Exhibit 5 (the original bid which the Marine Corps received from appellant); the quantity of chests shown on that form was the same as shown on Exhibit 5 (37,876), but the price per unit shown on said form was $12\frac{1}{2}$ cents, and the total amount shown thereon was \$4,734.50; appellant told Weinstein that said total amount was the amount he had to pay for the lot of chests; appellant stated that he had invested \$2,408.22 in the deal and that the balance to be paid was \$2,327.28, which amount had to be paid that day (September 28) or he would lose the money he had invested; appellant asked Weinstein to invest \$3,000, and stated that the chests could be sold as junk for \$20 a ton; he also stated that the transportation to Los Angeles would be \$12,600; he also stated that the total expenses including cost of the chests would be about \$12,000, and "the sales" which would be made would be between \$15,000 and \$18,000; Resnick or appellant stated that, from the first money realized from the sale of the goods, appellant would return the \$3,000 plus \$1,000 profit to Weinstein; Weinstein replied that he would rather have a joint venture and invest the \$3,000, and then whatever profit or loss was realized would be divided equally among the three of them; appellant and Resnick said that that was "all right"; Weinstein then wrote a check for \$3,000 payable to appellant's company; appellant deposited the check to the account of his company, and then caused the bank to issue a certified check for \$2,327.28; he mailed the check to the Marine Corps; it was understood that the balance of the \$3,000 would be used to begin transportation of the chests; the three men then went to appellant's place of business where they discussed the transportation; then Weinstein, in the presence of appellant and Resnick, made notes of certain points of their agreement; he read the notes to appellant and Resnick, and they said that it

was all right for him to give the notes to his attorney for use in preparing an agreement; he obtained a copy of the bid from appellant and later returned it; he believed it was the same copy of the bid which he had seen at the bank, and that his notes show that the total amount which appeared on said bid was \$4,734.50; his notes also show that appellant stated he had invested \$2,408.22; on October 5 appellant told them that he had not heard anything from the Marine Corps; Weinstein then gave appellant and Resnick a copy of the agreement which his attorney had prepared; appellant stated that he could not sign the agreement without consulting his attorney.

On October 6 appellant wrote a letter to the Marine Corps in which he asked when he could get the chests. On October 9 the Marine Corps wrote a letter to appellant's company in which it was stated that the bid had been rejected "as being too low," that a refund would be made, and that the chests would be readvertised at a later date. Thereafter appellant received a check from the United States Treasurer, dated October 7, 1953, for \$1,974.28, which represented the difference between \$2,327.28, the amount of the check mailed by appellant on September 28, and \$353, being an amount which was held as a deposit by the Marine Corps on a bid which appellant had made on other material not involved here. On October 14 appellant cashed said refund check, deposited \$30, took approximately \$1,400 "in bills," and purchased a cashier's check for \$544.46 payable to the United States Treasurer. (Later appellant sent the check for \$544.46 to the Marine Corps as a deposit on a new bid on the same chests.) On October 14, the day he cashed the refund check, appellant, Weinstein and Resnick had a meeting, and appellant told Weinstein and Resnick that the bid had been rejected. Resnick testified that appellant stated that new invitations to bid were going out and that he had left all the money in San Francisco to go on the new bid. Weinstein testified that he told appellant at that meeting that he did not want "to go any further on this joint venture," and he would like to

have his money returned; appellant stated that he would not return the money—that it would be left for full payment of the new bid; Weinstein then told appellant that he should at least increase his bid from 12½ cents to 13 or 13½ cents (each); appellant stated that he knew his business and that he would bid the same amount, and that if Weinstein did not "want it" he would return his money but he could not return it at that time—he would do so within ten days or two weeks. On October 15 the Marine Corps returned all the monetary assets to appellant which it held for appellant's account, and rejected his "bids."

About October 15 appellant was convicted of the crime of arson. On October 26 Weinstein talked with appellant, in the county jail, and told him that he intended to prosecute him unless he returned the \$3,000. Appellant did not return any part of the money. Weinstein testified that he would not have written the check for \$3,000 if he had known that appellant had not purchased the chests or had not invested \$2,408.22 in the chests, or if he had known that appellant had bid 5¾ cents instead of 12½ cents.

Appellant testified, in part, that he told Resnick that he bid 5¾ cents each for the chests, and that the total price would be 12½ cents per unit by the time they arrived in his yard; he also told Resnick that he was satisfied that his bid had been accepted because the government never cashes checks except those of the successful bidder; he told Resnick that if he wanted to come in as a partner he could do so; when Resnick and Weinstein met him on September 28, Resnick stated that Weinstein wanted to lend \$3,000; appellant told Resnick that it made no difference to him where he got the money; Resnick then told appellant (out of Weinstein's presence) that Weinstein would like to come in as a third partner, and appellant replied that he was not looking for a third partner—that he was willing to have Resnick as a partner but that he wanted no part of a three-way partnership; he deposited Weinstein's \$3,000 check; Resnick

gave him the \$3,000 for one-half partnership in his business.

[1-3] With reference to appellant's contention that the evidence is insufficient to support the judgment, he argues in substance that there was no criminal intent at the time he received the \$3,000; he deposited the money in his company's bank account and mailed a certified check for \$2,327.28 to the Marine Corps with the knowledge and consent of Weinstein; and if the bid had been accepted and the money used to pay for the chests no criminal prosecution could have resulted. As above shown there was evidence that appellant made false representations regarding material facts at the time of the transaction with Weinstein. There was testimony that appellant told Resnick that he had been awarded the bid for the chests, and Resnick repeated that statement to Weinstein in appellant's presence; appellant told Resnick and Weinstein that he had to pay a total of \$4,734.50 for the chests, and that he had invested \$2,408.22 in the deal; appellant showed a purported copy of the bid to Weinstein, wherein the bid was shown as 12½ cents per chest and \$4,734.50 for all of the chests. Appellant had no money invested in the chests—the check for \$568.14 which he sent as a deposit was returned to the Marine Corps because appellant did not have sufficient funds in the bank. The bid which the Marine Corps received was 5¾ cents per chest and a total of \$2,272.56 for all of the chests. The check for \$2,327.28, which was mailed September 28, was for an amount in excess of the total amount bid for all the chests. The evidence was sufficient to support a finding that appellant was guilty of grand theft in that he obtained money by false pretenses. "The elements of the crime of grand theft on the theory of obtaining money by false pretenses are: (1) An intent to defraud; (2) an actual fraud committed; (3) the use of false pretenses to perpetrate the fraud; and (4) reliance upon the fraudulent representations in parting with the money or other property." *People v. Neseth*, 127 Cal.App.2d 712, 715, 274 P.2d 479, 480. Whether appellant obtained the mon-

ey with intent to defraud was a question of fact to be determined from the evidence of the entire transaction. *People v. Post*, 76 Cal.App.2d 511, 514, 173 P.2d 48. The evidence was sufficient to prove that appellant obtained the money with intent to defraud; and was sufficient to prove the other elements of grand theft. The evidence supports the judgment.

[4] Appellant also contends that the court erred in permitting Weinstein, over the objection of appellant, to use a memorandum while testifying. On cross-examination, when Weinstein referred to certain meetings he had with appellant, counsel for appellant asked him if he was testifying from notes. Weinstein replied in the affirmative, and said further that the notes were typed after the preliminary examination (held on March 23, 1954) and were a compilation or summary of his original notes which he had made on other occasions as the incidents occurred; and that his original notes were underneath the summary of his original notes. He also testified that he did not make any notes as to what was said in the conversations with appellant at the bank or at his place of business on September 28, or as to what was said in the conversation at his place of business on October 5; and that the summary was a memorandum as to dates and was not a memorandum as to "the contents" of conversations. Appellant objected to the use of the notes which were referred to as a summary of the original notes. The objection was overruled. On direct examination, when Weinstein was testifying regarding the meeting at the bank on September 28, the deputy district attorney asked him what was said about price. Thereupon appellant's counsel said that the witness was reading from notes, and that appellant objected thereto. The court asked the deputy district attorney to lay the foundation for the use of the notes. Then, in answer to questions by the deputy, Weinstein said that some of the notes were made at the time of the conversation and that some of the notes were a condensation of notes he had made at the time of the transaction on September 28, or a few days

later. He also said that the figures which were on one of the papers were put thereon in October, 1953. The trial court ruled that a proper foundation had been laid for the use of the memorandum. Section 2047 of the Code of Civil Procedure provides: "A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in this memory, and he knew that the same was correctly stated in the writing. * * *" It appears that the witness used the summary of his original notes to refresh his memory as to dates, places, and figures, and to facilitate the use of his original notes which were underneath or attached to the summary. Appellant does not contend on appeal that the original notes were not a proper memorandum for use in refreshing memory. The court did not err in overruling the objection.

[5] Appellant also contends that the court erred in sustaining an objection to appellant's offer in evidence of a letter which was sent by appellant to Resnick in January, 1954. During the direct examination of appellant, he was asked if he had contacted Resnick after he (appellant) was released from jail on December 15. The deputy district attorney objected "to anything further after the taking of the money." Appellant's counsel argued that the question pertained to the partnership between appellant and Resnick. The objection was sustained. Thereupon appellant's counsel offered in evidence the letter above referred to (from appellant to Resnick). Appellant's counsel stated that the letter was offered to show that appellant, after he was released from jail, offered to go ahead with the partnership with Resnick. The deputy district attorney objected to the offer on the ground that the letter did not pertain to Weinstein. The objection was sustained. It appears that the letter did not pertain to Weinstein, and that it was written about three months after Weinstein had given the money to appellant and after Weinstein had told appellant

that he intended to prosecute him. It was not error to sustain the objection to the offer.

The judgment is affirmed.

VALLÉE, J., and ASHBURN, J. pro tem., concur.



135 Cal.App.2d 180

D. Edgar COHN, Plaintiff,

v.

COUNTY BOARD OF SUPERVISORS OF
COUNTY OF LOS ANGELES, The Regional
Planning Commission of the County
of Los Angeles, and the Zoning Board
of the County of Los Angeles, Defendants,

D. Edgar COHN (Plaintiff)

and

P. J. Fobert (Intervener In Certain
Pleadings), Appellants,

v.

COUNTY BOARD OF SUPERVISORS OF
COUNTY OF LOS ANGELES
(Defendant),

and

Rhoda R. Adamson (Intervener In Certain
Pleadings), Respondents.

Civ. 20927.

District Court of Appeal, Second District,
Division 1, California.

Aug. 22, 1955.

Hearing Denied Oct. 19, 1955.

Proceeding for special permits under county zoning ordinance. The County Zoning Board recommended that permit be granted applicants to operate sand and gravel pit, rock quarry and crushing plant, but that permit for asphalt plant be denied. The regional planning commission approved the recommendations of the Zoning Board but the Board of Supervisors reversed the order and granted a permit for all three purposes. Complainants' alternative writ of review was dismissed by the Superior Court

of Los Angeles County, Arnold Praeger, J., which affirmed granting of permits by Board of Supervisors. Complainants appealed. The District Court of Appeal, Drapeau, J., held that applicants' interest in property was assignable to owner of property who was a real party in interest and had the right to intervene in proceedings protesting granting of permits.

Affirmed.

1. Municipal Corporations ⇨621.61

Special use permits under zoning ordinances run with the land.

2. Municipal Corporations ⇨621.61

A variance for the use of property in a particular manner is not personal to the owner at the time of the grant, but is available to any subsequent owner, until it expires according to its terms or is effectively revoked, and this is true even though the original owner did not act on it.

3. Counties ⇨21½

Where special permits to operate rock quarry and crushing plant, sand and gravel pit, and asphalt plant upon land were granted to applicants by county Board of Supervisors, applicants' interest in property was assignable to owner of property who was a real party in interest and had the right to intervene in proceeding protesting granting of permits. West's Ann.Code Civ.Proc. § 387.

4. Counties ⇨21½

Where notice of hearing before county Zoning Board upon application for special permit to operate rock quarry and crushing plant, sand and gravel pit, and asphalt plant upon land was published in a newspaper of general circulation more than ten days before the hearing, requirements of ordinance were complied with and protestants to granting of permits, who were present at hearing before Zoning Board, could not assert that they did not have legal notice.

5. Counties ⇨21½

It was presumed that county Board of Supervisors reviewed record and considered all facts before reversing Zoning Board which had heard witnesses and considered evidence upon application for special per-

mit to operate rock quarry and crushing plant, sand and gravel pit, and asphalt plant upon land.

6. Counties ⇨21½

Whether special permit to operate rock quarry and crushing plant, sand and gravel pit, and asphalt plant upon land was contrary to health, safety and general welfare of the people of the county was a matter committed to the discretion of the zoning authorities.

7. Municipal Corporations ⇨63(2)

The classification of zones and the granting of variances present questions generally within the discretion of the zoning authorities and their determination may not be set at naught by the courts unless it is arbitrary and unreasonable.

8. Counties ⇨21½

Where application under county zoning ordinance for special permit to operate rock quarry and crushing plant, sand and gravel pit, and asphalt plant upon land was made, and products of pit, quarry, and plant would be hauled by trucks around a narrow dusty road in front of a school, churches, and protestants' property two miles away, owner of land was entitled to put property to beneficial use despite feared nuisance.

Morris Lavine, Los Angeles, for appellants.

Harold W. Kennedy, County Counsel and Edward H. Gaylord, Deputy County Counsel, Los Angeles, for respondent County Board of Sup'rs.

Trippet, Newcomer, Yoakum & Thomas, F. B. Yoakum, Jr., Los Angeles, for respondent Adamson.

DRAPEAU, Justice.

The Board of Supervisors of the County of Los Angeles granted a special permit to operate a rock quarry and crushing plant, a sand and gravel pit, and an asphalt plant upon three parcels of land in Malibu Canyon. The permit was granted under the county zoning ordinance.

The surrounding property is mountainous brush land. The area is unclassified. In

such areas special permits are granted for various industrial enterprises.

The proceedings leading up to this action were as follows:

Art Jones and Harry McDowell made application to the County Zoning Board for a special permit to operate the facilities named. Protests were made to the Zoning Board by the Malibu Parent Teachers' Association, by various churches, by the principal of the Malibu school, and by other residents of the area.

The Zoning Board held a hearing, at which oral testimony was heard, and written complaints were received. The Zoning Board recommended that a permit for the asphalt plant be denied, but that a permit be granted for a sand and gravel pit and rock quarry and crushing plant, to continue until January 1, 1964.

The Regional Planning Commission approved the recommendation of the Zoning Board.

Jones and McDowell petitioned the Board of Supervisors to review the denial of the permit requested for the asphalt plant. The Board held a hearing, pursuant to section 662 of the Ordinance. This section provides that upon receiving a notice of appeal the Board of Supervisors may: (a) affirm the action of the Commission; (b) obtain all the records and evidence upon which the Commission made its decision and take whatever action it (the Board) decides is indicated; (c) refer the matter back to the Commission for further proceedings; or (d) set the matter for a new hearing before itself, as if no other hearing had been held.

A transcript of the prior proceedings was furnished to, and read by the Board. Then the Board reversed the order denying the permit for the asphalt plant, and granted a permit for all three of the purposes named.

Plaintiff, D. Edgar Cohn, filed his complaint in this action in the Superior Court. He objected to zoning the property for any of the uses permitted, and asked for a writ of review, or other appropriate remedy and, for declaratory relief. An alternative writ issued, and the matter was heard and considered in certiorari. Section 1067 et. seq., Code of Civil Procedure.

After the complaint was filed Jones and McDowell withdrew their intentions of going forward with the project, and assigned whatever rights they had in and to the permit to Rhoda R. Adamson, owner of the property. She appears as intervener in this action.

The trial court found that plaintiff, D. Edgar Cohn, had not appealed to the Board of Supervisors from the order of the Zoning Board, therefore that he had not exhausted his administrative remedies, and had no right to pursue the action. Demurrer to his complaint was sustained, without leave to amend.

But the action was not dismissed, for P. J. Fobert had also filed a complaint in intervention, making the same contentions as Mr. Cohn. And he had appealed from the decision of the Regional Planning Commission. The court found that he, therefore, had the right to continue with the action.

The court further found that the proceedings before the Board of Supervisors under Section 662 of the Zoning Ordinance accorded due process, and were within its jurisdiction, see *Cooper v. State Bd. of Medical Examiners*, 35 Cal.2d 242, 245, 217 P.2d 630, 18 A.L.R.2d 593, and that the Board had regularly proceeded and determined the matter.

Judgment followed against plaintiff, D. Edgar Cohn, and against plaintiff in intervention, P. J. Fobert, and for the Board of Supervisors, affirming the granting of the permit, and dismissing the alternative writ of review.

Plaintiff, D. Edgar Cohn, and plaintiff in intervention, P. J. Fobert, appeal.

Appellants urge the following grounds of appeal:

1. The court erred in permitting Rhoda R. Adamson to file her complaint in intervention.

2. Jones and McDowell had nothing to assign. The permit granted to them was personal and not transferable. Mrs. Adamson, therefore, has no justiciable rights in the controversy.

3. Notice required by section 638 of the Zoning Ordinance was not given.

4. Section 662 of the Zoning Ordinance is inherently unconstitutional, and its application in this case was unconstitutional and void for the reasons: that no hearing was held by the Board of Supervisors, and the Board acted arbitrarily and capriciously in reversing the Zoning Board, which board had heard the witnesses and considered the evidence.

5. There has been a non-compliance with the views of the air pollution control board, that the project is contrary to health, safety, and general welfare in the area.

These grounds of appeal have been considered, and will be commented upon in the order stated.

1. Referring to the first ground of objection, that the Superior Court erred in permitting the owner of the property to file her complaint in intervention:

[1-3] Special use permits under zoning ordinances run with the land. "A variance for the use of property in a particular manner is not personal to the owner at the time of the grant, but is available to any subsequent owner, until it expires according to its terms or is effectively revoked, and this is true, even though the original owner did not act on it." 62 C.J.S., Municipal Corporations, § 227(13) p. 547. Any person who is a real party in interest may intervene in any type of action or proceeding. *Robinson v. Crescent City, etc., Co.*, 93 Cal. 316, 318, 28 P. 950; Code Civ.Proc. § 387. Mrs. Adamson was a real party in interest and had the right to intervene.

2. Appellants' second ground of objection—attacking Mrs. Adamson's rights under the assignment—is likewise untenable.

Zoning ordinances are concerned with the uses to which property may be put. Jones and McDowell had a right to assign whatever interest they had in or to the premises, and Mrs. Adamson, as owner of the property, was entitled to assert her rights as owner and as assignee, and to have those rights determined in this action.

[4] 3. From the record it appears that notice of the hearing before the Zoning Board was published in a newspaper of general circulation more than ten days be-

fore the hearing. This complied with the requirements of the ordinance. Moreover, both appellants were present at the hearing before the Zoning Board. Having appeared there, it is questionable whether they may now assert that they did not have legal notice. *North Side Property Owners' Ass'n v. County of Los Angeles*, 70 Cal.App.2d 598, 604, 161 P.2d 613.

[5] 4. This Court can find no constitutional difficulties with either section 662 of the ordinance, or with its application to this particular case. This section provides a method for the administration of the ordinance. Nothing in the ordinance requires the Board of Supervisors to try a whole matter de novo. It is sufficient if protestants have an opportunity to be heard. And the Board may take into consideration evidence before the Zoning Board. That the Board of Supervisors did that in this case is shown by its records: "Following the reading of the transcript before the Zoning Board, by the members of the Board * * *." And it will be presumed that the Board of Supervisors reviewed the record and considered all the facts. *Pacific Employers Ins. Co. v. Industrial Accident Comm.*, 19 Cal.2d 622, 633, 122 P.2d 570, 141 A.L.R. 798.

[6] 5. Finally, whether the permit was contrary to the health, safety, and general welfare of the people of the county was a matter committed to the discretion of the zoning authorities. The Board of Supervisors did not act capriciously or arbitrarily. That body considered the facts. And that body properly gave consideration to the rights of the owner of the property—rights that should always be considered in the application of zoning laws, which of necessity limit rights of ownership of individuals in real property for the general welfare of all.

[7] In *Beverly Oil Co. v. City of Los Angeles*, 40 Cal.2d 552, at page 560, 254 P.2d 865, at page 869, our Supreme Court, speaking through Mr. Justice Shenk, states the cardinal rule in these matters: "The classification of zones and the granting of variances present questions generally within the discretion of the zoning authorities. Their determination may not be set at naught by

the courts unless it is arbitrary and unreasonable."

[8] In this case the burden of complaints of the protestants was that the products of the gravel pit, rock quarry, and asphalt plant would be hauled by trucks along a narrow, dusty road, in front of a school, churches, and protestants' property. But the pit, quarry, and asphalt plant were more than two miles distant from protestants' property.

Giving to their objections all the weight to which they are justly entitled, it seems to this Court that to deny the owner of property the right to its use in such circumstances would be to carry zoning entirely too far. Measures undoubtedly can be taken to correct the nuisance feared by protestants, without denying to the property owner the right to put her property to beneficial use.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



134 Cal.App.2d 611

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

**William M. MAXEY, Charles E. Maxey and
Clarence Luther Anderson, Defendants.**

Charles E. Maxey, Defendant and Appellant.
Crim. 5396.

District Court of Appeal, Second District,
Division 3, California.

July 27, 1955.

Hearing Denied Aug. 25, 1955.

Prosecution under indictment charging defendant with conspiracy to commit grand and petty theft, with separate offenses of grand theft, and with falsifying and failing

to make proper entries in corporate records. From adverse judgment of the Superior Court, Los Angeles County, Ralph K. Pier-son, J., and from order denying motion for new trial, the defendant appealed. The District Court of Appeal, Vallée, J., held that the evidence was sufficient to support the convictions.

Judgment and order affirmed.

1. Criminal Law ⇨1023(2)

An order granting probation is a final and appealable judgment. Penal Code, § 1237.

2. Conspiracy ⇨47

Corporations ⇨324

Larceny ⇨65

Evidence and reasonable inferences which jury might have drawn therefrom were sufficient to support conviction for conspiring to commit grand and petty theft, for grand theft, and for falsifying and failing to make proper entries in corporate records. Penal Code, §§ 182, subd. 1, 487, subd. 1; West's Ann.Corp.Code, § 3020(a, b).

3. Criminal Law ⇨1159(2, 4)

Reviewing court is not concerned with credibility of witnesses and the weight of the evidence.

Welford R. Wilson, Los Angeles, for ap-
pellant.

Edmund G. Brown, Atty. Gen., and Jay L. Shavelson, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

[1, 2] Appellant Charles E. Maxey, his brother William M. Maxey, and Clarence Luther Anderson were charged in count I of an indictment with conspiracy to commit grand and petty theft. Pen.Code, § 182(1). Seventeen overt acts were alleged. Appellant was also charged in counts II, IV, VII, and IX with separate offenses of grand theft, Pen.Code, § 487(1), and in counts III, V, VI, VIII, and X with separate offenses of falsifying and failure to make proper entries in corporate records. Corp.Code, §

3020(a, b).¹ William M. Maxey was also charged with several counts of grand theft. Appellant was found guilty as charged in counts I to X inclusive. A separate verdict was returned as to each count. William M. Maxey was found guilty as charged in count I and in a number of the other counts. Anderson pleaded guilty to count I. Proceedings were suspended and appellant was granted probation. An order granting probation is deemed to be a final judgment. Pen.Code, § 1237. Charles E. Maxey appeals from the judgment and the order denying his motion for a new trial. His principal contention is that the evidence does not support the verdicts.

Loyal Automobile Insurance Company was a California corporation doing business in the county of Los Angeles, insuring against loss, damage, and theft of automobiles. Anderson testified that in January 1951 the Maxeys informed him they had purchased an insurance company and wanted him to join the organization; they employed him in February 1951 although he had no knowledge of or experience in the insurance business; he was to be trained by William. He later testified the employment was in 1952. An office was set up for him in Santa Monica and he was given the work of handling claims for Loyal. In September 1951 the Jackson family of Detroit, at the solicitation of the Maxeys, purchased a controlling interest in Loyal for about \$60,000. Appellant was then elected president and William, secretary. The Maxeys had a small financial interest in the company. The Jacksons remained in Detroit and left

the management and control of the company largely in the hands of the Maxeys.

On October 15, 1951 articles of incorporation of Pan-Cosmos Insurance Agency were filed with the secretary of state. William became president; appellant, secretary; and one William Freeman, treasurer, of Pan-Cosmos. On November 13, 1951 the Maxeys and Freeman opened an account in the name of Pan-Cosmos with Bank of America. The office of Pan-Cosmos consisted of a desk and filing cabinets in the room occupied by Loyal. On November 26, 1951 one Price was employed as business manager of Pan-Cosmos. He had little experience in the insurance business and was under the supervision of appellant.

In September 1952 the Maxeys and Anderson purchased Ed Thomas' garage, later renamed "Swede's Auto Repair," each to contribute \$2,000 to capital. Appellant stated to the others that he could raise the \$2,000 but he did not want his name to appear because of his relationship with Loyal and he would substitute the name of his wife. A bank account was opened in the name "Swede's Auto Repair" on September 12, 1952. Any two of William, Anderson, and one Thomas were authorized to draw on the account. Appellant's wife did not contribute any money to the purchase of the garage or to the capital account which was credited to her.

Count I, Overt Acts 1, 2, 3, 4, and 5.

Counts II and III.

Count I alleged as overt acts 1, 2, 3, 4, and 5 the formation of Pan-Cosmos, the ex-

1. Corporations Code, § 3020, reads: "(a) Every director, officer, or agent of any corporation, domestic or foreign, who knowingly receives or possesses himself of any property of the corporation, otherwise than in payment of a just demand, and, with intent to defraud, omits to make, or to cause or direct to be made, a full and true entry thereof in the books or accounts of the corporation, is guilty of a public offense.

"(b) Every director, officer, agent, or shareholder of any corporation, domestic or foreign, who, with intent to defraud, destroys, alters, mutilates, or falsifies any of the books, papers, writings, or

securities belonging to the corporation, or makes or concurs in making any false entries, or omits or concurs in omitting to make any material entry in any book of accounts or other record or document kept by the corporation is guilty of a public offense.

"(c) Each public offense specified in this section is punishable by imprisonment in a state prison not less than three nor more than 10 years, or by imprisonment in a county jail not exceeding one year, and a fine not exceeding five hundred dollars (\$500), or by both such fine and imprisonment."

execution of an agency agreement between Loyal and Pan-Cosmos, the theft of \$3,500 from Loyal by appellant and William, the drawing of a check on Pan-Cosmos' bank account by appellant and its deposit in his personal account, and the drawing of a check for \$2,395.75 by appellant on his personal account and its deposit in an escrow transaction. Count II alleged the theft of the \$3,500. Count III alleged falsification by appellant and William of Loyal's records with respect to the \$3,500 check.

In December 1951 an agreement was executed by Loyal and Pan-Cosmos by which the latter was to become a general agent for Loyal. The agreement was signed by appellant and William on behalf of Loyal and by Price on behalf of Pan-Cosmos. It provided that Pan-Cosmos, as agent, could retain as commissions 10 per cent of premiums collected for Loyal. It also provided for profit-sharing based on the excess of premiums over subsequent claims on policies procured by Pan-Cosmos. On January 10, 1952 appellant, as president, and William, as secretary of Loyal, signed a check on Loyal's bank account for \$3,500 payable to Pan-Cosmos. At appellant's direction, Loyal's accountant entered this check on Loyal's records as a contingent commission on a "retro" contract. The check was deposited in Pan-Cosmos' bank account the same day. At the time of the deposit the balance in the account was \$86.05. Immediately following the deposit, two checks were drawn on the Pan-Cosmos account by appellant and William as officers of Pan-Cosmos, one for \$3,000 and one for \$500. The \$3,000 check was payable to Security-First National Bank and was on the same day—January 10, 1952—deposited in appellant's account therein. The \$500 check was payable to William and was cashed by him. Prior to the deposit of the \$3,000 check, the balance in appellant's account was \$68.52. Immediately following the deposit appellant drew a check for \$2,395.75 on his account. This check was deposited in an escrow as part payment on a home being purchased by appellant and his wife. Appellant told Loyal's accountant that Pan-Cosmos had produced some \$35,000 in insurance and the \$3,500 represented a 10 per cent commission. The

fact was that the insurance had been written by another agency which placed the insurance with Loyal directly and paid the premiums less commissions directly to Loyal. Pan-Cosmos never remitted any premiums to Loyal.

Count I, Overt Act 6. Counts IV and V.

Count I alleged as overt act 6 the theft of \$1,000 by appellant from Loyal. Count IV alleged the same theft. Count V alleged that appellant omitted to make and cause to be made a full and true entry with respect to the \$1,000 in the records of Loyal.

Tilford Gaines was insured by Loyal against theft of his Chevrolet between May 1951 and May 1952. In January 1952 his car was stolen. He reported the theft to Loyal and received a check for \$1,445. In April 1952 the car was found by the police and title was vested in Loyal pursuant to the terms of the contract of insurance. Appellant informed one Smead that the Chevrolet was for sale and Smead so informed Pete Perry, who offered \$1,000 for the car. Perry made a down-payment of \$100 by a check payable to appellant and paid the \$900 balance by a cashier's check payable to Loyal. The \$100 check was endorsed by appellant and given to "La Tijera Golf, Inc." No entry was made in the Gaines claim file showing receipt of the \$100 or the \$900, which should have been applied to reduce Loyal's \$1,445 loss on the claim. There was nothing in the records of Loyal to show that \$1,000 had been received for the car. Appellant told Loyal's accountant that the \$900 had been received by Pan-Cosmos as the result of a sale by the latter of "a car that it owned" and instructed him to credit against the \$3,500 owed by Pan-Cosmos to Loyal, which he did.

Count I, Overt Act 7. Count VI.

Count I alleged as overt act 7 the theft of \$85 by appellant and William from Loyal. Count VI alleged that appellant and William falsified the books of Loyal by drawing a check for \$85 payable to James Construction Company and entering it on the records of Loyal as payment for painting and shelving when Loyal was not indebted to James.

On March 24, 1952 a check for \$85 was drawn on Loyal's account by appellant and William payable to James Construction Company. At appellant's direction, the amount was entered on Loyal's disbursement journal as payment for work done on its office building. The \$85 check was used by appellant as payment on work performed by James at appellant's home. Appellant told Loyal's bookkeeper the \$85 was an advance payment to James for painting and shelving in Loyal's office and that he would get them to do the work if "he could ever catch up with them." No such work was ever done at Loyal by James.

Count I, Overt Acts 8, 9, and 10.

Counts VII and VIII.

Count I alleged as overt acts 8, 9, and 10 the filing of an adjustor's report and loss expense voucher for \$44.90 by Anderson, the theft of \$642.52 by appellant and William, and the theft of \$44.90 by Anderson. Count VII alleged the theft of the \$642.52 by appellant and William. Count VIII alleged that appellant and William falsely entered the \$642.52 in the records of Loyal as payment for repairs on an automobile pursuant to a claim by an assured.

There was a claims file in Loyal's records compiled in connection with a purported accident involving a 1948 Chrysler owned by one Franklin who was insured by Loyal from August 22, 1951 to February 22, 1952. The file contained copies of the policy, a report of loss showing an accident on August 14, 1952 purportedly signed by the assured, an adjustor's report by Anderson showing the results of a supposed investigation made by him, a statement of expenses of \$44.90 supposedly incurred by him, estimates of cost of repair, final billing of the insurance company, and a draft dated September 15, 1952 for \$642.52 on Loyal signed by appellant and William payable to Swede's Auto Repair. The draft was endorsed by Anderson for Swede's Auto Repair and deposited in the latter's bank account. As previously mentioned, the account had been opened on September 12, 1952. The check for \$642.52 was entered in the cash disbursement journal of Loyal as payment on the Franklin claim. A check for \$44.90 was given to

Anderson by Loyal and entered in the books as payment of expenses incurred in adjusting the Franklin claim. The estimate of repairs in the file had in fact been made on another car. The assured, Franklin, did not have an accident on August 14, 1952 or at any time during the period his Chrysler was insured by Loyal, nor did he make any report of loss. He did not sign the report of loss purportedly signed by him, nor authorize anyone to sign on his behalf.

Count I, Overt Acts 11, 12, and 13.

Counts IX and X.

Count I alleged as overt acts 11, 12, and 13 the filing of an adjustor's report and loss expense voucher for \$75.90 by Anderson, the theft of \$745.98 by appellant and William, and the theft of \$75.90 by Anderson. Count IX alleged the theft of the \$745.98 from Loyal by appellant and William. Count X alleged that appellant and William falsely entered the \$745.98 in the records of Loyal as payment for repairs on an automobile pursuant to a claim by an assured.

There was a claims file in the records of Loyal relating to a claim purportedly made by one Christians, who was insured by Loyal for damage to his 1947 Ford. The file contained a report of loss reportedly signed by the assured and a loss report by Anderson, a statement including \$25.90 purportedly incurred as expense by Anderson as adjustor and \$50 purportedly advanced by him for "tow and storage," a check dated September 19, 1952 for \$745.98 payable to Vic Perry's Auto Repair signed by appellant and William, and estimates of cost of repairs on a 1947 Ford. The \$745.98 check was entered in the disbursement records of Loyal as a payment for repairs on Christians' 1947 Ford. A Loyal check signed by appellant and William for \$25.90 was given to Anderson. It was entered on Loyal's records as compensation for settlement of the Christians claim. Another check for \$50 signed by appellant and William was given Anderson by Loyal and entered in the disbursement journal as repayment for advances. The estimate of repairs purportedly made by Vic Perry's Auto Repair on the Christians 1947 Ford was in fact an estimate on a 1949 Ford which had not been insured

by Loyal. Christians did not have an accident during the period he was insured by Loyal. He did not report any accident nor did he sign or authorize anyone to sign the report which bore his purported signature.

One Smead, who was the owner of Vic Perry's Auto Repair, and with whom the Maxeys did business, had taken title to a totally wrecked 1949 Ford. William purchased the car from Smead for \$300. Vic Perry's Auto Repair made an estimate of \$745.98 as the cost of repairing this car. The estimate was altered so as to describe the 1947 Ford owned by Christians and placed in the Christians claim file. The check for \$745.98 was used to pay the cost of repairing the 1949 Ford owned by William. The 1949 Ford was thereafter sold to Loyal for \$1,000, which issued a check dated September 12, 1952 signed by appellant and William for that amount payable to Swede's Auto Repair. The check was endorsed by Anderson on behalf of Swede's Auto Repair and deposited in its account.

Count I, Overt Acts 14, 15, 16, and 17.
Counts XI and XII.

Count I alleged as overt acts 14, 15, 16, and 17 the filing of an expense voucher for \$25 by Anderson, the theft of \$800 by Anderson and William, the theft of \$25 by Anderson and the writing of a letter by William to an attorney. Count XI was a charge against William and Anderson, and not against appellant. Count XII was a charge against William, and not against appellant. Since overt acts 14, 15, 16, and 17 did not allege any activity on the part of appellant it is unnecessary to relate the evidence with respect thereto. It is enough to say the evidence fully supports the doing of the acts alleged.

[3] Without further discussion it is apparent that the evidence and the reasonable inferences which the jury may have drawn therefrom amply support the verdicts. See *People v. Bentley*, 75 Cal. 407, 409, 17 P. 436; *People v. Steccone*, 36 Cal.2d 234, 237-238, 223 P.2d 17; *People v. Curtis*, 106 Cal. App.2d 321, 325, 235 P.2d 51; *People v. Fratianno*, 132 Cal.App.2d 610, 282 P.2d 1002. Appellant's argument goes to the credibility of the witnesses and the weight

of the evidence—matters with which this court has no concern.

In his opening brief, in stating his points, appellant says the court erred in admitting and rejecting evidence as to four matters. He does not mention these points again in either his opening or closing brief. Notwithstanding the failure of appellant to argue the points or furnish us with authority with respect to them, the attorney general, with commendable regard for his responsibility, discusses them at length. We have examined the points and find them all to be without merit.

We find no error in the record.

The judgment and the order denying a new trial are affirmed.

SHINN, P. J., and PARKER WOOD, J.,
concur.



135 Cal.App.2d 186

**CULINARY ALLIANCE AND HOTEL
SERVICE EMPLOYEES LOCAL UNION
402, Plaintiff and Appellant,**

v.

**J. R. BEASLEY, d/b/a Beasley's Friendly
Corner, et al., Defendants and
Respondents.**

**Verne R. BEASLEY and Ruby A. Beasley,
husband and wife, Plaintiffs and
Respondents,**

v.

**LOCAL JOINT EXECUTIVE BOARD OF
SAN DIEGO, COMPRISING WAITERS
AND BARTENDERS UNION LOCAL NO.
500 and Culinary Alliance and Hotel
Service Employees Local Union No. 402,
etc., Defendants and Appellants.**

Civ. 5110.

**District Court of Appeal, Fourth District,
California.**

Aug. 23, 1955.

**Action by union for injunction restrain-
ing operators of bar and restaurant from**

coercing their employees to become members of incorporated independent union as condition of employment, consolidated for trial with action by restaurant operators for injunction restraining union from picketing their business and from obstructing or interfering with conduct thereof. The Superior Court of San Diego County, John A. Hewicker, J., rendered judgment restraining union from picketing or interfering with operators' business, and union appealed. The District Court of Appeal, Barnard, P. J., held that evidence supported findings that independent union was bona fide labor organization, that neither restaurant operators in question nor employer of any employee member of independent union had contributed any finances to such union, or had committed any act which would in any way interfere with affairs of such union or committed any act which constitute attempt to dominate or control such union, and that each employee had voluntarily joined independent union, uninfluenced in any way by restaurant operators or their representatives.

Judgment affirmed.

1. Labor Relations ☞352

Only company union financed in whole or in part, interfered with, dominated or controlled by employer, is excluded from consideration under Jurisdictional Strike Law. Labor Code, §§ 923, 1117.

2. Labor Relations ☞945

In action by union for injunction restraining operators of restaurant from coercing employees to become members of independent union as condition of employment, consolidated with action by operators for injunction restraining union from picketing, evidence supported findings that independent union was bona fide labor organization, that neither employers in question nor any employer of any employee member of independent union had contributed finances to such union, or had interfered with affairs of such union or attempted to dominate such union, and that each employee voluntarily joined independent union. Labor Code, §§ 923, 1117.

Walter Wencke, San Diego, for appellants.

Clifford L. Duke, Jr., San Diego, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment entered in two actions which were consolidated for trial.

V. R. Beasley and his wife operated a place in San Diego serving food and liquor. They had eight employees consisting of a bar manager, two bartenders, a kitchen manager and four waitresses. Prior to September 18, 1951, they operated under a collective bargaining contract with the local Joint Board, comprising Local Union 402 and Local Union 500. During the next two years they conducted the business in accordance with the terms of that contract, and the Joint Board collected dues from their employees and informed new employees they would have to join the union in order to work there. In September, 1953, the Joint Board removed the Union House Card from the establishment and told Beasley that his contract had been cancelled by Joint Board in 1951. That fact had not theretofore been brought to Beasley's attention. Beasley's Union House Card was not returned, but negotiations continued until about March 1, 1954. The only disagreement between the parties was over the terms of a health and welfare plan proposed by Joint Board, which was causing considerable controversy in the community throughout 1953.

In the fall of 1953, one Copelan participated in the organization of several independent employee unions, one being at the Coca Cola Bottling Company in San Bernardino. That union had been duly certified by the National Labor Relations Board as a bona fide labor organization, qualified to represent the employees of the Coca Cola Bottling Company. In February, 1954, Copelan and another man organized a non-profit corporation, which was incorporated on February 26, 1954, as "Employees' Collective Bargaining Association." This will be referred to as the "Association." As of March 29, 1954, it had about 100 members and had executed collective bargaining

agreements on behalf of the employees of twelve separate and unrelated employers.

As of March 1, 1954, only two of Beasley's employees were members of the local unions and represented by Joint Board, although three others had prior to January been such members. On March 6, 1954, seven of Beasley's eight employees held a meeting at which five became members of the Association, and designated that organization as their exclusive bargaining representative. Another later joined, making six of the eight Beasley employees who were members of the Association. On the same day, March 6, a committee selected by the employees, consisting of two Beasley employees and Copelan as an officer of the Association, signed a contract with Beasley on behalf of all the employees of this establishment. On March 15, 1954, the Association filed a petition for certification with the National Labor Relations Board, which petition had not been acted on at the time of the trial. On March 19, 1954, Joint Board demanded of Beasley that he sign a contract with Joint Board. Beasley replied that he had already signed a contract with the Association on behalf of his employees. That same day, a picket line was established by Joint Board and one employee left, he being the only employee who was then a member of the local unions.

That same day, March 19, the first of these actions was filed by Local Union 402, naming Beasley and the Association as defendants. The complaint alleged, aside from formal matters, that Beasley "operates a saloon with kitchen"; that on October 10, 1953, Beasley informed this union that he would thereafter operate non-union, and would no longer negotiate with the union; that prior to March 6, three named individuals were members of Local Union 402; that on March 6, Beasley "herded his employees" into a room above his saloon and told them they must join the Association if they desired to continue in his employ; that the Association is organized ostensibly to protect employees but actually is formed by employers to combat legitimate unions; that Beasley's acts, in refusing to bargain with the union and in requiring

his employees to join the Association, were deliberately designed to induce the employees to leave the union; that as a result of these acts these employees were forced to choose between retention of their employment and affiliation with their union, and the union was caused to lose three members as well as prospective members; and that, between November 18, 1951, and October 10, 1953, Beasley operated in compliance with the then extant collective bargaining agreement in the culinary industry, and in accordance with the contract in effect prior to November 18, 1951. The prayer was for an injunction restraining the defendants from coercing their employees to become members of Association as a condition of employment.

The defendant Beasley filed an answer, and also on March 20, 1952, filed the second of these actions praying for an injunction enjoining the Joint Board and the local unions from picketing this business, from obstructing or interfering with the conduct thereof, and from doing any act to prevent the Beasleys from obtaining supplies for use in the business. Local Unions 402 and 500 answered this complaint.

After a trial which began on March 29, 1954, the court found that each of the allegations of the complaint in the first action, as above summarized, was not true, with one exception. It was found that the last one, to the effect that Beasley had operated in compliance with the bargaining agreement common to the industry between November 18, 1951, and October 10, 1953, was true. The court also found that all of the allegations of the complaint in the second of these actions are true and, among other things, found that the Association is incorporated as a nonprofit corporation; that it is a labor organization existing solely for the purpose of dealing with employers concerning labor grievances, wages, hours of work, and conditions of employment on behalf of employees who are members of said corporation; that the Association has entered into a collective bargaining agreement with the Beasleys covering the wages, hours of work, and conditions of employment of their employees; that this agree-

ment was executed on behalf of all of the employees employed by Beasley, and was ratified by a majority of such employees; that each of these employees voluntarily joined the Association, and neither the Beasleys nor their representatives had influenced any employee in any way in making this choice; that neither the Beasleys nor any employer of an employee member of the Association have contributed any finances to said corporation, nor have they committed any act which would in any way interfere with the affairs of said corporation, or any act which would constitute an attempt to dominate or control said corporation; that the picketing of this place of business by Joint Board and the local unions was for the purpose of compelling the Beasleys to execute a bargaining agreement with the local unions, and to recognize them as the exclusive bargaining agent for all of its employees; that this picketing resulted because of a dispute between the local unions and the Association as to which organization should have the exclusive right to represent Beasley's employees; that the Association has at all times since March 6, 1954, been the exclusive bargaining representative of all the employees employed by Beasley, and the Joint Board and local unions have at no time since said date been such exclusive bargaining representative; and that the local unions have acted in concert with other unions in order to injure the Beasleys' business, for the purpose of forcing them to recognize and bargain with Joint Board and the local unions as the exclusive agent of the Beasley employees. Judgment was entered restraining Joint Board and the local unions from picketing or interfering with this business, as prayed for in the second of these actions. The Joint Board and the local unions have appealed from this judgment.

As the appellants state, the issue presented on this appeal is whether or not the Association was a bona fide labor organization and free from interference or domination by Beasley, within the meaning of Section 1117 of the Labor Code, and free from interference by employers of labor within the meaning of Section 923 of that code. The real question presented is whether the evi-

dence sufficiently supports the court's findings to the effect that the Association was a bona fide labor organization; that neither the Beasleys nor any employer of any employee member of the Association have contributed any finances to said corporation, or have committed any act which would in any way interfere with the affairs of that corporation or committed any act which could constitute an attempt to dominate or control said corporation; and that each employee voluntarily joined the Association, uninfluenced in any way by the Beasleys or their representatives. The appellants, in effect, contend that the evidence does not support these findings for a number of reasons.

It is argued that since the by-laws of the Association forbid it to strike or picket, it is not a genuine labor organization because it is powerless to enforce any demands it may justly make. There was evidence that it was the purpose of the Association to attempt to procure a contract between its employee members and their employers, that if a contract could not be agreed upon the Association had no desire to represent such employees, and that when a contract was signed with an employer it would attempt to make the employer live up to it, taking court action if necessary. While this may be one matter to be considered in determining whether or not a bona fide labor organization exists, the existence of such a provision in the by-laws is not conclusive to the contrary. As was said in *Suttin v. Unity Button Works*, 144 Misc. 784, 258 N.Y.S. 863, 864, "It is praiseworthy that a union, having made a contract * * * should come into a court of equity and there seek protection rather than to resort to a strike to redress the wrong."

It is contended that this Association is absolutely controlled by "employer" directors. It is argued that under the by-law provisions of this Association the directors elect the officers; fill their own vacancies on the board of directors; determine their own compensation; hold so-called elections every two years; hold no general meetings; may amend and alter the by-laws to suit themselves; may interpret the by-laws to their own satisfaction; and pay no dues.

It is then argued that under these unlimited powers the directors have absolute control since two of the three directors of the Association are "employers", with the result that these directors are, in fact, "employer czars."

The Association was about a month old at the time of the trial. The articles of incorporation name three persons who are to act as directors until the selection of their successors. One of these was Copelan, who was an employee of the Coca Cola Bottling Company in San Bernardino. The other two were a man who operated a market in San Bernardino, and his wife who worked in the market. The size of this market does not appear. While this man was an employer in an unrelated business in another city he was in no sense an employer of the Beasley employees here involved, and it does not necessarily follow that he was such an employer as was contemplated by the words "the employer" found in Section 1117 of the Labor Code. The by-laws of the Association do not support the charge that they give absolute control to the directors. Some of the things complained of are found in practically all such by-laws. These by-laws provide for biannual meetings of the members of the corporation; that special meetings may be called at any time by the president, the majority of the board of directors, or upon written request of 25% of the members; that notice must be given of the time and place of all such meetings; that the directors named in the articles are to serve until the next biannual meeting and until their successors are appointed; that any vacancy in the board shall be filled by the board of directors, the person appointed to serve until his successor has been duly elected; that any director may be removed by a two-thirds vote at any regular meeting, or any special meeting called for such purpose; that the directors shall receive no compensation for their services, provided that this shall not prevent a director from receiving compensation when authorized by the board for services rendered as an employee of the corporation; that the by-laws may be amended at any meeting of

the members upon a three-fourths vote of the members present; and that the board of directors shall likewise have authority to amend the by-laws, provided that in the event of any action taken by vote of the members, respecting any amendment, the action of the members shall be controlling over any action taken by the directors. This question of absolute control of the Association by its directors was, at best, one of fact for the court.

It is argued that the "check-off" provision in the Association contract with Beasley "assures the financial stability" of the Association. We are pointed to evidence that under their contract Beasley's employees signed an authorization for their employer to deduct their dues from their wages and remit such dues to the Association at the first pay period of each month. While this may "assure the financial stability" of the Association, no good reason is advanced or authority cited in support of the conclusion that this fact disqualifies an organization from being a bona fide "labor organization", within the meaning of Section 1117 of the Labor Code. If such a rule were established as the law, we fear there would be many large and influential labor unions who would lose their standing as bona fide labor organizations.

It is argued that the "lack of negotiation" here is a further indication of employer domination. It is argued that there was no "give and take" negotiation because there was evidence that when the contract between the Association and Beasley's employees was entered into neither side asked for anything which the other side refused. There was evidence that the parties sat down and discussed wages, holidays, vacation pay and such matters, and that they came to an agreement. We know of no law requiring that something must be asked for and refused, in order to constitute a negotiation between parties over the terms of a contract.

It is argued that Beasley interfered with and supported the association by permitting his employees to attend an organizational meeting during working hours, and performing their work for them while they

were attending such meeting. The evidence is that the meeting was held at 6:00 P.M. because one shift was leaving and the other coming on and all would be available, and that the employees were asked to attend the meeting by one of the employees, who was manager of the kitchen. Assuming that this is one fact to be considered it is not, in itself, controlling.

It is argued that Beasley's interference on behalf of the Association is disclosed by the fact that he discharged two employees who refused to join the Association, one on March 6, 1954, and the other at sometime thereafter which is not disclosed by the record. One of these employees testified that Beasley told him on March 8 that he had not signed up with the Association, and he was through. We are pointed to no such evidence with respect to the other of these employees, and we have found none. On the other hand, Beasley denied having made the statements attributed to him and testified that these men were discharged for other reasons which are entirely sufficient. Nothing more than a conflict appears in this connection.

The arguments that Beasley's attorney represented the Association, and that Beasley's kitchen manager solicited and arranged the organizational meeting of the Association, require little consideration. The evidence with respect to these matters amply supports the findings made by the court.

It is argued that it is immaterial whether Beasley actually exercised domination since the more effective his control the less it was needed; and that the desires of the employees are not relevant to the issue of domination, financing or interference. The question with respect to Beasley's domination and control was one of fact, and the evidence amply sustains the court's findings with respect to the matters coming within the scope of the pertinent sections of the Labor Code, and fully sustain the findings with respect to all of the material matters alleged in the complaint in the first of these actions. This is simply a case where the appellants failed to sustain the burden of proof resting upon them.

Some contention is made that the Association is merely a "protection racket" because Beasley's employees did not know it was employer-controlled, did not know the terms of the contract they were entering into, and had never received a copy of the by-laws of the Association. There was ample evidence that the terms of the contract were explained to them; and evidence that some of them who had been members of Local 402 for years had never seen a copy of its by-laws.

Finally, it is argued that a similar "problem of determining whether an employer-dominated Association could be a bona fide labor union within the meaning of the Jurisdictional Strike Act" resulted in a different holding by a trial judge in San Bernardino County, in the case of *Roberts v. Carpenters Local 944*. That fact, if true, is not controlling on this appeal. The trial court was and this court is concerned with the evidence and record here presented.

[1] It is only a company union "financed in whole or in part, interfered with, dominated or controlled by" *the employer* which is excluded from consideration under the Jurisdictional Strike Law. *Voeltz v. Bakery etc. Union*, 40 Cal.2d 382, 254 P.2d 553, 555. It may be said here as was said in that case: "We do not believe that the fact that a dispute existed between defendants and plaintiff before the association was formed and came into the picture, takes the case out of the act * * *. It may be inferred that what began as a dispute between employer and the union became a dispute between unions as to which should be exclusive bargaining agent."

[2] The evidence sufficiently supports the findings made, and it cannot be held as a matter of law that the Association was not a bona fide labor organization, or that it was financed in whole or in part, interfered with, dominated or controlled by the Beasleys, the employer here in question.

The judgment is affirmed.

MUSSELL, J., and SHELL, Justice pro tem., concur.

E. E. WELLS and John M. Reynolds,
Plaintiffs and Respondents,

v.

H. Thomas COMSTOCK and Grace E. Mendizza, also known as Grace Ellen Comstock Harriis, Defendants and Appellants.
Civ. 20539.

District Court of Appeal, Second District,
Division 3, California.

Aug. 22, 1955.

Rehearing Denied Sept. 21, 1955.

Hearing Granted Oct. 19, 1955. *

Action for balance of purchase price due on sale of stock. From an adverse judgment of the Superior Court, Los Angeles County, Paul Nourse, J., buyer and surety appealed. The District Court of Appeal, Shinn, P. J., held that where the buyer knew that the stock had been wrongfully issued contrary to conditions of the permit from the Corporation Commissioner, the buyer was estopped to plead illegality of the stock issuance as a defense, and that defenses unavailable to the buyer were also unavailable to the surety.

Affirmed.

Vallée, J., dissented.

1. Appeal and Error ⇨760(2)

To raise question of insufficiency of evidence, brief on appeal should state, by reference to transcript, the evidence claimed to be insufficient, unless there is no evidence pertaining to the particular fact found in which event a statement to that effect will suffice.

2. Licenses ⇨39.24

In action for balance of price on sale of shares of stock, evidence established that buyer knew shares had been issued contrary to conditions of permit from Corporation Commissioner,

3. Licenses ⇨39.24

In action for balance of price on sale of shares of stock, wherein evidence established that buyer knew shares had been issued contrary to conditions of permit from Corporation Commissioner, evidence failed to establish that sale was part of, dependent

* Opinion vacated 297 P.2d 961.

upon or related to scheme for wrongful issuance.

4. Contracts ⇨103

Licenses ⇨39.8, 39.15

A bargain collaterally and remotely connected with illegal purpose or act is not for such reason illegal if proof of bargain can be made without relying upon illegal transaction, but exception to this rule exists in that if a purchaser of stock which has been issued illegally in that the same was not authorized by permit or that issuance was contrary to terms of authorization is innocent of any wrong, he is not bound by contract and may recover any sums paid on account of purchase.

5. Licenses ⇨39.17

Where buyer and seller of shares of stock are equally at fault with respect to wrongful issuance of the stock without authorization or contrary to terms of authorization, rule that a bargain collaterally and remotely connected with an illegal purpose or act is not for such reason illegal if proof of bargain can be made without relying upon illegal transaction, applies.

6. Licenses ⇨39.17

Where buyer of share of stock knew that stock had been wrongfully issued contrary to conditions of permit from Corporation Commissioner, buyer was barred, by principle that one cannot take advantage of his own wrong, from using illegality of stock issuance as a defense. West's Ann. Civ.Code, § 3517.

7. Licenses ⇨39.17

Where balance of purchase price on sale of stock was not paid, court would not refuse to enforce seller's demand merely because seller had participated in wrongful issuance of stock contrary to conditions of permit, where sale itself was valid and was not furtherance of illegal purpose. West's Ann.Civ.Code, § 3517.

8. Contracts ⇨138(1)

Parties to an illegal contract will be left where the court finds them.

9. Licenses ⇨39.17

Where buyer of shares of stock knew that stock had been wrongfully issued con-

trary to conditions of permit from Corporation Commissioner, buyer was estopped to maintain defense of illegality.

10. Licenses ⇨39.16

Where buyer of shares of stock knew that stock had been wrongfully issued contrary to conditions of permit from Corporation Commissioner, buyer knew what he was getting under purchase contract and therefore had no claim for breach of warranty or for want of consideration.

11. Guaranty ⇨78(1)

As general rule, guarantor may not avoid his obligation on grounds that are unavailable to his principal. West's Ann. Civ.Code, § 2808.

12. Principal and Surety ⇨143

Where buyer of shares of stock knew that stock had been wrongfully issued contrary to conditions of permit from Corporation Commissioner and as result of such knowledge was estopped to defend on ground of illegality, breach of warranty or want of consideration, such defenses were also unavailable to buyer's surety. West's Ann.Civ.Code § 2808.

William J. Curren, Jr., Los Angeles, and Donald E. Paterson, Jr., Granada Hills, for appellants.

Trihey & Mirich, San Pedro, for respondents.

SHINN, Presiding Justice.

Plaintiffs E. E. Wells and John M. Reynolds agreed to sell to H. Thomas Comstock, who agreed to buy, 440 shares of the capital stock of Finance Control, a California corporation, for the sum of \$11,998.80, payable \$2,000 down and the balance within 15 days. Grace E. Mendizha entered into a written agreement with the sellers that if Comstock defaulted in his contract to pay plaintiffs she would well and truly pay any sums that might remain unpaid. The \$2,000 payment was made. Defendants refused to make any further payment and plaintiffs brought this action against Comstock and Mendizha for the recovery of \$9,998.80 and attorney's fees.

Defendants answered denying that plaintiffs were the owners of 440 shares of such stock and alleging that defendant Comstock was the owner of 380 shares. It was alleged that at all times plaintiff Reynolds was president and Wells treasurer of the corporation; that plaintiffs procured a permit from the Division of Corporations authorizing the issuance by the corporation to Reynolds, Robert E. Wood, D. W. McCormick and E. E. Wells or any or all of them not to exceed 500 shares for the price of \$10 per share cash so as to net the corporation the full amount of the selling price; that 380 shares of said stock were issued without cash or any other consideration given to the corporation therefor. Comstock filed a cross-complaint for money had and received in the sum of \$363.80; plaintiffs answered the cross-complaint. Judgment was in favor of plaintiffs against both defendants for the amount prayed for, namely, \$9,998.80 and \$459.95 as attorneys fees. Defendants appeal.

The court found that plaintiffs were the owners of 440 shares of stock, 405 shares belonging to Reynolds and 35 shares to Wells; that said stock was issued to them without the payment of cash or other consideration to the corporation but "that the defendant, H. Thomas Comstock, participated in and induced the issuance of said certificates Nos. 3, 6, and 9, evidencing 380 shares of the capital stock of said Finance Control, a corporation, for a consideration other than \$10 per share cash, and that at the time he participated in the issuance of said shares and induced the issuance thereof he knew that the issuance of said stock for a consideration other than \$10 per share cash was contrary to and in violation of the permit issued by the Corporation Commissioner." It was found that Comstock was estopped from asserting that said certificates 3, 6 and 9 are void or that they were issued in violation of the provisions of the Corporate Securities Act or said permit.

On behalf of Comstock it is urged (1) that there was no evidence to justify the finding that he knew that the 380 shares were issued other than for a cash consideration or contrary to the conditions of the

permit, (2) that even though the parties were in *pari delicto* in causing the stock to be issued the contract of sale was itself illegal and hence unenforceable, and (3) that there was a breach of warranty of title and a total failure of consideration for the agreement in that plaintiffs had no title to the stock and that it was without value.

[1, 2] The contention that there was no evidence to justify the finding that Comstock knew that the stock was issued contrary to the conditions of the permit could properly be disposed of in a summary manner. The briefs of the defendants do not purport to set forth any of the evidence pertaining to that issue. We stated in *Goldring v. Goldring*, 94 Cal.App.2d 643, 645, 211 P.2d 342, 343: "It is incumbent upon the appellant to state fully, with transcript references, the evidence which is claimed to be insufficient to support the findings. * * * we do now give notice that henceforth it will be the practice of this court to disregard claims of insufficiency of the evidence even though that be the only ground of appeal, where the appellant has failed to make a satisfactory statement in the opening brief, or a supplement thereto, of the evidence claimed to be insufficient, with transcript references. Counsel who ignore the rule may expect affirmation of the judgment or order appealed from in proper cases." Of course, where there is no evidence whatever pertaining to a particular fact found, a statement to that effect is sufficient, but, for reasons of our own, we shall develop that this is not such a case.

There was evidence that Comstock was general manager of the corporation; his duties were the raising of money for the corporation and he was very active in the management of its affairs. Comstock testified that he gave Reynolds \$150 with which to purchase 15 shares of stock about December 11, 1952; that about March 20, 1953, he gave Reynolds \$100 with which to purchase 10 shares of stock, and that he gave Mrs. Wells \$150 with which to purchase 15 shares of stock. He testified that he arranged for the corporation to borrow \$3,800 from his father-in-law, one Cherico,

for which the corporation gave Cherico a note in that amount, which it paid in February 1953. The corporate books were falsified to show that the \$3,800 represented the price paid to the corporation for 380 shares at \$10 per share. The answer of the two defendants alleged that Comstock was the owner of the 380 shares. Mr. Reynolds testified that he paid nothing for any of the 380 shares. Comstock testified that he knew of the issuance of the 380 shares to Reynolds at the time they were issued and that he asked Reynolds if he (Reynolds) wanted to purchase the stock for him (Comstock). He (Comstock) paid nothing for the issuance of any of the stock except \$400 as consideration to the corporation for the 40 shares which were issued to Reynolds and Mrs. Wells. He also testified that he knew that a permit was being applied for which would authorize the sale of stock for cash at \$10 per share and that a permit was issued. It is clear from the evidence that he not only participated in the issuance of the 380 shares but that he initiated the scheme under which they were issued and in which it was pretended that the \$3,800 borrowed from Cherico by the corporation was the consideration for the stock. The answer of the defendants alleged that these shares were issued without any consideration whatever. Although Comstock testified that he had never seen the permit the only material question was whether he knew that the stock was to be sold for \$10 per share. In view of his transactions at that price and his knowledge that the application was for the sale of stock at \$10 per share, there clearly is no semblance of merit in the claim that he did not know the price at which stock could be sold. Not only was there sufficient evidence to support the finding that he had such knowledge but we do not see how the court could reasonably have made a contrary finding.

The findings in question have firm support in the evidence and they establish that plaintiffs and Comstock were equally at fault in their wrongful conduct. Therefore the rules with respect to parties in *pari delicto* and the rule that one may not

take advantage of his own wrong have application.

[3] There is another fact which we must recognize, namely, that it was not established that the issuance of the stock and the subsequent contract of sale were a part of a single transaction or scheme. The stock was issued in December 1952 and March 1953; the contract was entered into June 19, 1953. Defendants did not plead nor offer evidence to prove and the court did not find that the two transactions were interdependent or related.

[4,5] The foregoing facts require the consideration of two principles of law. The first is found in Restatement, Contracts, section 597, which reads: "A bargain collaterally and remotely connected with an illegal purpose or act is not rendered illegal thereby if proof of the bargain can be made without relying upon the illegal transaction." There is an exception to this rule which is recognized in the cases of contracts for the sale of stock which has been issued illegally in that the same was not authorized by permit or the issuance was contrary to the terms of the authorization. In such cases a purchaser of the stock, *if innocent of any wrong*, is not bound by his contract and may recover any sums paid on account of the purchase. But it is the fact that he was not a participant in the wrong which enables him to go behind his own transaction to prove the void character of the stock. Eberhard v. Pacific Southwest L. & M. Corp., 215 Cal. 226, 9 P.2d 302; Castle v. Acme Ice Cream Co., 101 Cal.App. 94, 281 P. 396; Bliss v. California Coop. Prod., 23 Cal.App.2d 245, 72 P.2d 885. Defendants seek to bring themselves within this exception but they are barred in this effort by the finding that Comstock was in *pari delicto* with plaintiffs. Where the parties are equally at fault the rule and not the exception applies. Domenigoni v. Imperial Live Stock etc. Co., 189 Cal. 467, 209 P. 36; Miller v. California Roofing Co., 55 Cal.App.2d 136, 130 P.2d 740.

[6,7] The second principle is that no one can take advantage of his own wrong, § 3517, Civ.Code. The maxim stated in

the code section has been applied in many instances. Bliss v. California Coop. Prod., supra, 23 Cal.App.2d 245, 72 P.2d 885; Meyer & Holler v. Ramona Village, 5 Cal. App.2d 679, 43 P.2d 823, 44 P.2d 643; Castle v. Acme Ice Cream Co., supra, 101 Cal.App. 94, 281 P. 396; § 3517, West's Annotated Civil Code and notes of decisions thereunder. The defense of illegality introduced into the case by defendants was clearly an attempt to take advantage of Comstock's wrong. Plaintiffs made out a good case against Comstock by proof of the contract of sale and Comstock's default thereunder, but the circumstances under which they acquired the stock were not any part of their case. We must assume that the court regarded that as a separate and completed transaction. There was no evidence that at the time the stock was issued there was any agreement that Comstock would buy the 380 shares from Reynolds and Wells. When defendants introduced the issue of the unlawful issuance of the stock it was their purpose to prove that the plaintiffs alone were the wrongdoers in that transaction, but they thereby opened the door for proof that Comstock also was a participant in the wrong. When it was established that he was equally guilty of the illegal acts the defense of illegality was rendered unavailable to him. To have sustained that defense would have allowed him to take advantage of his own wrong. A party to a contract lawful on its face will not be permitted to escape the duty of performance upon the ground of the commission of illegal acts in which he was a wilful participant. The contract here involved was not of itself illegal. Granting the plaintiffs the relief they sought was not giving the court's aid to the accomplishment of an illegal purpose.

[8,9] The present case must not be confused with attempts to enforce contracts which are themselves illegal. Here the attempt was to escape liability by proof of illegal, antecedent, unrelated transactions in which Comstock was a guilty participant. There are numerous principles of law in which defendants seek refuge and which would avail them if Comstock had been innocent of wrong in the issuance of

the stock, or if the contract upon which suit was brought was, itself, illegal. As an innocent party he could have proved at least as against the guilty Reynolds that the stock was illegally issued and void. Or if the contract sued on had been illegal in itself the law would not have permitted its enforcement. The parties to the illegal contract would have been left where the court found them. *Domenigoni v. Imperial Live Stock etc. Co.*, supra, 189 Cal. 467, 209 P. 36; *Duntley v. Kagarise*, 10 Cal.App.2d 394, 52 P.2d 560. But the claim of illegality could not have validity as a defense when it was shown that Comstock had actively participated in the illegal acts upon which the defense was founded. The court properly held defendants to be estopped to maintain that defense. This, of course, was not applying the doctrine of estoppel to give validity to an illegal contract. No such question was involved.

[10] The defenses of breach of warranty of title and want of consideration were not pleaded by defendants except to the extent that they were encompassed within the defense of illegality. The validity of these defenses was destroyed by the finding that Comstock was a party to the illegal issuance of the stock. Through the application of the doctrine of estoppel, the issue of illegality was removed from the case. Moreover, the fact that Comstock knew exactly what he was getting under his purchase contract defeats the claims of breach of warranty and want of consideration. *Harvey v. Dale*, 96 Cal. 160, 31 P. 14; *Sutro v. Rhodes*, 92 Cal. 117, 28 P. 98; *Giovannoni v. Bartmann*, 59 Cal.App. 651, 661, 211 P. 844; *Christy v. Sullivan*, 50 Cal. 337.

[11,12] It is contended further on behalf of defendant Mendizza that the doctrine of estoppel was improperly applied as against her. The obvious answer is that it has not been applied against her but as against Comstock. Her liability was commensurate with that of Comstock, § 2808, Civ.Code. It is the general rule that a guarantor may not avoid his obligation on grounds that are unavailable to his princi-

pal. *Grace v. Croninger*, 56 Cal.App. 659, 666, 206 P. 130; *Stavnow v. Winfree*, 99 Cal.App. 566, 278 P. 905; *Union State Bank v. American Surety Co.*, 324 Mo. 438, 23 S.W.2d 1038, 1044; *Stewart v. Bramhall*, 74 N.Y. 85; *Salvin v. Myles Realty Co.*, 227 N.Y. 51, 124 N.E. 94, 6 A.L.R. 58; *Krekel v. Thomasma*, 255 Mich. 283, 238 N.W. 255, 81 A.L.R. 786; *Ebner v. West Hollywood T. Co.*, 45 Cal.App. 186, 187 P. 114. The promise of Mendizza was that she would pay if Comstock defaulted in the obligation. There was no other condition expressed in her agreement. No facts were alleged or proved which would have precluded enforcement of the contract of guarantee by plaintiffs. Defendant Mendizza established no defense to the action.

The court made no findings with respect to the allegations of the cross-complaint but no point is made of this omission.

The judgment is affirmed.

PARKER WOOD, J., concurs.

VALLÉE, Justice.

I dissent.

Plaintiffs require the aid of a void contract, one contrary to public policy, to establish their case. As officers and directors of the corporation they issued the securities to themselves. They did so in violation of the permit. The securities were void. Corp.Code, § 26100. As a part of the same transaction they entered into a written contract with defendant Comstock to sell the securities to him and he agreed to buy. The contract was void. No title passed. *Domenigoni v. Imperial Live Stock etc. Co.*, 189 Cal. 467, 475, 209 P. 36; *First Nat. Bk. of Calexico v. Thompson*, 212 Cal. 388, 404, 298 P. 808; *Castle v. Acme Ice Cream Co.*, 101 Cal.App. 94, 99, 281 P. 396; *Tatterson v. Kehrlein*, 88 Cal.App. 34, 48, 263 P. 285. A contract proscribed by law is against public policy. *Tevis v. Blanchard*, 122 Cal.App.2d 731, 733, 266 P.2d 85. The fact that the contract to purchase was entered into June 19, 1953, whereas the securities were issued in December 1952 and March 1953, did not give life or validity to

the securities which were lifeless and void *ab initio*.

The majority say "that it was not established that the issuance of the stock and the subsequent contract of sale were a part of a single transaction or scheme," and "[t]here was no evidence that at the time the stock was issued there was any agreement that Comstock would buy the 380 shares from Reynolds and Wells," and "[h]ere the attempt was to escape liability by proof of illegal, antecedent, unrelated transactions in which Comstock was a guilty participant."

The evidence, without conflict, is directly contrary to these statements. Plaintiff Reynolds, president of the corporation, testified that certificates 3, 6, and 9 for 380 shares, those in question and originally issued to him, were originally issued pursuant to an oral agreement with defendant Comstock; that they had "a working agreement"; the agreement was entered into some two months prior to the issuance of the stock; the agreement "was talked about from time to time"; "[a]t that time this 380 shares was held to be divided at a later date"; Comstock said he wanted the stock issued in his (Reynolds') name "[b]ecause he could not get it in his name"; it was discussed on different occasions; the idea of having the stock issued in his (Reynolds') name was Comstock's. Comstock testified that before the certificates were issued he and Reynolds discussed issuing them in Reynolds' name; he asked Reynolds if he wanted to purchase the stock, the entire 380 shares, "for me" (Comstock); that he "was not in a position where [he] wanted to have any assets." In reply to questions by the court Comstock further testified: "The Court: He was to hold it for you? The Witness: That's right," "The Court: You considered he was holding that stock for you? The Witness: That's right." There was no other evidence on the subject. It cannot be assumed that the trial judge regarded the circumstances under which plaintiffs acquired the stock as a separate and completed transaction, for at the conclusion of the trial he stated: "That he [defendant Comstock] had some arrange-

ment, the exact details I don't know, under which they [the stock certificates] were issued in the name of the plaintiff, but for his benefit as he so testified directly."

The uncontradicted and only evidence definitely and positively established that the issuance of the stock and the sale to Comstock were part of a single scheme. The evidence is not susceptible of any other reasonable conclusion. The uncontradicted and only evidence was that at the time the stock was issued it was agreed Comstock would buy the 380 shares from plaintiffs. The stock was first issued in the names of plaintiffs because Comstock did not want any assets in his name at that time. The bargain on which plaintiffs sue was not "collaterally and remotely connected with an illegal" act, nor was it an unrelated transaction. It was a part of the same transaction and scheme.

Section 609 of the Restatement of Contracts says:

"A bargain that is illegal when formed does not become legal

(a) by reason of a change of fact, except where both parties when the bargain was made neither knew nor had reason to know the facts making it illegal, * * *."

The rule is not, as stated by the majority, that "When it was established that he [defendant Comstock] was equally guilty of the illegal acts the defense of illegality was rendered unavailable to him." On the contrary, the rule is that a court will not be "a handmaid of iniquity of any kind." *Domenigoni v. Imperial Live Stock etc. Co.*, 189 Cal. 467, 475, 209 P. 36, 39. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. *Loving & Evans v. Blick*, 33 Cal.2d 603, 607, 204 P.2d 23; *Domenigoni v. Imperial Live Stock etc. Co.*, 189 Cal. 467, 475-476, 209 P. 36; *Bank of Orland v. Harlan*, 188 Cal. 413, 422, 206 P. 75; *Mansfield v. Hyde*, 112 Cal.App.2d 133, 138, 245 P.2d 577; *Campbell v. Julian Merger Mines*, 111 Cal.App. 649, 651, 295 P. 1040. Comment b. on section 597 of the Restatement of Contracts

(section 597 is quoted by the majority) and says:

"Even though a plaintiff's case can be made out without indicating anything unlawful, it may be shown that the bargain is illegal because of facts not brought out in the plaintiff's case, provided that the facts so offered show a close enough connection with an illegal transaction. * * *

A court will not aid one party or another to an illegal transaction where they stand *in pari delicto*; but will leave them just where it finds them. The rule is one of universal application. It applies where the illegal transaction is entered into voluntarily and the turpitude of the parties is mutual. Knowles v. Sandercock, 107 Cal. 629, 642-644, 40 P. 1047; Colby v. Title Ins. & Trust Co., 160 Cal. 632, 638-640, 117 P. 913, 35 L.R.A., N.S., 813; Hedges v. Frink, 174 Cal. 552, 555, 163 P. 884; Domenigoni v. Imperial Live Stock etc. Co., 189 Cal. 467, 475-476, 209 P. 36; Haruko Takeuchi v. Schmuck, 206 Cal. 782, 787, 276 P. 345; Campbell v. Julian Merger Mines, 111 Cal. App. 649, 651, 295 P. 1040.

"Under a statute under which the parties are in *pari delicto* and equally within its prohibition, executed transactions stand and executory contracts are invalid; neither party can obtain affirmative relief because of the policy against aiding one who has done a wrong to the public. The law washes its hands of both parties."

(34 Cal.L.Rev. 697. See cases cited supra and Smith v. California Thorn Cordage, Inc., 129 Cal.App. 93, 99-100, 18 P.2d 393; Miller v. California Roofing Co., 55 Cal. App.2d 136, 141, 130 P.2d 740.

Smith v. California Thorn Cordage, Inc., supra, 129 Cal.App. 93, 18 P.2d 393, quotes 6 Ruling Case Law 825 with approval (p. 100):

"Where the parties are *in pari delicto*, no affirmative relief of any kind will be given to one against the other. The only equitable remedies which they can obtain are such as are purely defensive."

Under the foregoing authorities, where the parties to an illegal contract are *in pari delicto*, the courts will not, on the one hand, undo what has been done, nor on the other, perfect what has been left unfinished.

The facts in Duntley v. Kagarise, 10 Cal. App.2d 394, 52 P.2d 560, were substantially the same as those in the case at hand. Each plaintiff owned stock. Each entered into a contract to sell his stock to the defendant, one of the original incorporators of the corporation, in violation of the permit. The defendant executed notes to the plaintiffs in part payment for the stock. The action was on the notes. The judgments were for the defendant. On review it was held the notes were void, the attempted sale was void, the doctrines of estoppel and ratification had no application, and the judgments were affirmed. See also Gridley v. Tilson, 202 Cal. 748, 752-754, 262 P. 322; Silverthorne v. Percy, 120 Cal.App. 83, 87, 7 P.2d 746. A "promissory note may not depend upon a consideration which is a violation of an express statutory inhibition." Tevis v. Blanchard, supra, 122 Cal. App.2d 731, 738, 266 P.2d 85, 90. The contract of guaranty was an integral part of the transaction, and as such equally infected with illegality. (Id.) Holding the contract effectual on the ground of estoppel is to make it valid.

The Restatement says: "A party to an illegal bargain can neither recover damages for breach thereof nor, by rescinding the bargain, recover the performance that he has rendered thereunder or its value," with exceptions not applicable here. (Rest., Contracts, § 598.) Comment a. on section 598 in part says:

"[T]he rule of public policy that forbids an action for damages for breach of such an [illegal] agreement is not based on the impropriety of compelling the defendant to pay the damages. That in itself would generally be a desirable thing. When relief is denied it is because the plaintiff is a wrongdoer, and to such a person the law de-

nies relief. Courts do not wish to aid a man who founds his cause of action upon his own immoral or illegal act. If from the plaintiff's own statement or otherwise it appears that the bargain forming the basis of the action is opposed to public policy or transgresses statutory prohibitions, the courts ordinarily give him no assistance. The court's refusal is not for the sake of the defendant, but because it will not aid such a plaintiff." (Italics added.)

The prohibitions and penalties of the Corporate Securities Act are leveled solely against the seller and not against the buyer, *Robbins v. Pacific Eastern Corp.*, 8 Cal.2d 241, 278, 65 P.2d 42; *Tatterson v. Kehrein*, 88 Cal.App. 34, 49, 263 P. 285; they are not meant to benefit the seller. *Silva v. Holme*, 109 Cal.App.2d 461, 467, 241 P.2d 21. The courts declare securities issued in violation of a permit absolutely void as between the issuer and purchaser (or sub-purchaser) whenever it is to the detriment of the purchaser to declare them valid, and will declare them enforceable whenever it is to the benefit of the purchaser. (See 10 So.Cal.L.Rev. 483; 34 Cal.L.Rev. 553.)

The doctrine of estoppel ordinarily may not be invoked to give validity to a contract which is void through violation of the law. The rule has been declared and applied in cases dealing with shares of stock which are void because of nonconformity with a permit. The doctrine of estoppel by conduct and ratification has no application to a contract which is void for the reason that it violates an express mandate of the law or the dictates of public policy. Such a contract has no legal existence for any purpose, and neither action nor inaction of a party to it can validate it, and no conduct on his part can be invoked as an estoppel against asserting its invalidity. *Hedges v. Frink*, 174 Cal. 552, 555, 163 P. 884; *Pollak v. Staunton*, 210 Cal. 656, 662-664, 293 P. 26; *Walker v. Harbor Realty etc. Corp.*, 214 Cal. 46, 48, 3 P.2d 557; *Mary Pickford Co. v. Bayly Bros., Inc.*, 12 Cal.2d 501, 524, 86 P.2d 102; *Fewel & Dawes, Inc., v. Pratt*, 17 Cal.2d 85, 91, 109 P.2d 650; *Honn v. Hamer*, 81 Cal.App. 276, 277, 253 P. 336; *Reno v. American Ice Machine Co.*, 72 Cal.

App. 409, 413, 237 P. 784; *Miller v. California Roofing Co.*, 55 Cal.App.2d 136, 141-143, 130 P.2d 740; *Live Oak Cemetery Ass'n v. Adamson*, 106 Cal.App., Supp., 783, 790-792, 288 P. 29. Comment a. on section 599 of the Restatement of Contracts says:

"There is no estoppel to plead illegality or to prove facts showing that a plaintiff is a guilty party to an illegal bargain."

The majority say that "the rules with respect to parties in *pari delicto* and the rule that one may not take advantage of his own wrong have application." They do. But the rule with respect to parties in *pari delicto* is misapplied and the plaintiffs, wrongdoers who are guilty of a criminal offense, Corp.Code, § 26104, are permitted to take advantage of their own wrong. Just how defendant Comstock would be taking advantage of his own wrong by a judgment leaving the parties where they stand is not made clear, nor can it be. And an innocent guarantor is penalized to the enhancement of the guilty plaintiffs. I would reverse.

Rehearing denied; VALLÉE, J., dissenting.



135 Cal.App.2d 166

SEQUOIA INVESTMENT CORPORATION,
Plaintiff and Appellant,

v.

Doris PAILLARD, Defendant and
Respondent.
Civ. 20700.

District Court of Appeal, Second District,
Division 1, California.

Aug. 22, 1955.

Rehearing Denied Sept. 12, 1955.

Hearing Denied Oct. 19, 1955.

Action for specific performance of contract to sell realty. The Superior Court of Los Angeles County, Clarence E. Johns, Judge pro tem., rendered judgment for vendor and purchaser appealed. The District Court of Appeal, White, P. J., held that where vendor agreed to sell vacant land on

lot west of existing wire fence, description of realty was not so uncertain as to deny purchaser the remedy of specific performance.

Reversed and remanded.

1. Specific Performance ⇨29(2)

To compel specific performance of an agreement for the sale of real property, it must not only be in writing, subscribed by the party to be charged, but the writing must also contain such a description of the property agreed to be sold that it can be identified with reasonable certainty.

2. Evidence ⇨460(7)

While parol evidence may not be introduced for purpose of ascertaining and locating land about which parties negotiated and a description thereof which they have omitted from the writing, nevertheless the sufficiency of the description may be established where identification may be readily made by a competent surveyor with reasonable certainty.

3. Vendor and Purchaser ⇨22

Sufficiency of description of subject-matter of contract to sell realty may be established where identification may be readily made by a competent surveyor with reasonable certainty, either with or without the aid of extrinsic evidence.

4. Specific Performance ⇨29(2)

Where vendor agreed to sell vacant land on lot west of existing wire fence, description of realty was not so uncertain as to deny purchaser the remedy of specific performance.

5. Specific Performance ⇨13

Vendor could not defend action for specific performance on ground that her title to realty was not so complete, because of existing trust instrument on property, as the one she agreed to convey.

6. Specific Performance ⇨10(1)

Purchaser was entitled to specific performance of contract to sell realty with respect to the interest that vendor did own and to waive any deficiency in performance.

7. Specific Performance ⇨59

Where realty was encumbered by a trust deed to secure indebtedness and vendor agreed to sell on condition that purchaser secure a reconveyance from beneficiaries of trust deed but vendor subsequently wrote that she was willing to deliver title with the cloud on the title, condition precedent to performance was waived by vendor, and purchaser, who was willing to accept realty as encumbered, was entitled to specific performance.

8. Appeal and Error ⇨991

Whether or not extrinsic evidence is sufficient to show that land, which is the subject-matter of a contract to sell realty, can be identified with reasonable certainty, is a question of fact for the trial court.

Harry G. McMahon, Arcadia, for appellant.

Claude L. Welch, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff instituted this action to compel specific performance of a written contract to convey certain real property. Defendant was the owner and in possession of a parcel of real property situated in the City of Monterey Park, County of Los Angeles, described as "Lot 362 of Ramona Acres Plat No. 2". On April 16, 1952, plaintiff and defendant entered into a written agreement under the terms of which defendant agreed to sell for \$1,000 and plaintiff agreed to buy "Lot 362 Ramona Acres, Plat No. 2 * * * property purchased will be described later and is to include all portions of said lot lying westerly of the existing wire fence". Contemporaneously with the execution of said agreement, plaintiff paid to defendant the sum of \$200 as part payment on the purchase price.

On April 25, 1952, an escrow was opened wherein the following instructions were given:

"Lot 362 of Ramona Acres Plat No. 2, except the easterly * * * feet

thereof, measured along the southerly line of said lot * * * which land is more particularly described as all portions of vacant land lying west of existing wire fence. Exact legal description will be later approved by buyer and seller."

After execution of the foregoing agreement of April 16, 1952, plaintiff immediately went into possession of and commenced to improve the property by shoring up the large concrete flood control conduit crossing the property and proceeding to have the property filled, i. e., the ground level was raised from 20 to 25 feet as the property formerly was part of an old wash or arroyo paralleling Atlantic Boulevard on the east, south of Garvey, in the City of Monterey Park.

Plaintiff alleged in its complaint that the balance due on said agreement in the sum of \$800 was deposited with the escrow holder. It was also alleged on information and belief that the property here in question was encumbered by a deed of trust dated August 28, 1950, to secure an original indebtedness of \$6,500 to Guy F. and Blanche B. Williams, husband and wife, as joint tenants. That plaintiff on several occasions demanded that defendant execute and deliver to the escrow holder a conveyance covering said property but that defendant, without just or reasonable cause, refused so to do. Judgment was prayed for that defendant be required to convey to plaintiff the above mentioned property subject to any indebtedness secured by the foregoing trust deed.

By her amended answer defendant denied that she ever entered into an agreement to sell defendant the aforesaid real property, denied execution of any written agreement in connection therewith, and denied generally the other allegations of plaintiff's complaint. In her answer defendant alleged that on or about April 16, 1952, she entered into an oral agreement with John R. Armetta (concededly an agent of plaintiff) by which she agreed to sell the above mentioned property "upon condition that the said Armetta would obtain from the holders of a trust deed

upon the whole of said property, a reconveyance of that portion which the said Armetta agreed to buy; that said Armetta agreed to obtain said partial reconveyance as a condition precedent to the effectiveness of said agreement to sell; that said agreement was never reduced to writing and no note or memorandum thereof was ever made; that in furtherance of said agreement this defendant signed certain escrow instructions, a copy of which is attached to the complaint herein, and accepted from the said Armetta an initial payment of \$200.00 on account of the agreed sale price of said property in reliance upon the said Armetta's promise to obtain said partial reconveyance." That said reconveyance was not obtained and that defendant, on October 11, 1952 and again on December 15, 1952, returned said \$200 to Mr. Armetta and notified him that her "proposition to sell was withdrawn". By way of a second and separate defense defendant pleaded that plaintiff's cause of action was barred by laches, while in a third such defense rescission of the aforesaid agreement was pleaded.

Following trial the court found that defendant was the owner of the property here in question; that on April 16, 1952, plaintiff and defendant "signed a document reciting that for a consideration of \$1000.00, said defendant would sell to plaintiff an undescribed portion of said property, to be 'described later'." That on April 25, 1952, an escrow was opened by plaintiff in which it signed escrow instructions authorizing the escrow company to pay defendant the sum of \$800 as the balance on the purchase price of said property; that subsequently defendant signed the escrow instructions authorizing the escrow company to proceed with said escrow but, "that said escrow instructions did not describe the property to be conveyed". The court further found that at the time plaintiff paid to defendant the \$200 as a part payment on account of the agreed purchase price of \$1,000, "said defendant made it an express condition of said sale that plaintiff secure the approval of parties holding a Deed of Trust against the entire parcel above described, for the balance of the

purchase price, and an agreement by them to release from the Deed of Trust that portion which plaintiff desired to purchase; that plaintiff accepted said condition." It was further found that said condition was never fulfilled by plaintiff; that no adequate legal description of the property to be conveyed was ever made a part of said escrow instructions, and that the latter "contained a latent ambiguity". That at no time prior to filing the action herein was plaintiff "able and willing to meet the conditions prescribed by said defendant as a prerequisite to a sale of said property". That defendant on two occasions attempted to return the partial payment of \$200 to plaintiff who refused the same.

By reason of the foregoing findings the court entered the following Conclusions of Law:

"(1) No enforceable contract existed between plaintiff and defendant Doris Pailard for the sale of the property referred to in the Complaint." Judgment was accordingly entered for defendant and plaintiff prosecutes this appeal therefrom.

[1-4] As a first ground for reversal appellant challenges as unsupported by the evidence the findings that the property agreed to be conveyed was not described or was not sufficiently described to entitle appellant to prevail in an action for specific performance of a contract for the sale of the property in question. We think the position of appellant has merit. It is true, as maintained by respondent, that an agreement for the sale of real property must not only be in writing, subscribed by the party to be charged, but the writing must also contain such a description of the property agreed to be sold that it can be identified with reasonable certainty. In the instant case the agreement identified the property as "Lot 362 Ramona Acres Plat No. 2 * * * and is to include all portions of said lot lying westerly of the existing wire fence", while the escrow instructions, in addition to the description just noted, contained the following language: "which land is more particularly described as all portions of vacant land lying west of existing wire fence". That respondent had no mis-

givings regarding the property to be sold is evidenced by a portion of the latter with which she returned to appellant the down payment and wherein she said, "Concerning the sale of a portion of Lot 362 of Ramona Acres Plat No. 2, except the north 50 feet of the west 150 feet thereof". There was also introduced into evidence at the trial what was stipulated to be a correct map showing the property in question, while the witness Mr. Armetta (respondent's agent) testified that the easterly boundary line of the land agreed to be purchased by the appellant and sold by the respondent was marked by an existing fence, and he further testified without contradiction that the fence line was the easterly line of the property which is the subject matter of the suit. The other boundaries are existing lot lines: While parol evidence may not be introduced for the purpose of ascertaining and locating the land about which the parties negotiated and a description thereof which they have omitted from the writing, nevertheless, under the liberal rule now prevailing with reference to indefinite descriptions, the sufficiency of the description may be established where for instance identification may be readily made by a competent surveyor with reasonable certainty. And, when this is possible, either with or without the aid of extrinsic evidence, the description is sufficient. *McKevitt v. City of Sacramento*, 55 Cal.App. 117, 127, 203 P. 132; *Allen v. Stellar*, 106 Cal.App. 67, 71, 288 P. 855. We are satisfied that under the pleadings and the evidence adduced at the trial, it was error for the trial court to find and determine that the description of the property was insufficient and that there was a latent ambiguity in the escrow instructions. Both in the pleadings and by substantial and uncontradicted evidence appellant met the burden imposed upon it as to certainty of description concerning the property to be sold.

[5-7] We are also satisfied that the court's finding that at the time the document dated April 16, 1952, was signed, respondent made it an express condition of said sale that appellant would secure a reconveyance from the beneficiaries of

the Deed of Trust encumbering all of respondent's property, is supported by substantial evidence. In fact the record reflects that both appellant's agent, Mr. Armetta, and respondent made efforts to secure such reconveyance but without success. However, we are persuaded that there is merit in appellant's contention that the condition precedent was clearly waived by both appellant and respondent. In a letter written on October 25, 1952, respondent Doris Paillard stated, "It is my wish that the Sequoia people pay for an engineered survey of the property they want, and providing Mr. and Mrs. Williams acknowledge the survey and approve same *I am willing and then able to deliver title, with the cloud on the title as he, Mr. Armetta, recommends.*" (Emphasis added.) At the trial it was admitted that appellant waived any right to receive the property free and clear of the deed of trust in favor of Mr. and Mrs. Williams, and was willing to accept the property encumbered therewith. Respondent herein cannot defend the instant action on the ground that her title to the property is not so complete, because of the existing trust deed, as the one she agreed to convey. Appellant was entitled to enforce the contract with respect to the interest that respondent did own and to waive any deficiency in performance. In the instant case it is manifest that the vendee waived any defect in the vendor's title, and the latter waived whatever condition precedent was made a part of the agreement to sell. While it is true that no court could have required appellant to obtain the consent of the beneficiaries under the trust deed, to give a partial reconveyance, since the necessity for such reconveyance was waived by the vendee, the vendor could properly be required to convey what interest she had in the property. *Miller v. Dyer*, 20 Cal.2d 526, 529, 127 P.2d 901, 141 A.L.R. 1428. No unperformed condition precedent remained at the trial. It had been waived. Other points raised have been considered but discussion thereof is unnecessary.

[8] Since the judgment must be reversed, the court on a retrial may permit

to be established by extrinsic evidence the description of that part of respondent's property which is the subject matter of the agreement. Of course, whether or not such evidence is sufficient to show that the land can be identified with reasonable certainty, is a question of fact for the trial court.

The judgment is reversed and the cause remanded.

DORAN and DRAPEAU, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.



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Richard Clarence KADING, also known as Richard Clarence Williams, a minor, by his guardian ad litem, Charlotte Lorena Kading, et al., Plaintiffs,

Richard Clarence Kading, also known as Richard Clarence Williams, a minor, by his guardian ad litem, Charlotte Lorena Kading, Appellant,

v.

Howard R. WILLIS et al., Defendants,

Sparkletts Drinking Water Corporation, a California corporation, Defendant and Respondent.

Civ. 20783.

District Court of Appeal, Second District, Division 3, California.

Aug. 15, 1955.

Hearing Denied Oct. 13, 1955.

Child, who was five and one-half years old at time of accident, brought action against owner of delivery truck for injuries sustained by child when he was run over by truck as it was driven away from curb. The Superior Court of Los Angeles County, Caryl M. Sheldon, J., entered judgment adverse to child, and child appealed. The District Court of Appeal, Ashburn, J. pro tem., held that instruction that if child was a trespasser on truck and his presence on truck was unknown to driver, driver owed no ob-

ligation of due care to child was prejudicially erroneous.

Judgment reversed.

1. Appeal and Error ⚡930(1)

Where appellant argued on appeal that evidence was insufficient to support the verdict, District Court of Appeal was required to accept as established all evidence favorable to respondent and all reasonable inferences tending to support the verdict.

2. Automobiles ⚡162(1)

Motorist, who is or should be cognizant of proximity of children, must exercise ordinary care to discover their presence on or near his vehicle and, on such discovery, to use ordinary care to avoid inflicting injury on them, regardless of status of children as trespassers, licensees, or invitees.

3. Automobiles ⚡162(1)

Ordinarily, it is necessary for a motorist to exercise greater care for protection and safety of young children than for adult persons possessing normal and mature faculties.

4. Automobiles ⚡162(1)

Conduct of young children is unpredictable, and motorist should anticipate their thoughtlessness and impulsiveness.

5. Automobiles ⚡162(1)

Presence of children is, in itself, a warning requiring exercise of care by motorist for their safety.

6. Automobiles ⚡162(2)

If evidence should show that motorist has knowledge of presence of children, he may be held responsible for injury to children, though it appears that he did not see injured children in time to prevent injury.

7. Automobiles ⚡245(8)

Ordinarily, question whether motorist should be alerted to necessity of looking for presence of children is one of fact for jury.

8. Automobiles ⚡245(8)

Ordinarily, question whether duty of motorist to look for presence of children has been properly performed is one of fact for jury.

9. Automobiles ⚡245(8)

In action against owner of delivery truck for injuries sustained by five and one-half year old child, who was run over by truck as it was driven away from curb, question whether driver was negligent was for jury.

10. Automobiles ⚡245(57)

In action against owner of delivery truck for injuries sustained by five and one-half year old child, who was run over by truck as it was driven away from curb, question whether negligence of driver in parking truck on wrong side of street in violation of Vehicle Code and Municipal Code was the proximate cause of the accident was for jury. Vehicle Code, § 525.

11. Trial ⚡203(1)

Each party is entitled to proper instructions on any theory of the case which his evidence substantially supports.

12. Trial ⚡140(1)

Effect of testimony impeaching witnesses was for jury.

13. Automobiles ⚡246(51)

In action against owner of delivery truck for injuries sustained by five and one-half year old child, who was run over by truck as it was driven away from curb, evidence required giving of correct instructions, on appropriate request, pertaining to duty owed by truck driver to child if, as claimed, child was not upon the truck and also if he was in fact a trespasser on the truck.

14. Automobiles ⚡246(35)

In action against owner of delivery truck for injuries sustained by five and one-half year old child, who was run over by truck as it was driven away from curb, court should have given child's requested instruction that mere fact of a trespass on truck by child would not bar recovery.

15. Automobiles ⚡246(60)

In action against owner of delivery truck for injuries sustained by five and one-half year old child, who was run over by truck as it was driven away from curb, court properly instructed that burden of proof rested on child to establish his status

at time of accident, since his status as trespasser, licensee, invitee, or little child in immediate presence of danger and needing protection from others, determined the nature and quantum of care due him.

16. Automobiles ⇨244(7)

In action against owner of delivery truck for injuries sustained by five and one-half year old child, who was run over by truck as it was driven away from curb, it was incumbent on child to establish by competent evidence, either direct or circumstantial, the existence of a duty owing to him by truck driver and a breach or failure to perform that duty.

17. Appeal and Error ⇨1064(1)

Automobiles ⇨246(5)

In action against owner of delivery truck for injuries sustained by five and one-half year old child, who was run over by truck as it was driven away from curb, instruction that if child was a trespasser on truck, and his presence on truck was unknown to driver, driver owed no obligation of due care to child, was reversibly erroneous because it excluded any obligation of driver, though put on notice of probability of trespass by child, to use any care to discover child's proximity or to protect him against his own apparent inability to recognize the danger of his situation.

18. Trial ⇨296(3)

In action against owner of delivery truck for injuries sustained by five and one-half year old child, who was run over by truck as it was driven away from curb, prejudicial error in instruction that if child was a trespasser on truck, and his presence on truck was unknown to driver, driver owed no obligation of due care to child, was not cured by instruction concerning the duty of persons dealing with children.

19. Appeal and Error ⇨930(2)

District Court of Appeal on appeal was required to assume that jury understood the instructions and correctly applied them to the evidence.

20. Appeal and Error ⇨216(3)

Rule that one who would complain of absence of instruction on material matter

or of need of clarification or elaboration in instruction, which is correct as far as it goes, must tender an appropriate request or be precluded from claiming error, does not apply to an erroneous instruction, which is given at the instance of the opposing party.

21. Trial ⇨255(4)

In action against owner of delivery truck for injuries sustained by five and one-half year old child, who was run over by truck as it was driven away from curb, trial court was not obligated, in absence of request by child, to instruct jury that evidence received by way of impeachment of child's witnesses, did not constitute and could not be considered as affirmative evidence of facts asserted in the impeaching statements.

22. Trial ⇨255(1)

In a civil case, the trial court need not of its own motion give special instructions, in absence of a request therefor by counsel.

23. Trial ⇨255(3)

In action against owner of delivery truck for injuries sustained by five and one-half year old child, who was run over by truck as it was driven away from curb, court was not required, in absence of request by child, to instruct with reference to statutory presumptions that a person is presumed to be innocent of wrong and that the law is presumed to have been obeyed. West's Ann.Code Civ.Proc. § 1963, subds. 1, 33.

24. Automobiles ⇨243(1)

In action against owner of delivery truck for injuries sustained by five and one-half year old child, who was run over by truck as it was driven away from curb, wherein there was uniform evidence that driver on occasion in question told children to stay away from the truck, court properly refused child's offer of proof that during period of about two years prior to accident a driver of the truck had permitted children to play on the truck, since any previous or implied invitation to children to play on the truck was immaterial.

Cecil W. Collins, Los Angeles, and Gordon B. Friesen, Beverly Hills, for appellant.

Schell, Delamer & Loring, Los Angeles, for respondent.

ASHBURN, Justice pro tem.

Appeal from judgment for defendant entered upon verdict of jury. Plaintiff Richard Clarence Kading (commonly known as Dickie) sues through his guardian *ad litem* for damages for personal injuries received when he, aged five and a half years, was run over by a delivery truck of defendant Sparkletts Drinking Water Corporation which was being operated by its servant Howard R. Willis. The cause was dismissed as to Willis, who had been named as a defendant, and went to trial upon issues raised by the amended complaint and defendant Sparkletts' answer to same.

[1] Appellant argues first that the evidence is insufficient to support the verdict. In examining this point we must follow the familiar rule that all evidence favorable to respondent and all reasonable inferences tending to support the verdict must be accepted as established. In *re* Guardianship of Kentera, 41 Cal.2d 639, 645, 262 P.2d 317; *Marino v. Valenti*, 118 Cal.App.2d 830, 840, 259 P.2d 84. Thus viewed the evidence reveals that Willis on the day of the accident, August 1, 1952, was employed by Sparkletts and engaged in delivering bottled water for it; he stopped at the home of the parents of plaintiff at about the noon hour and there made a delivery; when he went into the house some four to six or seven children followed him in, drank water, went out with him and then got on the truck while he was putting a bottle in place. The group included plaintiff Dickie (five and a half years of age), his brother David (eight years old), friend Jerry Jancarik (eight years old), and several other boys of similar age. The Kading residence is on the east side of Glen Iris Street, which runs north and south. The truck was at the east curb and headed north when in front of the Kading home. When Willis saw the boys on the truck they were standing on the running board

looking in the window; he told them to get off the truck and back on the sidewalk, that he would see them again in two weeks; they reluctantly obeyed and got onto the sidewalk, where Willis saw them as he drove away. He went up the street to the Brown home, some 400 to 500 feet north of Kading's; it is situated on the west side of the street; he crossed the center line, parked at the left or west curb, headed north, and made a delivery at the Brown house. When he went in he saw no children around, and when he came out some 5 to 10 minutes later, he saw none; there were none on the sidewalk or at the curb. He entered the truck on the left side, looked in the mirror on the right side, saw no traffic and no boys. That mirror was so installed and adjusted that it would show traffic and the water bottles on the truck, and out about 4 to 5 feet beyond the bottles; but it did not reveal the running board along the side, for it was below the bottles. The mirror could be so adjusted as to show the running board but that would cut out the view of traffic in the street. Willis therefore had no way of knowing whether a child rode on the running board from Kading's to Brown's, or whether one was still there when he stopped for the Brown delivery, but he was sure that all of them got off the truck and onto the sidewalk before he left Kading's. And, as above stated, he saw none of them near the Brown house or near his truck parked in front of it, not until after the accident. The truck is so constructed that the driver cannot see through the rear window; from his seat the driver could not see the running board; he could have stuck his head out the right door to look down and around; but, having nothing to put him on notice of proximity of children, he started the truck in low gear, going north at 2 to 3 miles an hour and toward the center of the street; before he got there or shifted from low gear he heard a scream and stopped, having gone not over 15 to 20 feet. He left the truck, which was just across the center line of the street, and saw Dickie lying about 10 feet behind the vehicle; he was complaining about his stomach and apparently had been run over

by the truck receiving an injury to the pelvis. Willis carried him to the parking. When Dickie was seen lying in the street his brother David was with him, but Willis did not know where the boy had come from, or when, and he saw no other boys at that time. It does not affirmatively appear, except perhaps circumstantially, whether Dickie was on the running board and fell off, or was in the street and was run into by the side of the truck, or himself ran or jumped into or on it. But the jury could have found from the circumstantial evidence that the boy was on the running board and fell off when the truck started.

Defendant tried the case upon the theory that Dickie was on the truck and was a trespasser. Plaintiff's counsel apparently took the position, which they now urge, that he was not a trespasser because he was not on the truck and that the driver Willis failed to use ordinary care, as he was bound to do, to discover Dickie's presence close to the truck and to protect him from injury; alternatively, that even if the boy was upon the truck the driver was upon notice of that possibility and obligated to use reasonable care to ascertain whether such was the fact and if he found the boy there was required to use ordinary care to inflict no injury upon him.

[2-9] The rule now generally accepted in this state and elsewhere is that the operator of a motor vehicle who is or should be cognizant of the proximity of children must exercise ordinary care to discover their presence upon or near his vehicle and upon such discovery to use ordinary care to avoid inflicting injury upon them; and this rule applies regardless of the infant's status as trespasser, licensee or invitee. "As the courts have frequently said, it is ordinarily necessary to exercise greater care for the protection and safety of young children than for adult persons possessing normal and mature faculties. Their conduct is unpredictable and one operating a motor vehicle should anticipate their thoughtlessness and impulsiveness. Shannon v. Central-Gaither Union School Dist., 133 Cal. App. 124, 23 P.2d 769. The presence of children is in itself a warning requiring

the exercise of care for their safety. *Sep-
erman v. Lyon Fire Proof Storage Co.*,
97 Cal.App. 654, 275 P. 980. Moreover if
the evidence shows that a driver has knowl-
edge of the presence of children he may
be held to have been responsible although
it appears that he did not see the injured
child in time to prevent the injury." *Con-
roy v. Perez*, 64 Cal.App.2d 217, 224, 148
P.2d 680, 684. To the same effect are *Hil-
yar v. Union Ice Company*, 45 Cal.2d 30,
286 P.2d 21; *Frederiksen v. Costner*, 99
Cal.App.2d 453, 456, 221 P.2d 1008; *Free-
land v. Jewel Tea Co.*, 118 Cal.App.2d
764, 768-769, 258 P.2d 1032; *Marino v.
Valenti*, 118 Cal.App.2d 830, 842, 259 P.2d
84; *Gorzeman v. Artz*, 13 Cal.App.2d 660,
662, 57 P.2d 550; *Parra v. Cleaver*, 110
Cal.App. 168, 171, 294 P. 6; 30 A.L.R.2d
5, 102-105, annotation. The following cases
are not opposed to this rule, although some
language used therein, applicable to the
factual situation under consideration, may
so indicate at first reading: *Wilson v. City
of Long Beach*, 71 Cal.App.2d 235, 240-
243, 162 P.2d 658, 163 P.2d 501; *Allred
v. Pioneer Truck Co.*, 179 Cal. 315, 176
P. 455; *Bakos v. Shell Company of Cal-
ifornia*, 115 Cal.App. 142, 144, 300 P. 982;
Johnston v. Associated Terminals Co., 13
Cal.App.2d 121, 122, 56 P.2d 259; *Norland
v. Gould*, 200 Cal. 706, 709, 254 P. 560.
Ordinarily the question of whether a driver
should be alerted to the necessity of look-
ing for the presence of children is one of
fact for the jury to solve, as is also the
question of whether that duty, once it
arises, has been properly performed. This
was the holding in *Frederiksen v. Costner*,
supra, 99 Cal.App.2d 453, at page 458, 221
P.2d 1008, and *Freeland v. Jewel Tea Co.*,
supra, 118 Cal.App.2d 764, at page 769,
258 P.2d 1032. In our judgment respon-
dent's cited cases of *Coffey v. Oscar Mayer
& Co.*, 252 Wis. 473, 32 N.W.2d 235, 3
A.L.R.2d 753; *Ostrander v. Armour & Co.*,
176 App.Div. 152, 161 N.Y.S. 961; *Ab-
bott v. Railway Express Agency*, 4 Cir.,
108 F.2d 671, which hold as matter of law
that the driver's conduct was not negli-
gent in circumstances resembling those at
bar, cannot be held controlling in the face
of the California rulings we have cited.

The facts at bar, above summarized, presented a jury question which was decided in favor of defendant, and it cannot be said as a matter of law that the verdict was without support in the evidence.

[10] Appellant's counsel argue in this connection that there is no evidence that Dickie was on the truck; that it is presumed he was not there; that the truck was on the wrong side of the street and that, as it struck the boy on that part of the street, the driving and parking contrary to Vehicle Code section 525 and Los Angeles Municipal Code section 80.49 was negligence *per se* which constituted as matter of law the proximate cause of the accident. Section 525 requires vehicles to be driven upon the right half of the roadway and section 80.49 requires parked vehicles to be headed in the direction of traffic with the right wheels within 18 inches of the curb. (No question is raised here as to the validity of said Municipal Code section.) Respondent implicitly concedes the point that violation of these sections is negligence as matter of law. But counsel say the question of proximate cause was one of fact which was properly submitted to the jury. The court instructed upon proximate cause at plaintiff's request, and gave a specific one concerning violation of law at defendant's behest. This was correct. It was held, upon similar facts, that proximate cause was a question of fact in *Mecchi v. Lyon Van & Storage Co.*, 38 Cal.App.2d 674, 686, 102 P.2d 422, 104 P.2d 26. See also *Hilyar v. Union Ice Company*, *supra*, 45 Cal.2d at page 38, 286 P.2d 25; *Favalora v. Oden*, 13 Cal.App.2d 659, 57 P.2d 541; *Murphy v. St. Claire Brewing Co.*, 41 Cal.App.2d 535, 539, 107 P.2d 273; *Hickson v. Beitel*, 103 Cal.App.2d 391, 394, 229 P.2d 821; *Rabe v. Western Union Tel. Co.*, 198 Cal. 290, 297, 244 P. 1077; *Williams v. McDowell*, 32 Cal.App.2d 49, 55, 89 P.2d 155; *Farole v. Eichman*, 39 Cal.2d 822, 824, 249 P.2d 261; *Van Cise v. Lencioni*, 106 Cal.App.2d 341, 346, 235 P.2d 236.

Oblique recognition of the propriety of leaving the question to the jury in this case appears from the concluding argument of the matter in the opening brief. "The

weight of the evidence would indicate that the violation of law by the defendant was the proximate cause, or contributed in some degree, to plaintiff's injury."

It is apparent that the battle in the trial court was waged chiefly over the question of trespasser *vel non* and that defendant's counsel invoked the rule that no duty is owed a trespasser other than refraining from willful or wanton injury to him,—a doctrine which has been considerably modified with respect to trespassers whose presence is known, even though they be adults. *Fernandez v. Consolidated Fisheries, Inc.*, 98 Cal.App.2d 91, 97, 219 P.2d 73; *Hession v. City and County of San Francisco*, 122 Cal.App.2d 592, 601, 265 P.2d 542; *Boucher v. American Bridge Co.*, 95 Cal.App.2d 659, 666–669, 213 P.2d 537. The court said in *Fernandez v. American Bridge Co.*, 104 Cal.App.2d 340, at page 343, 231 P.2d 548, at page 550: "The California rule seems to be that, regardless of the status of a plaintiff as licensee, trespasser or invitee, where defendant knew, or should have known, of plaintiff's presence, the duty of reasonable care was owed to him." Appellant complains of the giving and the refusal of certain instructions upon this subject. Although counsel alleged in the complaint that plaintiff was near (not on) the truck and stoutly contended, as on this appeal, that the evidence does not warrant an affirmative finding that he was trespassing, they were confronted with the issue and with the need of correct instructions on the subject.

[11] To that end they requested an instruction reading as follows: "If you should find that plaintiff, a five-and-one-half-year-old child, was a trespasser upon the property of defendant, this fact in itself does not constitute a bar to recovery." The court declined to give it. But, at defendant's request, gave the following: "Before plaintiff can recover against defendant, it must first be established that the defendant breached a duty owed to plaintiff. Therefore, you must first decide the status of plaintiff immediately preceding the accident. If plaintiff had gotten upon the truck of the defendant without being expressly or im-

pliedly invited so to do, and defendant's driver was unaware of his presence, then plaintiff was a trespasser and defendant owed no duty to plaintiff except to refrain from intentional harm or from willful reckless or wanton injury. There is no liability for mere failure to exercise ordinary care under such circumstances. It is only if you find that plaintiff was not upon said truck that the ordinary rules of negligence apply, and the fact that I have instructed you on the ordinary rules of negligence is not to be taken by you as an indication on the part of this court that the plaintiff was or was not a trespasser. The burden of proof rests upon the plaintiff to establish by a preponderance of the evidence his status at the time of and immediately preceding the happening of this accident." These rulings in effect denied plaintiff, if on the truck, the benefit of discovery or of reasonable activity to that end on the part of the truck driver, plaintiff being only five and a half years old. Of course, each party is entitled to proper instructions upon any theory of the case which his evidence substantially supports. *Gilbert v. Pessin Grocery Co.*, 132 Cal.App.2d 212, 282 P.2d 148.

[12, 13] Plaintiff's evidence, which the jury could have accepted if so disposed, was to the following effect. After the boys were ordered off the truck at the Kading home Dickie, David and Jerry followed it up the street, on the east sidewalk and then crossed over to the west side where the truck was parked. They were nearing it when Willis took the water into the Brown house. When he came out David was on the grass but could not then see Jerry and Dickie who were on the other side of the truck. The driver said to get away from the truck, David did so, and Jerry apparently heard and came around onto the sidewalk; but not Dickie. As David and Jerry were standing on the sidewalk Willis put the bottle on the left side of the truck and entered on that side. Although the boys were on the running board at Kadings and had insisted on riding up to Brown's, leaving the truck only upon Willis' command, and although David was so close when he came out of Brown's that he ordered him back, Willis

did not go to the rear or the right side to see if any more children were upon or so close to the truck as to be in danger; at the Kading house there were four to six children around the truck; now there were only two in sight. Where were the others? As the driver was about to enter the truck he saw that there was no traffic near; looked through the right window as he entered and saw nothing; in the right mirror he saw there was no approaching traffic; he could not see the running board from his seat; did not stick his head out or adjust the mirror so it would reveal the running board and adjacent ground; such adjustment would have rendered him unable to see traffic but he had seen that there was none in the vicinity. He did nothing to ascertain whether there was any little boy on the right side of the truck or so close to it as to be in danger when he pulled out from the curb. There were some 22 children living on Glen Iris between the Kading and Brown houses, and Willis had been delivering on that street for at least two weeks, and probably six months. The jury could have found that Willis was thereby put on notice of the probability of children in the immediate vicinity of his truck at any time. On this occasion he started diagonally toward the center of the street and almost immediately, after moving six to seven feet, heard a scream, stopped, got out and found Dickie right behind the back wheel, and his brother David was with him then. This combination of alleged facts could have been accepted by the jurors as satisfactory proof. True, David and Jerry were impeached, but it was for the jurors to determine the effect of the impeaching testimony. Counsel agree that it does not constitute independent evidence as David and Jerry are not parties to the action. See *Kroplin v. Huston*, 79 Cal.App. 2d 332, 343, 179 P.2d 575. Dickie was not permitted to testify, being held not qualified because of his tender years. There were no other witnesses to the immediate facts of the accident. There was sufficient substantiality in plaintiff's showing to require the giving of correct instructions, upon appropriate request, pertaining to the duty owed to Dickie if, as claimed, he was not upon the truck and also if he was in fact a trespasser.

[14] The instruction (above quoted) to the effect that the mere fact of a trespass by Dickie, if one there was, would not bar recovery should have been given. This follows from application of *Frederiksen v. Costner*, supra, 99 Cal.App.2d 453, 221 P.2d 1008, and other authorities cited in the same connection, supra. But the refusal of this instruction would have been less prejudicial if the other instruction on the subject (also quoted above) had not been vitally erroneous.

[15, 16] Appellant complains first of that phase of it which pertains to burden of proof. It is the last sentence, which should be read in connection with the first two, thus: "Before plaintiff can recover against defendant, it must first be established that the defendant breached a duty owed to plaintiff. Therefore, you must first decide the status of plaintiff immediately preceding the accident. * * * The burden of proof rests upon the plaintiff to establish by a preponderance of the evidence his status at the time of and immediately preceding the happening of this accident." There is no error in this, for plaintiff's status as trespasser, licensee, invitee, or little boy in immediate presence of danger and needing protection from others, determines the nature and quantum of care due him. "It is incumbent on plaintiff to establish by competent evidence the existence of a duty owing to him or the person injured, and a breach or failure to perform that duty. Thus, where plaintiff claims that the injured person was an invitee on defendant's premises at the time of the injury, the burden is on plaintiff to establish that status; it is incumbent on him to establish an invitation by one with authority and, if part of his case, that defendant was negligent under the circumstances in extending it. Where the injured person is a licensee or trespasser, the burden is on plaintiff to establish such negligence or misconduct as is necessary to impose liability in view of the status of the injured person." 65 C.J.S., Negligence, § 208, pages 966, 967. This burden may be carried by direct or circumstantial evidence.

[17-19] The rest of the instruction is erroneous. We again quote it. "If plaintiff had gotten upon the truck of the defendant without being expressly or impliedly invited so to do, and defendant's driver was unaware of his presence, then plaintiff was a trespasser and defendant owed no duty to plaintiff except to refrain from intentional harm or from willful reckless or wanton injury. There is no liability for mere failure to exercise ordinary care under such circumstances. It is only if you find that plaintiff was not upon said truck that the ordinary rules of negligence apply, and the fact that I have instructed you on the ordinary rules of negligence is not to be taken by you as an indication on the part of this court that the plaintiff was or was not a trespasser." The first two sentences tell the jury that the mere fact of a trespass by Dickie relieved the driver of any obligation of due care toward him unless his presence as a trespasser was actually known. Thus it excludes any obligation of Willis, though put on notice of the probability of such trespass by a little boy, to use any care to discover his proximity or to protect him against his own apparent inability to recognize the danger of his situation. (The court instructed that plaintiff was incapable of contributory negligence.) The statement that "There is no liability for mere failure to exercise ordinary care under such circumstances" was definitely erroneous and misleading, emphasizing an absence of any duty to the child trespasser, before or after his acquiring that status, except to refrain from willful or wanton injury. The error is then compounded by saying in substance that, whether Dickie's presence on the truck was known or unknown, whether the probability of such presence was or should have been recognized by the driver, no duty of reasonable care arose unless "you find that plaintiff was not upon said truck." This definitely excludes the rule of the *Frederiksen* and similar cases, supra. And plaintiff was entitled to the benefit of that rule, which was inescapably excluded by the instruction given. The fact that the court had given at plaintiff's request a general instruction concerning the duty of persons

dealing with children (BAJI 148 quoted in footnote),¹ does not cure the error in the one now under consideration for it deals with the heart of the case and says, in effect, that the general rule does not apply if under any circumstances Dickie was on the truck and his presence unknown. "It must be assumed that the jury understood the instructions and correctly applied them to the evidence." *Zuckerman v. Underwriters at Lloyd's, London*, 42 Cal.2d 460, 478, 267 P.2d 777, 788.

[20] Respondent argues that appellant cannot complain because he requested no specific instruction embodying the application of the correct rule. It is true that one who would complain of an absence of instruction on a material matter or of need of clarification or elaboration in an instruction which is correct as far as it goes must tender an appropriate request or be precluded from claiming error, but that rule does not apply to an erroneous instruction which is given at the instance of the opposing party. *Colgrove v. Lompoc, etc., Club*, 51 Cal.App. 2d 18, 24, 124 P.2d 128; *Tabata v. Murane*, 24 Cal.2d 221, 228, 148 P.2d 605; *Sexton v. Brooks*, 39 Cal.2d 153, 158, 245 P.2d 496.

The error in the instruction just discussed is of such gravity as to require a reversal. In view of the necessity of a new trial certain other contentions of appellant will be examined.

[21, 22] Counsel contend that the court, without any request from appellant and on its own motion, should have instructed the jury that the evidence received by way of impeachment of Jerry Jancarik and David Kading, neither being a party to the action, does not constitute and cannot be considered as affirmative evidence of the facts asserted in the impeaching statements. Respondent concedes the substantial proposition, but contends properly that the court was not obligated to give such instruction

unless requested by appellant. It is so held in *Ornales v. Wigger*, 35 Cal.2d 474, 478, 481, 218 P.2d 531. This is because, in a civil case, "The trial court need not of its own motion give special instructions in the absence of a request therefor by counsel." *Id.* 35 Cal.2d at page 479, 218 P.2d at page 534.

[23] The same contention is made by appellant concerning the court's failure to instruct concerning presumptions declared in Code of Civil Procedure section 1963, subdivisions 1 and 33. The first declares a person presumed to be innocent of crime or wrong, and the second a presumption that the law has been obeyed. Counsel requested no instruction on this subject and the *Ornales* case, *supra*, is controlling here. Moreover, such an instruction if given would have been misleading, for it would inject into the case a false issue, that of responsibility of the plaintiff for his own conduct, when it is conceded that his tender years spell lack of any responsibility at all.

[24] Appellant's complaint of error in refusing his offer of proof of implied invitation to children to get upon the truck is without merit. During the testimony of Mrs. Jean Magno, after certain adverse rulings, counsel made this offer: "Mr. Collins: I offer to prove by the testimony of this witness that if she were permitted to testify she would testify that for a period of approximately two years prior to the accident she has seen the driver of the Sparkletts Water Company permit the children to get on his Sparkletts truck, permit them to help him carry the bottles in, and he has picked them up off the truck and set them on the parkway before he left, over a period of time at least, at least two years' time." This was in keeping with the allegations of the complaint. But Mrs. Magno testified that on this occasion, when he came into the Kading house, the driver told

1. "Ordinarily it is necessary to exercise greater caution for the protection and safety of a young child than for an adult person who possesses normal physical and mental faculties. One dealing with children must anticipate the ordinary behavior of children. The fact that they usually cannot and do not exercise the

same degree of prudence for their own safety as adults, that they often are thoughtless and impulsive, imposes a duty to exercise a proportional vigilance and caution on those dealing with children, and from whose conduct injury to a child may result."

the children not to get around the truck; Jerry Jancarik said this occurred at the Kading home; and David Kading testified that it occurred at his own home and in front of the Brown house. The driver Willis said it occurred at the first stop, but he saw no children near Brown's. These were the only witnesses who touched on the subject. In view of the uniform evidence that the driver on this occasion told the boys to stay away from the truck, any previous express or implied invitation by this or any other driver to get upon the vehicle became wholly immaterial. There was no error in the ruling.

Because of the erroneous instruction above discussed the verdict cannot stand.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.



135 Cal.App.2d 22

HARBOR INSURANCE COMPANY, a corporation, Plaintiff, Cross-Defendant, Appellant and Respondent,

v.

Otto A. PAULSON, Defendant, Cross-Complainant, Respondent and Appellant.

No. 16309.

District Court of Appeal, First District,
Division 1, California.

Aug. 15, 1955.

Declaratory judgment action by automobile seller's insurer against pedestrian, who had obtained judgment for personal injuries against conditional sales purchaser and seller, who had failed to comply with transfer of ownership formalities of Vehicle Code prior to the accident. The Superior Court, City & County of San Francisco, Daniel R. Shoemaker, J., entered judgment against insurer, which was also cross-defendant, and both parties appealed.

The District Court of Appeal, Bray, J., held that, in prior action by pedestrian against seller and buyer, judgment, which was in sum of \$16,371.27 against buyer and in sum of \$5,000 against seller, should have been construed as judgment against buyer alone in sum of \$16,371.27 and as joint and several judgment against both buyer and seller for \$5,000, so that total recovery would be only \$16,371.27, and, therefore, pedestrian, who had previously been paid the \$5,000 judgment against seller, was entitled to recover from insurer only the additional \$11,371.27.

Judgment affirmed.

1. Insurance ⇐435.9

Until formalities required by the Vehicle Code are met, automobile vendor, under conditional sales agreement, is, for purposes of omnibus coverage in liability policy issued vendor, still owner of automobile, and vendee is person driving with his permission, but, as between vendor and vendee, vendee is owner. Vehicle Code, §§ 177, 402.

2. Insurance ⇐146(3), 591½

Third person, who had obtained judgment against insured, stands in position of insured and can recover from insurer only if policy terms permit recovery but is entitled to insist upon having policy construed most strictly against insurer.

3. Automobiles ⇐192(1)

Automobile seller, who failed to comply with Vehicle Code registration provision in sale of the automobile would be liable as automobile owner to person injured by automobile while it was being operated by purchaser on ground that purchaser was operator with permission of seller as owner, even though owner's predecessors had failed to comply with such vehicle code registration provisions. Vehicle Code, §§ 177, 402.

4. Automobiles ⇐192(1)

True owner of automobile may be liable in damages upon theory of permissive use for damages resulting from operation of the automobile even though he may not be

registered as true owner in vehicle department records. Vehicle Code, §§ 177, 402.

5. Judgment ⇨713(3)

Judgment in prior action, in which pedestrian obtained verdicts against automobile seller and purchaser, in effect, determined that seller was automobile owner and that purchaser was driving with seller's permission and was res judicata of such issue between such parties but was not res judicata, in subsequent action by seller's insurer against pedestrian, of question whether public liability policy of seller, who had not met transfer formalities of the Vehicle Code, covered purchaser. Vehicle Code, §§ 177, 402; West's Ann.Code Civ. Proc. §§ 1908, subd. 2, 1910.

6. Judgment ⇨540

For doctrine of res judicata to apply, parties and issues must be identical.

7. Automobiles ⇨247, 248

In action against motorist responsible for negligent operation of automobile and against automobile owner for the \$5,000 statutory liability, there should be but one verdict for a single sum against all defendants jointly liable, and any statutory limitation of liability applicable to any defendant should be incorporated in the judgment entered on the verdict. Vehicle Code, §§ 177, 402.

8. Automobiles ⇨248

In prior action by pedestrian against automobile conditional seller and conditional buyer for injuries received when struck by automobile while operated by buyer, judgment, which was in sum of \$16,371.27 against buyer and in sum of \$5,000 against seller, who had not complied with transfer of ownership formalities required by the Vehicle Code, should have been construed as judgment against buyer alone in sum of \$16,371.27 and joint and several judgment against both buyer and seller for \$5,000 so that total recovery would be only \$16,371.27. Vehicle Code, §§ 177, 402.

9. Judgment ⇨239

Generally, liability of tort-feasors cannot be segregated, and only one judgment

can be entered against both, even though amount of recovery may, by statutory provision, be limited against certain tortfeasors.

Harold C. Brown, San Francisco, for appellant (plaintiff, appellant, and respondent).

Carroll, Davis & Burdick, San Francisco, for X-appellant Otto A. Paulson.

Gibson, Dunn & Crutcher by Sherman Welpton, Jr. and Leslie G. Turner, Los Angeles, Keith, Creede & Sedgwick by Wallace E. Sedgwick, San Francisco, Amicus Curiae in support of respondent Harbor Ins. Co.

BRAY, Justice.

In an action for declaratory relief, both parties appeal upon an agreed statement. Plaintiff and cross-defendant appeals from the judgment against it in the sum of \$11,371.37. Defendant and cross-complainant appeals claiming the judgment in his favor should have been for \$16,371.27.

Questions Presented

1. Did the public liability policy cover a vendee of an automobile sold him by the insured where the formalities for transfer of ownership required by the Vehicle Code were not complied with?

2. Was the Fronce judgment res judicata of this question?

3. If so covered, is plaintiff entitled to a \$5,000 credit on the Fronce judgment?

Facts

The action was tried upon an agreed statement. J. W. Alen individually and the Alen Motors Co.¹ held a policy of public liability insurance issued by plaintiff. The automobile in question was purchased by Alen from sellers who failed to execute the California Department of Motor Vehicles ownership certificate and Alen at no time obtained such. Thereafter and while the policy was in force, Alen sold and delivered said automobile to one Fronce. The purchase price was paid in

1. Herein jointly referred to as "Alen."

full. At no time did any of the parties to the sale complete the formalities required for the transfer of ownership as required by the Vehicle Code. Fronce while driving said automobile collided with defendant, a pedestrian, injuring him. Defendant sued Fronce for damages for said injuries. In said action defendant sought to enforce against Alen the statutory liability of \$5,000 provided by section 402, Vehicle Code (car being driven with permission of owner). Defendant recovered judgment against Fronce in the sum of \$16,371.27 and against Alen in the sum of \$5,000. The judgments, *by their terms*, did not provide for set-off or credit of the \$5,000 on the larger amount. No appeal was taken and the judgments became final. Plaintiff paid defendant the \$5,000 plus \$314.68 costs. No other sums have been paid.

Contentions of Parties

Defendant contends that Fronce was an additional insured under the omnibus clause of the policy issued to Alen by plaintiff and was driving with Alen's permission. Plaintiff contends that an outright sale of the automobile had been made to Fronce; that he was not driving with Alen's permission; that Fronce was not covered under the policy, and that at most, plaintiff was only liable for Alen's \$5,000 statutory liability, which sum it paid.

1. Policy Liability

The provisions of the policy applicable here follow: "The Definition of Insured Agreement of the policy is amended to read as follows: The unqualified word 'insured' includes the named insured and also includes * * * (2) any person while using an automobile covered by this endorsement, and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission." Thus, under the policy, the question is whether at the time of the accident Alen was the owner of the automobile and Fronce was driving with Alen's permission, express or implied. It should be borne in mind that plaintiff in paying the \$5,000 judgment against Alen in the

Fronce suit practically conceded Alen's ownership of the car as that statutory liability only exists against an *owner*. Plaintiff is in the rather inconsistent position of admitting Alen's ownership then and denying it now. Plaintiff's liability for payment of Alen's statutory liability (assuming ownership in Alen) comes under provision A of the policy. Its liability for the judgment against Fronce depends upon whether Fronce is an additional insured under omnibus clause B (above quoted), that is, whether "the actual use of the automobile is by the named insured or *with his permission*." (Emphasis added.)

[1,2] While the rule seems to be different in other states, see *Home Indemnity Co. v. Bowers*, 194 Tenn. 560, 253 S.W. 2d 750, 36 A.L.R.2d 673; 5 Am.Jur. 806, California has laid down the rule that until the formalities required by the Vehicle Code are met, the vendor of an automobile under a conditional sales agreement for purposes of omnibus coverage in a policy of public liability insurance issued to the vendor is still the owner and the vendee is driving with his permission. In *Sly v. American Indemnity Co.*, 127 Cal.App. 202, 15 P.2d 522, an automobile dealer sold under conditional sales contract an automobile to one Krause, title to remain in seller until full payment made. Possession was given the buyer. A policy of public liability insurance was issued covering both buyer and seller. A Division of Motor Vehicles certificate of registration was obtained showing the seller to be the legal owner and the buyer to be the registered owner. The buyer exchanged the automobile with one Mills for a motorcycle. No change of the registry of the automobile was made. About nine days later, while driving the automobile, Mills collided with the plaintiff, injuring her. She recovered a judgment against Mills for damages for her injuries. She thereupon sued the insurer in the above-mentioned policy to enforce collection of that judgment. The insurer defended, contending that prior to the accident the insured had transferred his interest in the automobile to Mills and therefore Mills was not covered by the policy. The court held the insurer liable on two

grounds (1) (not applicable here) that under the evidence the exchange had not been completed (aside from the effect of failure to register the transfer) and (2) (applicable here) that if the evidence showed that the court's finding of no transfer was erroneous and that transfer had actually *occurred*, the policy would still cover the transferee. The court said 127 Cal.App. at page 208, 15 P.2d at page 524: "It is true that possession of the automobile was transferred to Mills, who was operating the machine at the time respondent was injured. But it is expressly stated in the policy of insurance that insurance provided by the liability peril clause is so extended as to be available to any person lawfully operating the insured automobile provided such operation is with the permission of the assured named in the policy. There can be no doubt that the operation of the automobile at the time respondent was injured was with the permission of the assured." The court also pointed out the rule to be considered in construing the policy 127 Cal.App. at page 208, 15 P.2d at page 524: "This third person, when he has sustained injuries although, after he has obtained a judgment against the assured, he stands in the position of the assured and can recover from the insurer only if the terms of the policy permit recovery, is entitled to insist upon having the policy construed most strictly against the insurer."

In *Votaw v. Farmers A. Inter-Ins. Exch.*, 15 Cal.2d 24, 97 P.2d 958, 126 A.L.R. 538, the plaintiff as the owner of an automobile held a policy of public liability insurance on which a rider provided that the policy insured to the benefit of any person legally operating the automobile with the plaintiff's permission. The plaintiff sold the automobile to one Kin on an oral contract of conditional sale, the plaintiff retaining both the certificate of ownership and the certificate of registration. Kin, in operating the automobile, caused injuries to one Bunch. Bunch recovered a judgment for damages for said injuries against both Kin and the plaintiff, it being held in that action that plaintiff as the owner of the automobile was liable for the

statutory amount provided in section 1714-1/4, Civil Code (now Vehicle Code § 402). The plaintiff then paid the amount of the judgment against him and sued the insurer on the policy. In holding the insurer liable for the liability imposed by reason of ownership of the car and its being driven with the permission of the owner, the court said: "There can be no doubt that at the time of the accident the automobile in question was being operated by Kin with the consent of the plaintiff." 15 Cal.2d at page 27, 97 P.2d at page 959. While the *Votaw* case dealt with a conditional sale and our case deals with an attempted absolute sale, the decision in the *Votaw* case is important in that it is contrary to the rule that an omnibus clause in an insurance policy does not cover a conditional sale vendee established in other states, including the following cases cited by defendant and amici curiae: *Fagg v. Massachusetts Bonding & Ins. Co.*, 1933, 142 Or. 358, 19 P.2d 413 (full purchase price of automobile paid); *Virginia Auto. Mut. Ins. Co. v. Brillhart*, 1948, 187 Va. 336, 46 S.E.2d 377 (full purchase price of automobile paid); *Farm Bureau Mut. Ins. Co. v. Emmons*, 1952, 122 Ind.App. 440, 104 N.E.2d 413 (conditional sale buyer in default); *Whitney v. Employers' Indemnity Corp.*, 1925, 200 Iowa 25, 202 N.W. 236, 41 A.L.R. 495 (conditional sale); *Home Indemnity Co. v. Bowers*, 1952, 194 Tenn. 560, 253 S.W.2d 750, 36 A.L.R.2d 668 (conditional sale).

In *Traders & General Ins. Co. v. Pacific Emp. Ins. Co.*, 130 Cal.App.2d 158, 162, 278 P.2d 493, 496, the court said: "But the rule is now well settled that a conditional vendor is considered the owner of a vehicle and the conditional vendee is held to be the operator with permission of the owner, where the vendor delivers possession to the vendee and fails to comply with section 177 with reference to giving notice of the transfer prior to the occurrence of the accident." This rule has been established in this state even though section 66, Vehicle Code, in defining "owner" includes "the person entitled to the possession of a vehicle as the purchaser under a conditional sale contract * * *." Nor is the rule affected by the fact that as between the

vendor and vendee (where the purchase price is paid in full and the requirements of the Vehicle Code have not been met) the vendor may not assert any right, title or interest in the automobile. For the rights of the parties as between themselves see *Willard H. George, Ltd. v. Barnett*, 1944, 65 Cal.App.2d Supp. 828, 832, 150 P.2d 591; *Henry v. General Forming, Ltd.*, 33 Cal.2d 223, 226, 200 P.2d 785; *Kenny v. Christianson*, 1927, 200 Cal. 419, 253 P. 715, 50 A.L.R. 1297; *Boles v. Stiles*, 188 Cal. 304, 204 P. 848.

We find nothing to the contrary of our ruling in *Norris v. Pacific Indemnity Co.*, 39 Cal.2d 420, 247 P.2d 1, which held that an insurance policy covering any person driving with the consent of the owner did not extend to a person given permission to drive by the owner's son who had been given permission to drive but who had expressly been instructed to allow no one else to drive.

The result of the failure of a vendor in this state to meet the requirements of the Vehicle Code is that, while as between him and his vendee, the latter becomes the owner of the vehicle, as to third parties who are injured by the vehicle still registered to him as owner, the vendor remains the owner and the vendee is using the vehicle with his permission. While this may seem an artificial rule, and is contrary to that of most states, nevertheless the vendor has it in his power to fully protect himself by the very simple expedient of complying with the law. Section 177 makes it his duty, upon a sale or transfer and delivery of possession, *immediately* to send the department the notice required by that section.

Section 402, Vehicle Code, provides that if a motor vehicle is sold under a conditional sales contract, title remaining in the vendor, the vendor shall not be deemed to be the owner within the provisions of that section providing a statutory liability upon the owner for negligence by a person driving the vehicle with permission of the owner, but the vendee is deemed to be the owner. In *Helmuth v. Frame*, 46 Cal.App.2d 372, 115 P.2d 846, it was held that this provision applied only if the vendor strictly complied with the transfer requirements

provided in section 177, Vehicle Code. There the vendor failed to so comply, and it was held subject to the statutory liability as owner. We can see no reason why, if a conditional vender who fails to comply with the transfer requirements is held to still be the owner, a vendor who attempts an absolute sale but likewise fails to comply, should not be considered the owner. See *Bunch v. Kin*, 2 Cal.App.2d 81, 37 P.2d 744, where the contention was made that the effect of the failure to comply with the transfer requirements did not apply to conditional sales but only to absolute sales, and where the court, in effect, held that they applied to both.

[3,4] When Alen originally purchased the automobile it failed to get from the then owners the ownership certificate required by the Department of Motor Vehicles. It is now contended that for that reason Alen never became the owner of the car. Certainly, as between the original vendors and Alen, the latter became the owner of the car. In selling to Frons Alen exercised all the rights of ownership. So far as the policy of insurance is concerned, the moment Alen purchased the car, Alen became its owner, even if Alen never obtained any indicia of ownership. There is no requirement in the policy that the insurer's liability under the policy be restricted to automobiles as to which Alen had complied with the motor vehicle department's requirements. Alen was the true owner. "It has also been held that the true owner, although he may not be registered as such in the records of the vehicle department, may be liable in damages upon the theory of permissive use. The true owner should not escape liability imposed on him in that capacity simply because he has inadvertently neglected or deliberately failed to comply with the registration provisions of the Vehicle Code." *Helmuth v. Frame*, supra, 46 Cal.App.2d at page 377, 115 P.2d at page 850. It is there said: "* * * the code provisions were not enacted for the benefit of those who fail to obey the law." 46 Cal.App.2d at page 377, 115 P.2d at page 850. See *Schmidt v. C. I. T. Corporation*, 14 Cal.App.2d 92, 57 P.2d 1016; to the same effect.

Thus, the determination that for liability purposes Alen was still the owner of the automobile, that Fronce was driving with Alen's permission and that Fronce was an additional insured under the omnibus clause of the policy, was correct.

2. Res Judicata

[5, 6] The judgment in the action of Paulson v. Fronce and Alen determined, in effect, that Alen was the owner of the automobile and Fronce was driving with Alen's permission, and is res judicata of that issue as between those parties. Plaintiff here, however, was not a party to that action. Nor was the issue of ownership identical with that issue here. There the question was ownership as determined by the Vehicle Code. Here, while that question is included, the additional question of ownership under the terms of the insurance policy appears. In order that res judicata may apply, the parties and the issues must be identical. Code Civ.Proc. § 1908, subd. 2; § 1910; *Burnett v. King*, 33 Cal.2d 805, 205 P.2d 657, 12 A.L.R.2d 333.

3. Amount of Judgment

[7] In the action of Paulson (defendant here) against Fronce and Alen, there were two verdicts in favor of Paulson, one for \$16,371.27 against Fronce alone, the other for \$5,000 against Alen alone. Judgments were entered to the same effect. No appeal was taken from either judgment. Plaintiff paid the \$5,000 judgment and it has been satisfied of record. In our case, in granting Paulson judgment against plaintiff the trial court assumed that the \$16,371.27 judgment against Fronce included the \$5,000 judgment against Alen and therefore credited the latter amount against the former amount, giving Paulson judgment for only \$11,371.37. On appeals from judgments of the type involved here it has frequently been held that in an action against the person responsible for negligently driving an automobile and against the owner for the \$5,000 statutory liability, it is improper to have separate verdicts, but that there should be but one verdict for a single sum against all defendants jointly liable and that any statutory limitation of liability applicable to any defendant

should be incorporated in the judgment entered on the verdict. *Aynes v. Winans*, 33 Cal.2d 206, 200 P.2d 533. See *Lynch v. Birdwell*, 44 Cal.2d 839, 285 P.2d 919, distinguishing the situation there from that in the *Aynes* case, because in the former case section 352, Vehicle Code, was involved and not section 402, Vehicle Code, which was involved in the *Aynes* case, and is involved in ours.

"When both the operator and owner are joined as defendants, some confusion has been created because of the limited liability of a defendant owner. *Snodgrass v. Hand*, 220 Cal. 446, 31 P.2d 198; *Bradford v. Brock*, 140 Cal.App. 47, 50, 34 P.2d 1048. Separate verdicts have caused as much confusion as a single verdict against both classes of defendants. *Harveld v. Milani*, 1 Cal.App.2d 157, 160, 36 P.2d 393; *Webster v. Harris*, 119 Cal.App. 46, 52, 6 P.2d 88. The foregoing cases suggest that the problem is to be determined from the verdict or verdicts which are brought in what the jury had in mind as the total sum to be allowed. When the verdict is single as against both operator and owner, there can be no ambiguity on this subject. Ambiguity as to the total sum to be allowed is created only when there are separate verdicts as against the separate defendants. The cases clearly hold that when a single verdict is brought in against both classes of defendants, and such verdict by its terms fails to limit the liability of owner defendants to those amounts fixed by the statute (section 1714-1/4, Civ.Code), an appellate court may modify the judgment by reducing the same to the statutory limits as against owner defendants. *Webster v. Harris*, [supra]; *Harveld v. Milani* [supra]." *Milburn v. Foster*, 8 Cal.App.2d 478, 481, 47 P.2d 1106, 1107.

[8] In *Phillips v. Superior Court*, 32 Cal.App.2d 371, 89 P.2d 698, separate judgments were entered, each for \$2500. After the time for appeal had expired and no appeal taken, plaintiff moved the trial court to correct "clerical mistakes" in the two verdicts to change the amounts in each to \$5000 (a total of both). The order of denial of this motion was affirmed. *Phipps v. Patter-*

son, 27 Cal.App.2d 545, 81 P.2d 437. Subsequently defendants moved to have the judgment corrected to provide a joint and several judgment against both defendants in the sum of \$5,000. This the trial court ordered. On appeal the court held this action proper because "the clerk inadvertently entered a several judgment against each defendant, when in fact the verdict correctly construed is a joint and several judgment and should have been entered against both defendants." 32 Cal.App.2d at page 375, 89 P.2d at page 700. Thus, it would appear that the trial court (in the original case) should have construed the judgment as a judgment against Fronce alone in the sum of \$16,371.27 and a joint and several judgment against Alen and Fronce for \$5,000, making a total recovery of only \$16,371.27.

The situation here is different than in *Snodgrass v. Hand*, 220 Cal. 446, 31 P.2d 198, where the action of the trial court in determining that a verdict against the operator of a car in the sum of \$5,000 and against the operator and the owner jointly in the sum of \$5,000 meant an award of damages against the operator of the car in the sum of \$10,000 for half of which sum the owner was to be jointly liable. In our case, each award was against the particular defendant solely. As, under the law, the award against the owner, in spite of the form of the verdict, could only be an award against both defendants and as the jury indicated in its award against Fronce it limited the total recovery from him to \$16,371.27, the award against Alen and Fronce jointly must be included in that figure rather than added to it. See *Bradford v. Brock*, 140 Cal.App. 47, 34 P.2d 1048, where in holding that a separate verdict for \$2500 against the operator of a car and a separate verdict against the owner for \$2500, meant a total joint and several verdict for \$2,500 only, the court stated that the ruling in the *Snodgrass* case was not in conflict with its ruling, pointing out that in the *Snodgrass* case because the operator of the car was included in both verdicts the jury apparently intended to return a verdict against him for the total of the two verdicts. The court

said 140 Cal.App. at page 51, 34 P.2d at page 1050: "If the detriment to plaintiffs caused by the operator of the car is found by the jury to be \$2,500, they should not be permitted to collect that sum from him and then go to the owner or employer, whose liability arises out of his relationship to the car or its operator, and not out of any independent act, and collect a further like sum, thereby obtaining double the amount to which plaintiffs are entitled under the jury's decision."

In our case the jury found the detriment caused by the operator of the car to be \$16,371.27 only. Of this sum defendant has received \$5,000. He is now entitled only to the difference between those sums.

[9] While it would have been much simpler to have determined the effect of these verdicts and the judgments rendered thereon upon appeal, nevertheless they must be construed in the light of the holding in *Phipps v. Superior Court*, supra, 32 Cal.App.2d 371, 376, 89 P.2d 698, 701: "The general rule is that the liability of joint tort-feasors cannot be segregated, and that only one judgment can be entered against both (*Curtis v. San Pedro Transp. Co.*, 10 Cal.App.2d 547, 52 P.2d 528), though the amount of recovery may, by statutory provision, be limited against certain tort-feasors. * * *

"When a verdict is returned against the driver, and an amount is also assessed against the driver and owner, the verdict may be termed to be individual and joint."

(See also *Bradford v. Brock*, supra, 140 Cal.App. 47, 34 P.2d 1048, where the court held that two several verdicts of \$2,500 each did not permit a total judgment of \$5,000.)

This the trial court did in its judgment from which this appeal is taken. We find nothing in the record to justify disturbing that interpretation of the judgments.

Judgment affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

135 Cal.App.2d 152

Leadora O. PAGELS et al., Plaintiffs,

Leadora O. Pagels and Evelyn Eilenberger,
Plaintiffs and Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO,
CO., etc., et al., Defendants,

City and County of San Francisco, etc.,
Defendant and Respondent.

Civ. 16356.

District Court of Appeal, First District,
Division 1, California.

Aug. 22, 1955.

As Amended on Denial of Rehearing

Sept. 21, 1955.

Hearing Denied Oct. 19, 1955.

Negligence action. The Superior Court of the City and County of San Francisco, Harry J. Neubarth, J., rendered judgment of nonsuit based upon plaintiffs' opening statement. Plaintiffs appealed. The District Court of Appeal, Bray, J., held that where police car chased automobile at 60 miles per hour in heavy traffic at a distance of about 30 feet and police car failed to flash red light and sound siren, and after several blocks and streets of pursuit, pursued automobile sideswiped three automobiles and then ricocheted head-on into plaintiffs' automobile, police officer owed no duty to plaintiffs to sound a warning although pursuit contributed to the pursued's reckless driving, although pursuit was very close in heavy traffic, and although police car was equipped with siren and light.

Affirmed.

Automobiles 175(5)

Where police officer chased automobile at 60 miles per hour in heavy traffic at a distance of about 30 feet and failed to flash red light and sound siren and after several blocks and streets of pursuit, pursued automobile sideswiped three other automobiles and then ricocheted head-on into plaintiffs' automobile, police officer owed no duty to plaintiffs to sound siren or flash red light in order to warn them of approach of pursued automobile, although pursuit contributed to the pursued's reckless driving, although pursuit was very close in heavy traffic, and although police car was equipped

with siren and light. Vehicle Code, §§ 454, 671.

Philander Brooks Beadle, Morton L. Silvers, San Francisco, for appellants.

Dion R. Holm, City Atty. of the City and County of San Francisco, Robert M. Desky, Deputy City Atty., San Francisco, for respondent.

BRAY, Justice.

Plaintiffs appeal from a judgment of nonsuit based upon plaintiffs' opening statement.

Question Presented.

Does a police officer engaged in a lawful chase have a duty to sound the siren and flash the red light when his patrol car is so equipped, in order to warn drivers of other cars of the approach of the pursued car?

Opening Statement.

Police Officer Creeden, driving a black, unmarked police car equipped with proper siren and red light, observed at approximately Eighth Avenue and Fulton Street in San Francisco a Buick with license plates so bent as to be difficult to read. The Buick driver, disobeying the officer's signal to pull to the curb, speeded up Eighth Avenue. The officer followed and the chase covered several blocks and on several streets. As the cars approached the intersection of Seventh Avenue and Clement Street they were going between 60 and 65 miles an hour, and the police car was approximately 30 feet behind the other car. That location was in a shopping district where traffic was heavy. Crossing the intersection at a speed in excess of 60 miles an hour in heavy traffic, the pursued car followed closely by the police car continued a short distance down the block. There a car was pulling out of a supermarket. The pursued car sideswiped it, glanced off and then sideswiped a second car, bounced off and sideswiped a third car on the other side of the street. It then ricocheted head-on into the car in which plaintiffs were riding, seriously injuring plaintiffs. The police car was able to avoid contact with any of the

cars. The police car's red light was not flashed and the siren was not sounded at all, or if sounded, was so weak and inaudible as not to be heard by anyone in its area.

Duty.

Plaintiffs contend that it was the duty of the operator of the police car to sound the siren and flash the light so as to give other cars on the street an opportunity to clear it and that as this duty was not performed, there was a question of fact for the jury as to whether the ultimate collision would have been avoided or the chain of causation broken, had such action been taken.

Section 454, Vehicle Code, provides in effect that the driver of a police car pursuing an actual or suspected violator of the law, is exempt from the normal rules of the road if he sounds a siren as may reasonably be necessary and displays a lighted red lamp visible from the front. However, such drivers are not relieved "from the duty to drive with due regard for the safety of all persons using the highway, nor shall the provisions of this section protect any such driver from the consequences of an arbitrary exercise of the privileges declared in this section."

In *Draper v. City of Los Angeles*, 91 Cal. App.2d 315, 205 P.2d 46, 47, petition for hearing by Supreme Court denied the police car was pursuing a car which had disregarded a boulevard stop. In crossing an intersection the pursued car, going about 60 to 70 miles an hour, struck the plaintiff's car. During the chase the police car did not approach the pursued car closer than 275 feet, and as the police car approached the intersection it slowed down and parked at the curb at the intersection. The plaintiffs claimed (1) that it was negligence for the police car not to be equipped with a siren, and (2) that the question whether the failure to sound a siren was a proximate cause of the accident should have been submitted to the jury. The court held that neither contention was sustainable. As to the first contention the court pointed out that section 671, Vehicle Code, provided "'Any authorized emergency vehicle *may* be equipped

* * *'" with a siren; that section 454 grants a privilege of exemption, if the vehicle is so equipped, and that under neither section is the vehicle *required* to be so equipped, and that failure to have the car equipped with a siren did not constitute negligence. As to the second contention the court said that it was not reasonably or at all necessary for the officers to give warning of their approach to the intersection as the undisputed evidence showed that they intended to, and did stop at the intersection. "The officers, of course, were not required to warn pedestrians or other drivers to keep out of the way of the Pratt car [the pursued car]. Pratt's actions were distinct from theirs and placed no responsibility upon them. It is true that he was endeavoring to escape from them and for that reason, perhaps, was driving recklessly but that was his affair, not theirs. Although the pursuit no doubt contributed somewhat to his reckless driving, the officers were under no duty to allow him to make a leisurely escape. There was no evidence whatever that they were endeavoring at the time to force his car to the curb. They owed no duty to plaintiffs except to operate their own car with due care and they fulfilled this duty. The failure to have a siren on the car or to use one under the circumstances was not a violation of law. There was no evidence of negligence on the part of the officers. The court properly held as a matter of law that the negligence of Pratt was the sole cause of the accident." 91 Cal.App.2d at pages 318-319, 205 P.2d at page 48.

It would appear that the *Draper* case ruling is determinative here. True, as pointed out by plaintiffs, there was a difference in the facts of the two cases, in that in the *Draper* case the police car did not approach within 275 feet of the pursued car, while here the distance between cars was only about 30 feet, and in the *Draper* case the police car had stopped chasing the pursued car immediately before the accident occurred. However, as regards the holding that the police were not obligated to warn the public of the approach of the pursued car, those are minor differences. As there held, although the pursuit contributed somewhat to the pursued's reckless driving, the

officers owed no duty to the plaintiffs except to operate their car with due care. It would make no difference whether within limits the pursuit was close or far. Nor does the fact that in the Draper case the police car was not equipped with siren and light, while the police car here was, make the Draper decision not applicable. That decision did not limit its holding that the officers owed the plaintiffs no duty to sound a warning to the fact that the car was not equipped with a siren, but also held that the actions of the driver of the pursued car were distinct from the actions of the officers and placed no responsibility on them, that as long as the officers operated their car with due care they met their duty. "The failure to have a siren on the car *or to use one* under the circumstances was not a violation of law." 91 Cal.App.2d at page 319, 205 P.2d at page 48, emphasis added.

Section 671, Vehicle Code, which provides that an emergency vehicle may be provided with a siren states that it shall only be used in emergency including the immediate pursuit of an actual or suspected law violator, in which event the driver "shall sound said siren when necessary to warn pedestrians and other drivers of the approach *thereof*." (Emphasis added.) Plaintiffs in effect would have us add to this section "and of the pursued car." Had this been the intention of the Legislature it would have added those words, or, at least, would have made the presence of a siren compulsory. As to both siren and red light it has merely said that if the driver of a police car desires to be freed from the necessity of regarding certain rules of the road he must sound a siren and flash a red light. Here the accident was not caused by any violation of the rules of the road by the police car (even though it was violating some of them). Hence there can be no liability for failing to do the things which would have been important had the accident been caused by the police car's violation of those rules. See *Richards v. Stanley*, 43 Cal.2d 60, 271 P.2d 23 (where it was held that an automobile owner who leaves it unattended and

unlocked with the ignition keys in it is not liable for negligent operation of the automobile by one who steals it) for discussion to the effect that where a defendant owes no duty to a plaintiff there is no issue to be submitted to the jury. Also, the case points out that even though a certain result may have been foreseen (here it is contended that the officers should have foreseen that the pursued might have run into other cars), nevertheless there must be a duty before there can be liability—"there are many situations involving foreseeable risks where there is no duty." 43 Cal.2d at page 67, 271 P.2d at page 27.

Cases like *Stone v. City and County of San Francisco*, 27 Cal.App.2d 34, 80 P.2d 175; *Lucas v. City of Los Angeles*, 10 Cal.2d 476, 75 P.2d 599, and *Raynor v. City of Arcata*, 11 Cal.2d 113, 77 P.2d 1054, holding municipalities liable for injuries caused by their emergency vehicles where the operators failed to sound the siren are not applicable here because in them the very cars which caused the accidents were the cars of the defendants.

Strictly speaking, the complaint did not charge negligence in failing to give warning of the approach of the pursued car. It charged negligence only in failing to give warning of the approach of defendant's car and alleged that defendant caused the pursuit car to collide with plaintiffs' automobile. Plaintiffs do not now contend that the fact that the police car was chasing the pursued car and thereby indirectly caused that car to increase its speed constituted negligence. As said in the Draper case, *supra*, "Although the pursuit no doubt contributed somewhat to his reckless driving, the officers were under no duty to allow him to make a leisurely escape." 91 Cal.App.2d at page 319, 205 P.2d at page 48.

The nonsuit was properly granted. The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

135 Cal.App.2d 143

COUNTY OF SAN DIEGO,
Plaintiff and Respondent,
v.

BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION, a corpo-
ration; Doll L. Jackson, et al., Defendants,
Doll L. Jackson, Appellant.
Civ. 4876.

District Court of Appeal, Fourth District,
California.

Aug. 19, 1955.

Hearing Denied Oct. 13, 1955.

Eminent domain proceeding. Superior Court of San Diego County, John A. Hewicker, J., entered judgment awarding compensation of \$1,625 to landowner who appealed from judgment and order denying motion for separate trial. The District Court of Appeal, Shell, J. pro tem., held that where subsequent trial record showed that other landowner, appellant's codefendant, made no objections during trial and challenged no prospective juror, and that counsel for appellant was not restricted in cross-examination of other landowner or his witness and other landowner offered no instructions as to defense, appellant landowner was not prejudiced by denial of motion.

Affirmed.

1. Trial ⚡3

Where condemnation proceedings as to several parcels of land are consolidated, determination of motion for separate trial rests in sound discretion of trial court. West's Ann.Code Civ.Proc. § 1244, subd. 5.

2. Trial ⚡3

In eminent domain proceedings which were consolidated as to two landowners, affidavits stating that other landowner, after delaying several days, came to appellant landowner's attorney's office where he refused to discuss defense of case in appellant's presence and that other landowner had not employed counsel, appraisers, or expert witnesses to assist in presentation of defense, failed to establish good cause to order separate trials. West's Ann.Code Civ.Proc. § 1244, subd. 5.

3. Appeal and Error ⚡949

When an attack is made upon a discretionary procedural order of trial court, reviewing court may deduce that order was not made in exercise of sound discretion if record of trial indicates that such order resulted in probable or possible prejudice to a party.

4. Eminent Domain ⚡262(5)

Where eminent domain proceedings were consolidated as to two landowners and appellant landowner's motion for separate trial was denied, and subsequent trial record showed that other landowner made no objections during trial and challenged no prospective juror, and that counsel for appellant landowner was not restricted in cross-examination of other landowner or his witness and that other landowner offered no instructions, appellant landowner was not prejudiced by such denial. West's Ann.Code Civ.Proc. § 1244, subd. 5.

5. Eminent Domain ⚡220

In eminent domain proceedings, observations made by jury on visit to landowner's premises during course of trial constituted independent and substantial evidence which could be considered by jury in arriving at verdict.

6. Eminent Domain ⚡262(4)

In condemnation action, in absence of showing of passion or prejudice, finding of jury when supported by substantial evidence will not be set aside on appeal.

7. Eminent Domain ⚡149

In eminent domain proceedings, evidence as to value sustained jury's finding awarding landowner \$1,625 compensation.

8. Eminent Domain ⚡219

In eminent domain proceedings, exclusion of appellant landowner's letter, dated 16 months after taking of property, to bank where escrow was established for sale of appellant's remaining property to purchasers, wherein appellant reserved a right to any recovery for compensation damages against county, was not error where such reservation was specifically testified to by appellant and was not contested by county.

9. Evidence ⇨318(2)

In eminent domain proceedings, exclusion, as hearsay evidence, of letter from municipality realty board to relator to the effect that appellant's property was appraised by nine realtors resulting in medium estimated price of \$12,527, was not error.

10. Eminent Domain ⇨253(1)

Order denying landowner's motion for separate trial in proceeding to condemn several parcels was not appealable order. West's Ann.Code Civ.Proc. § 963.

Thomas Whelan, San Diego, for appellant.

James Don Keller, Dist. Atty., and County Counsel of San Diego County, and Robert G. Berrey, Deputy Dist. Atty., San Diego, for respondent.

SHELL, Justice pro tem.

Appellant was, on May 7, 1952, the owner of 22.10 acres of land lying in the Sweetwater River Valley in San Diego county. On that day, this action in eminent domain was filed in the superior court of San Diego county by the plaintiff county seeking possession of and title to portions of the property of numerous defendants for the purpose of construction of a county road. Possession of .82 acres of appellant's property was taken on May 7, 1952, and that date is conceded to be the date of valuation.

The property of Stanley Marshall, a co-defendant, and that of appellant, were designated as parcels 1 and 2, respectively. Mr. Marshall has not appealed from the judgment of the trial court. We are concerned here only with the appeal of Doll L. Jackson.

On March 11, 1953, after due notice to appellant and his codefendant Marshall, the superior court granted the county's motion to strike certain portions of appellant's answer and a motion to consolidate the trials as to appellant's property and defendant Marshall's property. However, the case was first tried with respect to parcel 2, owned by appellant, during April, 1953, it being shown at that time that defendant

Marshall was unable to be present by reason of illness. Following that trial appellant moved for a new trial, which motion was granted unless the county would consent to an increase in the award made by the jury. The county declined to consent to such increase and a new trial was ordered.

In January, 1954, the action was tried before a jury, as to parcels 1 and 2, after the court denied appellant's motion for a separate trial, which motion had been noticed for hearing at the same hour that the case had been set for trial. Judgment was entered January 27, 1954, and has become final as to parcel 1, owned by the defendant Marshall. Appellant Jackson, owner of parcel 2, appeals from the judgment. In the interval between the first and second trials the new road was constructed by the county.

Appellant urges that:

I. The trial court erred in denying his motion for separate trial.

II. The jury's award and the judgment are inadequate as compensation to him.

III. The trial court erroneously excluded defendant's exhibit "B" for identification.

IV. The trial court erroneously excluded defendant's exhibit "C" for identification.

[1] As to contention I it is conceded that the determination of a motion for separate trial rests in the sound discretion of the trial court, but appellant says that in this instance the trial court abused its discretion in denying a separate trial. He insists that an appellate court must, in determining that question, look only to the showing made by the moving party and his opponent at the time of hearing of the motion.

The affidavit of Thomas Whelan in support of appellant's motion for separate trial states that he sent word to defendant Marshall on January 4, 1954, that he desired Marshall to come to his office for the purpose of discussing with Mr. Whelan matters pertaining to the impending trial of the case; that on January 6th Marshall came to Mr. Whelan's office, but refused to

discuss the case with Mr. Whelan in appellant's presence; that he, Mr. Whelan, did discuss with Marshall, in the absence of appellant, matters pertaining to the trial; that it is his belief such discussion involved a confidential relationship, but that from such discussion, it is Mr. Whelan's opinion that "there will be a conflict in interest and a conflict in testimony between defendants Marshall and Jackson concerning land values, and other matters affecting land values * * *".

Appellant's affidavit in support of the motion for a separate trial, so far as it may be in any way material, says that the action was separately tried as to the properties of three other owners named in the same action; that after talking with Mr. Marshall, he, appellant, is of the opinion that neither he nor his counsel can agree with Marshall as to the management of the defense, or in respect to questions of law arising during the trial; that Marshall refused to accompany him to Mr. Whelan's office; that on January 6, 1954, Marshall refused to discuss the impending trial with Mr. Whelan in appellant's presence; that in his opinion there is no relationship between his property and that of Marshall; that Marshall has failed to prepare his case for trial and has failed to employ an appraiser; that appellant "believes" that Marshall hopes to obtain the benefits that will accrue to both because of appellant's employment of counsel and of an appraiser, and appellant's procurement of expert testimony; that Marshall has informed him of the contentions he will make at the trial; that it is "certainly not probable" that appellant's case can be tried by his counsel without disagreement with Marshall as to the management of the defense and the presentation of evidence; that it is certain that there will be disagreements between Mr. Whelan and Marshall as to grounds of objection to plaintiff's evidence, as to evidence to be adduced on behalf of defendants and as to charges proposed to be given to the jury; that it is grossly unfair to him that his case be tried with that of Marshall; that he has paid and will pay for professional services rendered him in the preparation and presentation of his case; that he believes Marshall hopes

to benefit therefrom "up to a point" and will thereafter pursue his own course in a matter detrimental to appellant's interest and will basically disagree with appellant's testimony regarding property values.

[2] On these two affidavits appellant bases his claim of an abuse of discretion. The only statements contained in them as to probative facts are that Marshall delayed several days in coming to Mr. Whelan's office at appellant's request; that when he did come to Mr. Whelan's office he refused to discuss the case in appellant's presence; and that Marshall had not employed counsel, appraisers, or expert witnesses to assist in the presentation of the case upon the trial. The other statements made in the affidavits are mere conclusions. They are no more than mere predictions of prejudice. We cannot say that the trial judge could not have reasonably reached the conclusion that the affidavits failed to establish good cause to order separate trials.

Appellant's motion was made pursuant to section 1244, subdivision 5, of the Code of Civil Procedure, which provides:

"* * * All parcels of land, or other property or interest in or to property, lying in the county, and required for the same public use, may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of the parties. * * *"

Appellant relies upon the case of *Judson v. Malloy*, 40 Cal. 299. That case, no doubt, was controlling until the enactment of section 1244 of the Code of Civil Procedure in 1872. Since *Judson v. Malloy* was decided in 1870, it could not have been in contemplation of the code section. If it should now control, there would be no discretion in the trial court to deny a motion for separate trial and would completely negate the provision of section 1244 giving the court discretion to consolidate or sever such causes of action. After first conceding that such discretion is in the court, by his reliance upon *Judson v. Malloy*, appellant in effect assumes the position that it was mandatory for the court to grant the motion.

The case of *County of San Luis Obispo v. Simas*, 1 Cal.App. 175, 81 P. 972, a condemnation case, approved an order of the trial court denying a motion for separate trials. In *County of Sacramento v. Glann*, 14 Cal.App. 780, 789, 790, 113 P. 360, 364, the court, referring to *County of San Luis Obispo v. Simas*, supra, says:

"* * * the order of the trial court in refusing separate trials was challenged, and it was therein held that 'the discretionary power as to separation being vested in the trial court, and no abuse being apparent, its order will not be reviewed.' The court assumed that there was no question that said section includes the case of several defendants owning different parcels in the same county."

We find no later case construing section 1244, subdivision 5, of the Code of Civil Procedure.

[3, 4] When an attack is made upon a discretionary procedural order of the court, we may deduce that the order was not made in the exercise of sound discretion if the record of the trial indicates that such order resulted in probable or possible prejudice to a party. We have searched the record here for any instance of disagreement between appellant and Marshall as to the management of the defense or as to question of law arising during the trial. We find none. The reporter's transcript shows that Marshall made no objections during the trial, he challenged no prospective juror, counsel for appellant was not restricted in cross-examination of Marshall or Marshall's witness, and Marshall offered no instructions. Appellant's counsel during the trial suggested to the court that by reason of Marshall's status as owner he was entitled to give his opinion as to the value of his land, reminded Marshall that he had overlooked testifying concerning the elevation of the road above his land, interposed with the court to assist Marshall, and on cross-examination of Marshall elicited answers amplifying Marshall's claim that the building of the road would result in difficulty in obtaining permits to install an access ramp to the new road and to install water pipes through the road embankment. We are

not critical of the assistance thus given to Marshall, but it tends to show that appellant's prediction of prejudice made in his affidavits supporting his motion for separate trial was not realized at the trial.

II. Plaintiff urges that the evidence was insufficient to support the award of compensation by the jury.

Two expert witnesses on behalf of the county testified as to value, damages and special benefits. One of these experts gave his opinion that the value of appellant's property taken was \$1,100; that severance damages were in the amount of \$550 and that special benefits accrued to appellant's remaining property of a value of \$1,000, resulting in a net figure of \$1,500 as adequate compensation.

An expert witness for appellant testified that in his opinion the value of appellant's land taken was \$2,500, and that severance damages had accrued of a value of \$12,500. Appellant himself testified that he was damaged in a total of \$30,500, basing this opinion upon the difference between his estimate of a value of \$43,000 of all his property, before the taking, and \$12,500, the price he actually obtained for his remaining property, after the construction of the road and sixteen months after the taking.

The realtor, through whose agency appellant made the sale, stated that he was not familiar with the value of appellant's property as of the date of taking, had made no special investigation of other sales in the vicinity, and that, in his opinion, the price obtained for appellant's property was its fair market value at the time of its sale.

The verdict of the jury found the value of appellant's property taken to be \$1,625, severance damages of \$650, and value of special benefits to appellant's remaining property to be of a value of \$1,000, resulting in a net award to appellant of \$1,625. This was \$125 more than estimated by one of the county's experts and \$525 more than estimated by the other expert, but \$13,375.00 less than estimated by appellant's expert.

[5] The jury visited the premises during the course of the trial. We must infer that the observations made by the jury

upon such view constitute independent and substantial evidence which could be considered by the jury in arriving at a verdict. *Anderson v. State of California*, 61 Cal. App.2d 140, 142 P.2d 88; *People v. Al. G. Smith Co.*, 86 Cal.App.2d 308, 194 P.2d 750.

[6] It is the rule in California that in a condemnation action, in absence of a showing of passion or prejudice, the finding of a jury when supported by substantial evidence will not be set aside on appeal. *City of Fresno v. Hedstrom*, 103 Cal.App.2d 453, 229 P.2d 809; *Richter v. Walker*, 36 Cal.2d 634, 640, 226 P.2d 593; *Santa Barbara County v. Hollister Estate Co.*, 111 Cal.App. 564, 295 P. 866; *County of Los Angeles v. Carpenter*, 118 Cal.App.2d 871, 873, 258 P.2d 1056.

[7] We are unable to draw the inference suggested by appellant from the language used by the trial judge on February 26, 1954, when denying appellant's motion for new trial, that inference being that both the trial court and the jury disregarded the evidence as to value and relied only on the conclusions drawn upon the view of the premises. From the entire statement of the trial judge on that occasion we conclude that he fully agreed with the findings of the jury as to value and damages.

As to appellant's contentions that prejudicial error was committed by the trial court in refusing to admit in evidence defendant's exhibit "B" for identification and defendant's exhibit "C" for identification, our examination of those documents in the light of the testimony convinces us that not only was the trial court correct in sustaining objections to their receipt in evidence, but their receipt in evidence would have been error.

[8] Exhibit "B" for identification was a letter admittedly dictated by Mr. Whelan, signed by appellant, and dated October 19, 1953, 16 months after the taking of the property, to the Chula Vista Branch of the Bank of America National Trust & Savings Association, pertaining to the escrow established with said bank for the sale of appellant's remaining property to a Mr. and Mrs. Dickson. The last paragraph of that letter contained this language:

"It is and has been my contention that the entire tract was damaged by the taking of this right of way and in addition to the \$12,500.00 to be paid to me as aforesaid by Mr. Dickson, I am to have and I do reserve the right to collect damages for the taking of the right of way and the severance damages to the balance of the property by reason of that taking. In other words, if my property had not been damaged by reason of the taking of this right of way I would not have sold the entire tract for the sum of \$12,500.00 and I want it to be specifically understood by the purchaser, Mr. Dickson, as well as all concerned, that the sum of \$12,500.00 to be paid to me for my property is in addition to any recovery I may have or may obtain against the County of San Diego, not only for the taking of the right of way but for severance damages to the remainder of the property."

Appellant urges that this letter should have been admitted in evidence to prove that he, in making the sale to the Dicksons, reserved the right to compensation from the county. That reservation was not contested by the county. The fact that appellant had reserved such right was specifically testified to by him. The two expert witnesses for the plaintiff county also testified that they were aware of such reservation. No evidence to the contrary was presented, and counsel for the county made no contention to the contrary.

[9] Defendant's exhibit "C" for identification is a document reading as follows:

"C. R. Hanan

"Dear Realtor:

"Your property, listing number 101353 located at 3175 Glenn Abbey, C. V. has been inspected by 9 Realtors of the National City-Chula Vista Realty Board on 9-24-53. Each broker present submitted an estimate of the selling price of this property on today's market. These individual estimates were then added together and the total divided by the total number of brokers inspecting the property. The medium estimated price was found to

be 12,527. We hope this information will assist you in affecting an early sale.

"Yours very truly,

"Lillian Beam /s/

"Lillian Beam, Executive Secretary

"National City-Chula Vista Realty Board."

No citation of authority is needed in support of our conclusion that defendant's exhibit 'C' for identification is hearsay and that the exclusion thereof by the trial court was correct.

[10] We conclude that the court's order denying appellant's motion for a separate trial was properly made in the exercise of a sound discretion; that the evidence is sufficient to sustain the judgment and that no errors resulting in prejudice to appellant were made by the trial court in excluding the proffered exhibits.

The order denying appellant's motion for separate trial, not being an appealable order; Code Civ.Proc. § 963, the purported appeal therefrom is dismissed.

The judgment is affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.



135 Cal.App.2d 195

PEOPLE of the State of California,
Plaintiff and Respondent,
v.

ONE 1953 PONTIAC CATALINA AUTOMOBILE, License No. 9 N 16452, Engine No. C8XH1977, Defendant.

A. E. England Pontiac, Inc., Claimant and Appellant.
Civ. 5139.

District Court of Appeal, Fourth District,
California.

Aug. 23, 1955.

Proceeding to forfeit automobile for narcotics violations. Conditional vendor

asserted claim. The Superior Court of San Diego County, Dean Sherry, J., entered decree of forfeiture to the State of California and vendor appealed. The District Court of Appeal, Mussell, J., held that vendor did not comply with statute requiring a reasonable investigation of purchaser's moral responsibility, character and reputation before his interest was created in the automobile involved.

Judgment affirmed.

1. Forfeitures ☞3

A reasonable investigation of moral responsibility, character and reputation by vendor prior to creation of his vendor's lien, is one of the elements which must be proved before court is permitted to release vendor's interest from forfeiture of automobile for narcotics violation. Health and Safety Code, § 11620.

2. Forfeitures ☞3

Even though conditional vendor investigated purchaser's moral responsibility, character and reputation at time of purchase of first automobile, statute required vendor to make a new investigation at time of purchase of second automobile the next year in order to assert claim to second automobile forfeited for narcotics violation. Health and Safety Code, § 11620; West's Ann.Civ.Code, § 3532.

3. Forfeitures ☞3

Investigation by conditional vendor into financial standing or credit rating of automobile purchaser is not sufficient to satisfy statute requiring reasonable investigation of purchaser's moral responsibility, character and reputation as a condition to prevent forfeiture of conditional vendor's interest if automobile is used in narcotics violation. Health and Safety Code, § 11620.

4. Forfeitures ☞5

Reasonableness of investigation which statute requires a conditional vendor to make concerning purchaser's moral responsibility, character and reputation in order for court to release his claim to automobile forfeited for narcotics violation is ques-

tion of fact to be determined in each case. Health and Safety Code, § 11620.

5. Forfeitures ¶5

Conditional vendor's liens for attorney fees under conditional sales contract when asserted in proceeding to forfeit automobile for narcotics violation were not allowable in absence of statutory provision allowing such fees. Health and Safety Code, § 11610 et seq.

William P. Mealey, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Delbert E. Wong, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

This is an appeal by the claimant, A. E. England Pontiac, Inc., from a judgment ordering the forfeiture of a 1953 Pontiac Catalina automobile to the State of California pursuant to sections 11610 et seq., of the Health and Safety Code relating to forfeiture of vehicles used to unlawfully transport narcotics. The principal question involved is whether the appellant complied with the provisions of section 11620 of the Health and Safety Code requiring a conditional vendor to prove his contract to be bona fide and that his right, title, or interest in the automobile involved was created after reasonable investigation of the moral responsibility, character and reputation of the purchaser.

An agreed statement on appeal was filed herein and there is no dispute as to the following facts. On March 21, 1954, one Harry M. Pipes was arrested in the city of Escondido while driving the automobile here involved. He was under the influence of narcotics at the time and had in his possession codeine concealed in a camera case, together with a hypodermic. The car was seized by the police officers and is being held pending the outcome of these proceedings. Pipes had purchased the automobile from appellant on December 12, 1952, under a conditional sales contract. At the time of the purchase appellant received from Pipes a customer's statement, which was introduced in evidence as claim-

ant's exhibit "A". This document was signed by Pipes and contains his statements as to his address, income, ownership of property and encumbrances thereon, trade or occupation, previous employer, installment obligations, business and personal references and name of nearest relative. No investigation of the moral responsibility, character and reputation of Pipes was made by appellant at the time of the sale of this automobile other than the taking of said statements, exhibit "A".

In December, 1951, appellant sold a Pontiac automobile to Pipes under a conditional sales contract and at that time Pipes furnished the appellant a customer's statement in substantially the same form as exhibit "A" herein. This statement was introduced in evidence as claimant's exhibit "B". In checking the information contained in exhibit "B", Mr. Roozen, appellant's sales manager, made a telephone inquiry of the Beebe Drug Company in Escondido. The person who answered the telephone advised Mr. Roozen that the purchaser (Pipes) was employed by the drugstore as a druggist and was a person of good moral character and reputation. Mr. Roozen did not contact any of the other personal or business references listed on the customer's statement, exhibit "B". Subsequent to his purchase of the first automobile, Pipes made the regular payments under the conditional sales contract according to its terms and called at appellant's place of business six to ten times during the following twelve-month period for the purpose of making the payments and having the vehicle serviced. During these visits the head salesman became acquainted with Pipes.

It was stipulated at the time of trial that at all times involved herein Pipes was a registered pharmacist and that if appellant were entitled to a lien on the vehicle for reasonable attorney fees, the amount of said lien would be \$250. It was further agreed that at the time of said arrest and seizure appellant had a right, title and interest in and to said vehicle in the sum of \$944.70; that the right, title and interest of said A. E. England Pontiac, Inc. in and to said vehicle was bona fide and was made without any knowledge that said vehicle was

being or was to be used in violation of the provisions of law relating to narcotics.

The trial court found, among other things, that appellant made a reasonable investigation of the moral responsibility, character and reputation of Pipes prior to the purchase by him of an automobile in December, 1951, but that the interest of appellant in the automobile herein involved and acquired on December 12, 1952, was created without a reasonable investigation of the moral responsibility, character and reputation of Pipes. The trial court concluded that the said automobile should be forfeited to the State of California and entered its decree accordingly.

Appellant contends that a reasonable investigation of the moral responsibility, character and reputation of the purchaser of the automobile was made by appellant as required by section 11620 of the Health and Safety Code and that therefore the judgment should be reversed. We are unable to agree with this contention.

Notice of seizure and intended forfeiture proceedings was served on the appellant herein as required by section 11610 of the Health and Safety Code, which provides that a vehicle used as charged in the notice shall be forfeited to the State. Section 11620 provides that a claimant of any interest in the vehicle may "prove" that his lien or conditional sales contract was bona fide "and" that his interest was created after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser and without any knowledge that the vehicle was being or was to be used for the unlawful purpose.

[1] In *People v. One 1940 Ford V-8 Coupe*, 36 Cal.2d 471, 224 P.2d 677, 679, the court, in discussing said sections of the Health and Safety Code, said: "The statutory provisions require a reasonable investigation prior to the creation of the lien as one of the elements which must be *proved* before the court is permitted to release the claimant's interest from the forfeiture." In that case evidence was introduced at the trial to the effect that an investigation made at the time of the creation of the lien would

have shown that the purchaser under a lease contract was a person of moral responsibility and of good repute. The trial court applied the provisions of section 3532 of the Civil Code that the law neither does nor requires an idle act. The Supreme Court said that since an investigation was not made, the provisions of section 3532 of the Civil Code could not avail to prevent a forfeiture of the lien claimant's interest; that the investigation required by the statute may not be said to be an idle act even though proof at the trial may be entirely in favor of the claimant; that the legislature intended that the function of ascertaining the facts must be exercised in the first instance by the lender in pursuing his investigation; and that only the question of reasonableness be left to the court.

In *People v. One 1941 Chevrolet Coupe*, 113 Cal.App.2d 578, 248 P.2d 786, 788, the court, in discussing the reasonableness of the investigation by the lien claimant, said:

"Whether it was reasonable is a question of fact to be tested by the legal standards ordinarily applied and the burden of proof rests upon the claimant to establish his rights. There is no formula for 'a reasonable investigation'. Whether the efforts of the claimant have met the lawful requirements is to be determined by the proof in each case. However, one rule has been developed, to wit, a good financial standing or an excellent credit rating of the registered owner is not sufficient. The law is not satisfied unless the investigation uncovers the 'moral responsibility, character and reputation of the (purchaser).' *People v. One 1941 Buick Club Coupe*, 72 Cal.App.2d 593, 597, 165 P.2d 44, 49. A sincere investigation should disclose the home address of the prospective purchaser, his employer or place of business, the sources of his income, his family or social connections and his standing in his community. *People v. One 1939 Buick 8 Coupe*, 43 Cal.App.2d 411, 416, 110 P.2d 1013; *People v. One 1940 Buick 8 Sedan*, 70 Cal.App.2d 542, 550, 161 P.2d 264."

[2-4] Appellant argues that since it made a reasonable investigation in 1951 of the moral responsibility, character and reputation of Pipes and ascertained then that he was a registered pharmacist and that his moral responsibility and character were good, and since Pipes had become a customer of claimant for approximately one year, it became unnecessary to conduct a new or further investigation in 1952 when the automobile involved herein was sold and that such an investigation would not have furnished appellant with any further information. However, as was held in *People v. One 1940 Ford V-8 Coupe*, supra, 36 Cal.2d 471, 224 P.2d 677, the provisions of section 3532 of the Civil Code could not avail appellant to prevent a forfeiture, even though proof at the trial may be entirely in favor of the claimant. The record shows that appellant made no effort to verify the facts stated in the customer's statement furnished by Pipes, made in 1952. The fact that appellant made a sufficient investigation of the moral responsibility, character and reputation of Pipes in 1951, as found by the trial court, does not, in our opinion, excuse compliance with section 11620 of the Health and Safety Code at the time of the creation of claimant's lien on another automobile purchased a year later. The record shows that Pipes called at appellant's place of business between 1951 and 1952. However, there is nothing in the record to indicate that these were any more than casual business contacts. It was stipulated that at all times involved Pipes was a registered pharmacist and appellant argues that it had a right to rely on this fact. However, there is no indication in the record that appellant made any effort to ascertain whether Pipes was in fact a pharmacist at the time of the sale of the vehicle in question. In his customer's statement, made in 1952, (Exhibit "A") Pipes stated his trade or occupation as "Druggist" and his previous employer as "Beebe Drug Co.", and in his customer's statement in 1951 (Exhibit "B") Pipes stated his trade or occupation as "Pharmacist" and his previous employer as "Self". Appellant in 1952 made no effort to ascer-

tain whether Pipes was self-employed, as stated in 1951, or whether he was in fact employed by the Beebe Drug Company. It was stipulated at the oral argument herein that the notations in pencil on Exhibit "A" are not part of said exhibit. While Pipes made his periodic payments on the contract, that, in itself, was insufficient. An investigation into the financial standing or credit rating of a purchaser of a car is not sufficient—the law requires an investigation of the moral responsibility, character and reputation of the purchaser. *People v. One 1940 Buick 8 Sedan*, 70 Cal.App.2d 542, 548, 161 P.2d 264. And as is said in that case, the statute does not prescribe the maximum or minimum of the investigation that must be made. It requires "reasonable" investigation of the factors involved. What is reasonable must be governed by the facts of each case and the question as to whether a proper investigation has been made is one of fact and is to be tested by the legal standards ordinarily applied to such fact questions. Tested by these standards and those set forth in *People v. One 1940 Ford V-8 Coupe*, supra, 36 Cal.2d 471, 224 P.2d 677, and *People v. One 1941 Chevrolet Coupe*, supra, 113 Cal.App.2d 578, 248 P.2d 786, we cannot hold that the court's finding herein that the interest of appellant in the automobile acquired by Pipes in 1952 was created without a reasonable investigation of the moral responsibility, character and reputation of Pipes is unsupported as a matter of law.

[5] Appellant further contends that it is entitled to recover attorney fees as provided under the terms of its conditional sales contract. No authority to support this contention is cited and the statutes, Health and Safety Code, secs. 11610 et seq., do not provide for the allowance of attorney fees to claimants. Appellant may be entitled to recover such fees from Pipes pursuant to the contract, but that is not a matter involved in this proceedings.

The judgment is affirmed.

BARNARD, P. J., and SHELL, J. pro tem., concur.

134 Cal.App.2d 232

In the Matter of the ESTATE of August KELLER, also known as A. Keller, also known as John Doe Keller, also known as Richard Roe Keller, Deceased.

Jullus Keller et al., Appellants.

Bank of America National Trust & Savings Association, as executor of the last will and testament of August Keller, alias, deceased, Sanfra Keller, Sanfra Keller, as assignee of Wilhelm Keller and Clara Keller, Respondents.

Civ. No. 8591.

District Court of Appeal, Third District, California.

June 30, 1955.

Hearing Denied Aug. 17, 1955.

Proceeding in the matter of the estate of a decedent, involving dispute as to proper interpretation of will. The Superior Court, Modoc County, A. K. Wylie, J., entered a decree of distribution, and certain legatees appealed. The District Court of Appeal, Finley, J. pro tem., held that under bequest of 20 per cent of the properties of testator's estate, legatees were entitled to 20 per cent of net estate after payment of debts, expenses of administration, and taxes and not to 20 per cent of gross estate.

Judgment affirmed.

1. Wills ⇨456

Testamentary intent is to be gathered if possible by giving the most ordinary interpretation to language used in will without resorting to specious and fanciful reasoning.

2. Wills ⇨435

Courts may not rewrite a will under the guise of construction.

3. Wills ⇨455, 463

Testator's words and all of them should be considered in the light of common sense and given effect if it appears that violence to such virtue will not result in so doing.

4. Evidence ⇨16

It is common knowledge that people frequently use words without pausing to

give careful and detailed consideration to each possible aspect or shade of meaning.

5. Wills ⇨435

Where actual ambiguities occur in will, rules of interpretation and construction, if realistic, are helpful.

6. Wills ⇨472

In construing a will, consideration should first be given to the order in which the provisions thereof appear, and, unless some contrary design is apparent, each provision in will must be considered in the light of the preceding provisions.

7. Wills ⇨827

Statutory provision for payment of debts, expenses of administration, and family allowance out of residuary estate under specified circumstances is controlling, only if no contrary testamentary intent appears from language of will and will makes provision for residuary legatees and devisees. Probate Code, § 750.

8. Wills ⇨827

Testamentary direction that executor pay testator's just debts and all taxes, including inheritance taxes, though redundant, cannot be ignored any more than any other provision of will, if to give such direction effect will place no strain upon the construction as a whole.

9. Wills ⇨827

Direction, appearing first in will, that executor pay just debts and all taxes, including inheritance and estate taxes, should be interpreted as meaning that items therein mentioned should be paid prior to division of estate.

10. Wills ⇨466

Where cash assets amounted to less than \$5,000, whereas total estate amounted to almost \$160,000, use of the words "properties of my estate," in bequeathing to brothers and sisters 20 per cent of such properties disclosed no testamentary intent to create a salient distinction between such properties and the "rest, residue and remainder of estate" bequeathed in next paragraph to named cousin and wife and daughter.

11. Wills ⇐455

That different terms are used in different provisions of will constitutes no legal mandate that some distinction must of necessity be drawn.

12. Wills ⇐1, 439

A testator may provide for preferential treatment of members of a class, and rules of testamentary construction may require such treatment where necessary to resolve actual uncertainties, but where testator expresses his intention and it is reasonably apparent from a consideration of will as a whole what testator's desire was, such intention should be given effect without resort to artificial rules of construction.

13. Appeal and Error ⇐842(1)

Reviewing court is not bound by trial court's interpretation of a legal document.

14. Wills ⇐706

The most sensible and reliable test in reviewing trial court's construction of will is whether conclusion of trial court is the one which would be reached by nearly every attorney or layman upon a reading of the will without bias or any personal interest in the outcome.

15. Wills ⇐1, 452

Testator had power to favor a cousin and his wife and daughter over testator's brothers and sisters to whatever extent testator chose, and where he bequeathed only 20 per cent of his properties or estate to brothers and sisters and the remainder to cousin and his family, court was not entitled to indulge in presumption that testator intended to favor brothers and sisters.

16. Wills ⇐486

Legal presumptions may be resorted to as an aid to interpretation of otherwise ambiguous testamentary provision.

17. Wills ⇐587(1)

No particular mode of expression is necessary to constitute a residuary legatee and there is no particular clause or expression which, when used by a testator, will impart to each word a technical legal significance and thereby ipso facto constitute all recipients thereunder residuary legatees. Probate Code, § 161(4).

18. Wills ⇐587(1)

The expression "rest, residue and remainder", as used in a will, has no specific unequivocal technical meaning consistent only with statutory definition of residuary legacy. Probate Code, §§ 161(4), 750.

See publication Words and Phrases, for other judicial constructions and definitions of "Rest, Residue and Remainder".

19. Wills ⇐827

Under will directing executor to pay debts and all taxes, including inheritance and estate taxes, bequeathing 20 per cent of the properties of testator's estate to be divided equally among named brothers and sisters, and bequeathing the rest, residue and remainder of estate to named cousin and cousin's wife and daughter, brothers and sisters were entitled to 20 per cent of net estate after payment of debts, expenses of administration and taxes and not to 20 per cent of gross estate. Probate Code, §§ 161(4), 750, 950-956, 970; Revenue and Taxation Code, § 14101 et seq.

Charles Lederer, Alturas, and Otto A. Hoecker, John V. Copren, San Francisco, for executor.

Paul B. Baker, Alturas, for respondents.

FINLEY, Judge pro tem.

This appeal is from the decree of distribution entered in an estate and involves a dispute over the interpretation placed by the probate court upon the provisions of a will.

August Keller died on November 18, 1951, leaving a witnessed will which had been prepared by an attorney who became one of the attesting witnesses and who also became attorney for the executor for purposes of probate. The dispute concerns the difference in construction placed by the parties upon the following provisions of the will:

"First: I direct my Executor hereinafter named to pay my just debts as soon as it has funds of my estate and in hand sufficient for the purpose, and I also direct my said Executor to pay all taxes levied and assessed against my

property and all inheritance taxes and estate taxes.

"Fourth: I give, bequeath and devise to my brothers Julius Keller, Eugen Keller and Adolf Keller and to my sisters Pauline Schefter and my sister Margaret, whose last name I cannot recall, twenty (20%) per cent of the properties of my estate to be divided equally between my said brothers and sisters, all of whom reside in Switzerland.

"Fifth: I give, bequeath and devise all the rest, residue, and remainder of my estate unto my cousin Wilhelm Keller and his wife Sanfra Keller and their daughter Clara Keller to be equally divided between them, and all of whom are residing in Modoc County, California."

Appellants take the position that provision numbered "Fourth" should be interpreted to mean that the legatees and devisees thereunder are entitled to distribution of 20% of the gross estate and that all debts, costs of administration and taxes should be paid from that portion willed to the so-called residuary legatees under paragraph "Fifth". The probate court disagreed with this interpretation and in the decree of distribution adopted respondents' view, which is that all debts, costs and taxes should be deducted from the gross estate and that the net only should be distributed, 20% to appellants and 80% to respondents.

Appellants have urged several technical reasons in support of their position. Most of them are not applicable for it appears here that the intent of the testator can be gathered from the wording of the will.

[1-5] Over the centuries covering the history of wills and the probate thereof, many ingenious rules have been promulgated as aids in the interpretation of testamentary provisions which have been questioned. Throughout the numberless decisions on the subject, however, there has survived the cardinal rule that what the testator intended to accomplish is to be gathered if possible by giving the most ordinary interpretation to the language used without resorting to specious and

fanciful reasoning. In *re Estate of Puett*, 1 Cal.2d 131, 33 P.2d 825; In *re Estate of Heard*, 25 Cal.2d 322, 153 P.2d 553; In *re Estate of Bourn*, 25 Cal.App.2d 590, 78 P.2d 193. Courts are not invested under the guise of construction with the privilege of rewriting a testator's will. In *re Estate of Beldon*, 11 Cal.2d 108, 77 P.2d 1052; In *re Estate of Bendell*, 59 Cal.App.2d 165, 138 P.2d 378; In *re Estate of Swan*, 5 Cal.2d 635, 55 P.2d 1171. The testator's words and all of them should be considered in the light of common sense and given effect if it appears that violence to this simple virtue will not result in so doing. In *re Estate of Puett*, *supra*. It is common knowledge not only among courts and lawyers but also among others who deal with the problem of accurate expression, that people, even lawyers and judges many times used words without pausing to give careful and detailed consideration to each possible aspect or shade of meaning. When actual ambiguities occur, rules of interpretation and construction, if realistic, are helpful. But the fallacies underlying a strained construction tailored by the advocate to effect a desired result are usually apparent to those interested only in determining what the testator sought to achieve.

[6,7] We can see nothing unusual or particularly challenging in the layout, provisions or wording of this will. We are convinced that consideration should first be given to the order in which the provisions appear, for, unless some contrary design is apparent, what could be more logical in applying rules of interpretation than to say that each subsequent provision in a will must be considered in the light of that which has gone before. In the will before us the draftsman specified the order in which the mandates thereof were to be carried out and first on the list, and so specified by use of the word "First" at the beginning of the paragraph, is that the executor is to pay the testator's "just debts" and "all taxes levied and assessed against my property and all inheritance taxes and estate taxes." It is not provided that these payments are to be made from any specific fund or the residue of the estate. In this connection appellant cites section 750 of the Probate

Code, which, of course, is controlling if no contrary testamentary intent appears from the language of the will and if those mentioned in paragraph "Fifth" of the will are to be considered "residuary legatees and devisees."

[8, 9] The only direction in paragraph numbered "First" is that the items therein mentioned are to be paid. It is argued by respondent, and not without some justification, that this provision is redundant because the law requires these things to be done anyway. This may be true, but having chosen to include such a provision, if the testator had any impelling desire to have these obligations paid from the residue or any fund other than the general corpus of his estate this could easily have been accomplished by the inclusion of not more than three words, such as "from the residue". We recognize that, even though a provision directing the payment of debts, costs of administration and taxes is ordinarily redundant, a great many wills as a matter of form do carry such provisions. Under the accepted rules of interpretation and sound reason, this provision cannot be ignored, any more than can any other provision, if to give it effect would place no strain upon the construction as a whole. All things considered, we find the simplest and most obvious interpretation to be that the items therein mentioned should be paid before there is a division of the assets. In *re Estate of Hinckley*, 58 Cal. 457; In *re Estate of Bauer*, 59 Cal.App.2d 152, 138 P.2d 717; In *re Estate of Dargie*, 19 Cal. App.2d 215, 64 P.2d 1131.

[10, 11] The principal point upon which appellants predicate their claim to preferential treatment is that in paragraph numbered "Four" which contains the provision for their participation, the words "properties of my estate" are used in contradistinction to the words "rest, residue, and remainder of my estate" as used in paragraph numbered "Fifth". It is worthy of note, however, that at the time of the death of the testator the assets of his estate consisted primarily of ranches or interests in real estate and in cattle and other personal property aside from cash. From the original inventory it appears that the actual

cash asset amounted to less than \$5,000, whereas the total estate amounted to \$159,136.23. Therefore, as a matter of fact, whether the testator used the words "properties of my estate" or "the rest, residue and remainder of my estate", he was apparently still referring to his total assets. He made no mention of specific lands or goods in any dispositive provision. This being so, it seems obvious that the testator had in mind no thought of creating a salient distinction when he used the words "properties of my estate" in paragraph "Fourth" and "the rest, residue, and remainder of my estate", in paragraph "Fifth". Furthermore, the fact alone that different terms were used constitutes no legal mandate that some distinction must of necessity be drawn. In *re Estate of Heard*, supra.

Appellants complain that in not adopting their interpretation the probate court in effect read the word "net" into paragraph Fourth when it is not there. By the same token it is just as reasonable to say that had the court adopted appellants' interpretation it would of necessity have read the word "gross" into that provision and neither is that word there.

[12-14] A testator may, of course, provide for preferential treatment of the members of a class, and the rules of testamentary construction sometimes require it where necessary to resolve actual uncertainties. But where the testator expresses his intention and where it is reasonably apparent from a consideration of the will as a whole what his desire was, this should be given effect without resort to application of artificial rules. In *re Estate of Beldon*, supra. The probate court here made its finding, and, although an appellate court is not bound by a trial court's interpretation of a legal document, *Wagner v. Shapona*, 123 Cal.App.2d 451, 267 P.2d 378; *Leonard v. Huston*, 122 Cal.App.2d 541, 265 P.2d 566, we are satisfied that in this case the conclusion of the trial court is the one which would be reached by nearly every lawyer or layman upon a reading of the will without bias or any personal interest in the outcome. This would appear to be the most sensible and reliable test.

In re Estate of Kirby, 199 Cal. 135, 248 P. 517, is cited and relied upon by respondent as a case much the same in its general aspects as the case at bar. With this we agree. A similar point was involved and the manner of its resolution has been a guiding factor here. Appellants complain that: "The opinion in the Kirby case is noteworthy for the complete absence of any citations of authorities, code sections, or cases." They then continue: "Appellants surmise that the learned Justices must have had in mind the principle enunciated in other cases that 'very little aid can be procured from adjudged cases in the construction of wills.'" Appellants' "surmise" is undoubtedly well founded, for no two wills are exactly alike and but few are sufficiently similar in the wording of dispositive provisions so that a decision interpreting one would be of any great help in interpreting another. Evidence of this is the dearth of appellate decisions construing identical or closely worded provisions under comparable circumstances. We believe that this demonstrates the truth of the following quotation set forth by appellants in their opening brief:

"In support of their construction of the will learned counsel for respondent have cited and discussed very many decisions of courts of last resort. It may be said as to all of them that none disputes the paramount rule that the ultimate question is the intention of the testator as expressed in the will, and that technical rules of interpretation must yield to an intention clearly expressed. The real question discussed in all of them is, What did the testator mean in view of the language he has used in his will, in the light afforded by certain rules of interpretation which must prevail where a contrary intent does not clearly appear on the face of the will? Such is the question here involved. We have said: 'Of this class of questions, it may be said, with more truth, perhaps, than of any other, that each case depends upon its own peculiar facts, and that precedents have comparatively small value. "Except for the establishment of general prin-

ciples, very little aid can be procured from adjudged cases in the construction of wills.'" ([In re] Estate of Henderson, 161 Cal. 353, 357 [119 P. 496, 498]. See, also, Rosenberg v. Frank, 58 Cal. 387; Le Breton v. Cook, 107 Cal. 410, 416 (40 P. 552).) ([In re] Estate of Wilson, 184 Cal. 63, 67 [193 P. 581]). [In re] Estate of Henderson, 161 Cal. 353, 357 [119 P. 496; In re] Estate of Major, 89 Cal. [pp.] 238 [264 P. 542]; Rosenberg v. Frank, 58 Cal. 387."

[15, 16] Appellants argue at some length that, inasmuch as the legatees and devisees provided for in paragraph Fourth are brothers and sisters of the testator and those in paragraph Fifth are only a cousin and this cousin's wife and daughter, the rules of construction require us to indulge in the presumption that the testator's intent and purpose was to favor his brothers and sisters over the cousin and his family. The answer to this argument seems to be that it lay within the power of the testator to favor them to any extent he chose, even up to leaving them his entire estate, had he seen fit to do so. The fact remains that he left his brothers and sisters only 20% of his properties or estate while the remainder of 80% was left to the cousin and his family. Having expressed his preference by a percentage weighing so heavily in favor of the cousin and his family, we are not convinced, that contrary to this express election, we are entitled to indulge in any presumption which does not accord with it merely because certain rules laid down in the probate code provide that legal presumptions may be resorted to as an aid to interpretation of an otherwise ambiguous testamentary provision.

[17] Finally, appellant urges that a different construction should be placed upon use of the words "properties of my estate" than upon the words "rest, residue and remainder of my estate" because an attorney drew the will and, therefore, under the rule announced in Re Estate of Bourn, supra [25 Cal.App.2d 590, 78 P.2d 196], "the presumption that legal terms embodied in the will are used in their legal sense is all but conclusive." This rule, however, is to

be no more preferred than any other of the general rules laid down as aids in construction. Upon seeking to apply the rule above-quoted from *In re Estate of Bourn*, the question arises as to just what is to be defined as a legal term. At what point do common words undergo the change from common words to legal terms or words used in their legal sense? It is conceded that the expression "rest, residue and remainder" is one common to testamentary phraseology, but we have doubt that this fact alone would be sufficient to initiate its component terms into such an exclusive society of legal words as "fee title", "easement", "garnishment", "demurrer", etc., which are unquestionably legal words used in a legal sense wherever they appear. All who are familiar with the law recognize that the word "remainder" is one familiar to the common law, and when used in connection with an estate in real property has a very definite legal significance. When it is used to designate such an estate it may obviously be said to be used in a technical or in its legal sense. But, as pointed out in *Re Estate of Upham*, 127 Cal. 90, 59 P. 315, and *In re Estate of Lawrence*, 17 Cal.2d 1, 2, 108 P. 2d 893, 897, "No particular mode of expression is necessary to constitute a residuary legatee." We take this to mean that no particular clause or expression has yet been adopted as one which, when used by a testator, will impart to each word used a technical legal significance and thereby ipso facto constitute all recipients thereunder residuary legatees.

[18] Appellants in their briefs have set forth several excerpts, one from Webster's New International Dictionary and several from decided cases, in support of their claim that those named in paragraph Fifth are residuary legatees. Generally stated, the language quoted is to the effect that the "residue" or "remainder" of an estate is that portion left over: "after the satisfaction of all *debts* and previous devises and bequests." Webster's New International Dictionary, second edition, page 1966; *Security-First National Bank v. Wells*, 88 Cal.App.2d 210, 198 P.2d 700. "After payment of *debts* and legacies * * *." *In re Estate of Lawrence*, 17

Cal.2d 1, 108 P.2d 893. "After satisfying bequests and devises." 69 C.J. 413, sec. 1472; *Childs v. Gross*, 41 Cal.App.2d 680, 107 P.2d 424. (Emphasis added.) It will be noted that in the above quotations where emphasis has been added, the so-called "residuary" clause refers to that part of the estate remaining over after the bequests and also *debts* have been paid. These definitions are not in conflict with the provisions of section 750 of the Probate Code which merely directs that if no other provision for payment of "debts" is made by the testator or if the provision is made, but is inadequate for the purpose, and if that portion of the estate not disposed of by the will is insufficient, then the *debts*, expenses of administration or family allowance must be paid from "property given to residuary legatees and devisees." It appears, therefore, that the expression "rest, residue and remainder" has not been endowed by use or decision with any specific unequivocal technical definition. Certainly the authorities cited do not support appellants' conclusion that use of those words is consistent only with the definition of a residuary legacy set forth in Probate Code section 161, subdivision (4).

Appellants do not attempt to define the words "the properties of my estate" further than to say that the legacy thereby provided falls within the classification of "general legacies" as defined in Probate Code, § 161, subdivision (5). The question remains unanswered by appellants, excepting by the extent of their claim, whether they consider that the words "the properties of my estate" refer to real property only, to all real and personal property excepting the cash assets or to all real and personal property including cash. The record shows that all real and personal property has been sold and that the estate to be distributed now consists entirely of cash. What effect, if any, this might have upon the claims of the parties is not discussed.

[19] From an over-all consideration of the questions presented, together with our interpretation of what was intended by the legislature under the provisions of sections 950-956 and section 970 of the Probate Code and sections 14101 et seq. of the Reve-

nue and Taxation Code, we conclude, and so hold, that the proper and logical interpretation of the provisions of this will is that the testator intended to divide his entire estate in proportions of 20% and 80% after all debts, expenses of administration and taxes were "First" paid.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



135 Cal.App.2d 173

Leon SILVERBERG, also known as Lee Silver, Plaintiff and Appellant,

v.

Paul I. TERASAKI and Shuhel Terasaki, Defendants and Respondents.

Civ. 20861.

District Court of Appeal, Second District, Division 1, California.

Aug. 22, 1955.

Negligence action. The Superior Court of Los Angeles County, Wallace L. Ware, J., rendered judgment for defendant. Plaintiff appealed. The District Court of Appeal, Doran, J., held that in action arising out of intersection collision on rainy day between plaintiff's automobile which made a left turn and defendant's automobile which passed to right of automobiles that had yielded to plaintiff and, after applying brakes, skidded on wet pavement and struck rear of plaintiff's automobile, the issue of whose conduct was the proximate cause of the accident was one of fact for the jury.

Affirmed.

1. Automobiles ☞245(59)

In action arising out of intersectional collision on rainy day between plaintiff's automobile, which made a left turn, and defendant's automobile, which passed to the

right of automobiles that had yielded to plaintiff and, after applying brakes, skidded on wet pavement and struck rear end of plaintiff's automobile, the issue of whose conduct was the proximate cause of the accident was one of fact for the jury. Vehicle Code, § 529(b).

2. Appeal and Error ☞1064(1)

In action arising out of intersectional collision on rainy day between plaintiff's automobile, which made a left turn, and defendant's automobile, which passed to right of automobiles that had yielded to plaintiff and, after applying brakes, skidded on wet pavement and struck rear of plaintiff's automobile, instruction pertaining to no liability without fault and unavoidable accidents was not prejudicial to plaintiff.

Clarke & Gleis, Stanley N. Gleis, Beverly Hills, for appellant.

Betts, Ely & Loomis, Ingall W. Bull, Jr., Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from the judgment following the jury verdict for defendant.

Appellant was driving a small Anglia automobile east on Sunset Boulevard in Los Angeles in the lane next to the center line. Respondent was driving west in the lane next to the curb. As recited in appellant's brief, "The traffic signals at the intersection of Sunset Boulevard and Vine Street changed to 'Stop' for eastbound traffic as Appellant approached said intersection. Appellant stopped his automobile with the front end of said automobile just west of the westerly line of the westerly crosswalk at said intersection. When the traffic signals changed to 'Go' for the east and westbound traffic, Appellant gave the proper signal with the mechanical signal on his said automobile and also with his arm for a left turn to go north on Vine Street. Appellant proceeded in an easterly direction into the intersection and stopped to yield to the westbound traffic. The westbound automobile in the lane next to and north of the center line of Sunset Boulevard signalled and turned left to go south on Vine Street. The westbound au-

tomobile in the second lane north of the center line of Sunset Boulevard stopped and yielded the right of way to Appellant and the driver motioned with his arm for Appellant to continue his turn in front of him. Appellant proceeded in his turn and when Appellant was about entering the most northerly lane or curb lane of travel on Sunset Boulevard for westbound traffic, he observed the automobile of Shuhei Terasaki, Respondent, which was being driven by Paul I. Terasaki, Respondent, with the consent of Shuhei Terasaki, Respondent. At the time Appellant first observed Respondent's automobile, it was being driven in a westerly direction in the lane next to the north curb of Sunset Boulevard and was east of the easterly crosswalk line of Vine Street and was passing to the right of the automobiles that had yielded to the Appellant.

"Appellant proceeded out of the intersection by accelerating and endeavoring to get out of the path of the oncoming automobile of Respondent's. As Appellant's automobile was leaving the intersection, Respondent's automobile forcibly struck the right rear one-half of the Appellant's automobile." It appears from the record that it was raining or had been raining and the street was wet. Again, quoting from appellant's brief, "Respondent testified that he first applied his brakes after he saw Appellant's car, but that his car did not stop but skidded on the wet pavement and struck the middle and rear portions of appellant's car at the time when Appellant's car was about six (6) to eight (8) feet south of the north boundary of the intersection, and Appellant's car was then about twenty-five (25) feet west of the east boundary of the intersection."

It is contended on appeal that, "The evidence is insufficient to justify the judgment and the judgment is contrary to law." It is argued by appellant that, "Respondent's own testimony clearly shows he was negligent"; that "There is no substantial evidence to support a finding that appellant was guilty of contributory negligence"; that "Appellant had a legal right to proceed with his left turn, and respondent had the legal duty to avoid the collision"; that

"Appellant had the right to assume that respondent would obey the law and particularly would obey the mandate of Vehicle Code, section 529(b)"; and that, "It was prejudicial error for the court to give an instruction on unavoidable accident."

[1] The record presents a typical case of an automobile accident. The decisions relating to such actions are legion and citations as to the issues raised are unnecessary. A review of the record presents no prejudicial errors. The jury was fully and properly instructed. The issue of whose conduct was the proximate cause of the accident was purely one of fact and for the jury's determination. That the evidence supports the verdict and judgment there is no question.

[2] In the circumstances the giving of the instruction on unavoidable accident was not error. The instruction read as follows:

"In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it."

The instruction is not complicated and it must be assumed that it was understood by the jury. The issue as to negligence applied to both parties and from a review of the record it does not appear that any prejudice could have resulted from such instruction.

The judgment is affirmed.

DRAPEAU, J., concurs.

WHITE, Presiding Justice (concurring).

Assuming, as contended by appellant, that there is practically no conflict in the testimony of the witnesses as to the facts leading up to the accident, then, of course, inferences to be drawn therefrom would be resorted to. Conceding that different inferences might be drawn from the undisputed evidence, those adopted by the duly

constituted arbiter of the facts must be accepted by a reviewing court unless it can reasonably be said that the inferences so drawn in the court below are inherently improbable. Negligence is a relative term, depending upon the surrounding facts and circumstances. It is primarily a question of fact for the jury. *Mah See v. North American Accident Ins. Co.*, 190 Cal. 421, 426, 213 P. 42, 26 A.L.R. 123. While all the evidence must be examined by the appellate court it is not weighed. We cannot retry the cause. All the evidence most favorable to the respondent must be accepted as true and that unfavorable be discarded as not having sufficient virtue to be accepted by the triers of fact. When so viewed, the evidence is sufficient as a matter of law, the judgment must be affirmed. For the rule governing the limitations of the court on appeal see *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 429, 45 P.2d 183.



135 Cal.App.2d 139

Alice McNAMARA and Stanley J. McNamara, Plaintiffs and Respondents,

v.

SAN DIEGO TRANSIT SYSTEM, a corporation, Defendant and Appellant.

Civ. 5113.

District Court of Appeal, Fourth District, California.

Aug. 18, 1955.

Rehearing Denied Aug. 31, 1955.

Hearing Denied Oct. 13, 1955.

Action by pedestrian against bus line for injuries received when bus struck her while she was walking across street. The jury returned verdict for bus line, and the Superior Court, San Diego County, Arthur L. Mundo, J., granted pedestrian's motion for new trial, and bus line appealed. The District Court of Appeal, Mussell, J., held that instruction which stated pedestrian had continuous duty to look in direction of anticipated danger did not leave jury free

to decide what would constitute due care during time in which pedestrian was crossing street, and trial court properly granted new trial for this reason.

Order affirmed.

1. Trial $\Rightarrow$ 194(16)

In action by pedestrian against bus line for injuries received when bus struck her while she was walking across street, instruction which stated pedestrian had continuous duty to look in direction of anticipated danger did not leave jury free to decide what would constitute due care during time pedestrian was crossing street.

2. Appeal and Error $\Rightarrow$ 333(4), 978(1)

Where trial court grants new trial on ground of error in instructions, its conclusions, in exercise of wide discretion, will not ordinarily be disturbed, and all presumptions favor the order as against the verdict, and order will be affirmed if it may be sustained on any reasonable view of record. *West's Ann.Code Civ.Proc.*, § 657.

Lindley, Lazar & Scales and John H. Barrett, San Diego, for appellant.

William F. Reed, San Diego, for respondents.

MUSSELL, Justice.

This is an action for damages for personal injuries sustained by plaintiff Alice McNamara when she was struck by a San Diego Transit System bus. The accident occurred June 19, 1952, at approximately 1:45 a. m. near the intersection of 16th and Island Streets in San Diego. 16th Street is a through boulevard and runs north and south and Island Street runs east and west.

Plaintiff spent the evening before the accident with a friend (Mrs. Callari) and at about 10:30 p. m. they got in Mrs. Callari's car and "drove over to Carl's Dine and Dance", an establishment located on the east side of 16th Street, south of Island Street. They parked the car on the west side of 16th Street, facing south, and a few feet south of the intersection. They then walked across 16th Street to Carl's Dine

and Dance where they met friends, danced and drank about three bottles of beer. They left the cafe about 1:15 a.m. and walked north on 16th Street to the entrance of a building on the southeast corner of 16th and Island Streets. This entrance was about 12 feet south of the corner of the building. They there discussed entering the building to play a game of shuffle board, decided it was too late, and started across 16th Street to Mrs. Callari's car.

Mrs. McNamara testified that before she started across the street she looked to the north to see if there were any cars coming; that she saw lights to the north about a half or three-quarters of a block away; that assuming that this vehicle was a safe distance away, she and Mrs. Callari then walked across the street; that when they were in the center of 16th Street, Mrs. Callari started to run and called to plaintiff to "come on" or "hurry"; that she started around Mrs. Callari to get in on the other side of Mrs. Callari's car; that she was 10 or 15 feet south of the corner; that at the time the impact occurred she became unconscious and did not recall anything until she was in the hospital; that there was no marked crossing at the intersection of 16th and Island Streets.

Mrs. Callari testified that as they started across 16th Street she saw lights about a block away; that when she and Alice McNamara were about half way across the street she saw the bus a second time; that it was coming fast "So I ran"; that she estimated the bus was traveling between 30-40 miles per hour; that as she ran she did not look back to see what happened to Mrs. McNamara; and that she next saw her under a car.

Dale McSherry, the operator of the bus, testified that he was alone and was traveling south at an estimated speed of 20-25 miles per hour as he approached the intersection; that he slowed the bus, looked for approaching traffic, saw none, and proceeded through the intersection; that he saw a car pulling away from the curb and then saw Mrs. McNamara coming out from behind a car and that she was then approximately 50 feet south of the intersection; that she was crossing the street in front of

the bus "at a trot"; that he did not see what happened to her at the time of the impact.

Other witnesses for the defendant testified that Mrs. McNamara ran diagonally across the street in front of the bus and was struck by it while she was in the westerly southbound traffic lane of 16th Street; that she was thrown forward and down and under a car parked on the west side of the street.

After a jury trial a verdict was returned for the defendant. Plaintiffs moved for a new trial on all of the grounds stated in section 657 of the Code of Civil Procedure except that of newly discovered evidence. The trial court granted the motion without specifying the grounds therefor and defendant appeals from the order granting it.

It is stated by appellant in its opening brief (and not denied) that the only matter urged by plaintiffs as the basis for a new trial was the contention that the court erred in instructing the jury as follows:

"A pedestrian is under a continuing duty while crossing the street to exercise ordinary care for his or her own safety. While the law does not attempt to set forth exactly the conduct which must be followed in meeting this standard of care, it is not necessarily met by looking once and then looking away. The pedestrian must continue to look in the direction or directions from which danger is to be anticipated, even though in a marked or unmarked crosswalk, and to continue to be alert to safeguard himself or herself against injury."

In *Francis v. City and County of San Francisco*, 44 Cal.2d 335, 282 P.2d 496, 499, in an action for damages for injuries sustained by plaintiff Francis (a pedestrian) in a collision with a San Francisco municipal railway bus, the court held that the trial court committed prejudicial error in instructing the jury that "'It is a duty devolved upon Mr. Francis, as the act of an ordinarily prudent person, that immediately before placing himself in a position of danger, to look in the direction in which danger is to be anticipated. This is a continuing duty and it is not met

by looking once and then looking away. It is not a duty to look only one way and continue so to look, but rather to look in the direction or directions of anticipated danger and to continue to be alert to safeguard against injury.'” The Supreme Court, in commenting on this instruction, said:

“Similarly worded instructions have been held to be prejudicially erroneous as applied to the factual situations presented in *Salomon v. Meyer*, 1 Cal. 2d 11, 13, 32 P.2d 631; *Goodwin v. Foley*, 75 Cal.App.2d 195, 170 P.2d 503; *Long v. Barbieri*, 120 Cal.App. 207, 212, 7 P.2d 1082; and *Nickell v. Rosenfield*, 82 Cal.App. 369, 373-375, 255 P. 760. Each involved a pedestrian struck down in a cross-walk who looked before leaving the safety of the sidewalk but who did not maintain a continuous lookout while crossing the street. The instruction in each case was held to have fixed for the jury as a measure of ordinary care a continuous duty while crossing to look ‘to the right and to the left’ or ‘in the direction from which danger was to be anticipated’ without requiring the jury to first find that an ordinary and prudent person, crossing at that time and place and under the existing conditions of traffic, would have maintained such constant surveillance. It is usually a question for the jury and not for the court whether a pedestrian has used due care in crossing the street and in making the decision that he can cross with safety. There is no rule of law that irrespective of existing circumstances a pedestrian must look ‘continuously’ or be arbitrarily adjudged guilty of contributory negligence. *Filson v. Balkins*, 206 Cal. 209, 212, 273 P. 578; *Long v. Barbieri*, supra, 120 Cal.App. 207, 215, 7 P.2d 1082; *Nickell v. Rosenfield*, supra, 82 Cal.App. 369, 376, 255 P. 760; 164 A.L.R. 53, et seq.”

[1, 2] It is apparent that the instruction given in the instant case and that given in the *Francis* case are subject to the same criticism in that each requires a pedestrian

while crossing a street to continue to look to the right and to the left or in the direction from which danger is to be anticipated. The jury in the instant case was not left free to decide what would constitute due care during the time plaintiff was crossing the street and the trial court properly granted the new trial for this reason. Where the trial court grants a new trial on the ground of error in the instructions, its conclusion, in the exercise of a wide discretion, will not ordinarily be disturbed. All presumptions favor the order as against the verdict, and the order will be affirmed if it may be sustained on any reasonable view of the record. *Sparks v. Redinger*, 44 Cal.2d 121, 279 P.2d 971.

The order granting a new trial is affirmed.

BARNARD, P. J., and SHELL, Justice pro tem., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.



135 Cal.App.2d 16

In the Matter of the ESTATE of Jennette NOLAN, alias, Deceased.

Emmett LYONS, Administrator with the Will Annexed of the Estate of Jennette Nolan, alias, Deceased, In the District Court of the Second Judicial District of the State of Montana, In and for the County of Silver Bow, Appellant,

W. A. Robison, Administrator with the Will Annexed of the Estate of Jennette Nolan, alias, Deceased, In the Superior Court of the State of California, In and for the City and County of San Francisco, Probate No. 115,950,

and

State of California, Respondents.
Civ. 16098.

**District Court of Appeal, First District,
Division 1, California.**

Aug. 15, 1955.

Hearing Denied Oct. 13, 1955.

Appeal by administrator of domiciliary estate from portion of decree of settlement

entered by Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., distributing all personal property located in California as to which decedent died intestate, to the state of California as escheated property. The District Court of Appeal, Bray, J., held that personal property located in California but belonging to a non-resident who died intestate as to that property and who left no heirs, did not escheat to the state of California.

Decree reversed with direction.

Escheat ⇐3

Personal property located in California but belonging to a non-resident who died intestate as to that property and who left no heirs, did not escheat to the state of California. West's Ann.Civ.Code, § 946; Probate Code, §§ 231, 1027, 1040.

M. Mitchell Bourquin, San Francisco, for appellant.

Frank J. Fontes, San Francisco, Edmund G. Brown, Atty. Gen., Charles A. Barrett, Deputy Atty. Gen., for respondents.

BRAY, Justice.

The administrator of the domiciliary estate appeals on an agreed statement from that portion of the decree of settlement of the probate court wherein the sum of \$17,947.02¹ and all after acquired property of the estate is distributed to the State of California as escheated property.

Question Presented.

California has not heretofore determined the situs of personal property located in this state belonging to a nonresident intestate who leaves no heirs. The parties point out that there is a conflict of authority on the subject in other jurisdictions. Thus in *In re Lyons' Estate*, 175 Wash. 115, 26 P.2d 615, the doctrine of *mobilia sequuntur personam* was applied and the situs was held to be at the domicile of the intestate. In *In re Rapoport's Estate*, 317 Mich. 291, 26 N.W.2d 777, and in *In re Menschefrend's Estate*, 283

App.Div. 463, 128 N.Y.S.2d 738, overruling *In re Menschefrend's Estate*, 204 Misc. 661, 124 N.Y.S.2d 793, the situs of such personality was held to be in the state where it actually is located. We have been asked to make a choice of one of these rules. We deem it unnecessary to do so, for the reason that if the situs of the property is in Montana it must be disposed of according to Montana laws. On the other hand, if the situs of the personality is in this state, we believe that the Legislature has determined in section 946, Civil Code, that it must be dealt with according to the law of the domicile of the intestate. Thus the question to be determined here is the effect of that section.

Facts.

Jennette Nolan, a resident of Butte, Montana, died May 3, 1948. She left no known heirs. Although she left a will, she died intestate as to all of her assets in California consisting of certain real property and two savings bank accounts. Her will was duly admitted to probate in Montana. Thereafter ancillary probate proceedings of her will were had in the San Francisco Superior Court. No creditors' claims were filed in the latter proceeding. January 15, 1953, the California administrator filed here his petition for distribution of the California estate. February 13th, the Montana administrator filed here his petition for delivery of the assets to him. April 16th the State of California filed here its petition for delivery of assets to the Treasurer of the State of California as escheated property.

No provision was made in the will for disposition of either the California savings account or the California real estate, and therefore said decedent died intestate as to said personal and real property. There are sufficient assets in the Montana estate to pay all creditors' claims and the costs of administering that estate. August 26th the San Francisco Superior Court ordered the balance of said savings accounts, after payment of costs of administration, and all California estate that might hereafter be discovered, to be distributed to the State of

1. \$16,386.81 of this sum represents the proceeds of the bank accounts, less pro-

rated costs of administration. This \$16,386.81 is the only sum in dispute.

California as escheated property. That the real property escheated to the State of California and therefore that the distribution of it to the State of California, was proper, is conceded. The appeal is from the distribution to the State of California of the savings accounts only.

Effect of section 946, Civil Code.

That section provides: "If there is no law to the contrary, in the place where personal property is situated, it is deemed to follow the person of its owner, and is governed by the law of his domicile."

In *Estate of Barton*, 196 Cal. 508, 238 P. 681, the decedent was found to be a resident of California, leaving certain personal property situated in Rhode Island. His will left the stock to one Blake, "his heirs and assigns forever." Blake predeceased the testator. Under California law the bequest would lapse, while under Rhode Island law Blake's heirs would be entitled to take. The court applied section 946, Civil Code, stating: "The obvious meaning of the statute is that personal property is governed by the law of the domicile of its owner, *unless a general or specific law* where the property is situated provides that the law of the domicile shall not govern." (196 Cal. at page 513, 238 P. at page 683; *Emphasis added.*) The court held that in Rhode Island (where the property was situated) there was no law to the effect that the law of the domicile of the testator concerning lapsed legacies should not apply to personal property situated within that state; hence, the property should be dealt with under California law (the domicile of the owner). Thus it is clear that under section 946 the bank accounts will be deemed to follow the person of their owner, and governed by the law of her domicile (Montana), unless there is law to the contrary, not in Montana, but here, where the property is located. In determining this question we must consider three Probate Code sections, two of which, sections 231 and 1027, are cited as law to the contrary, and one, section 1040, is cited as supporting the view that there is no law to the contrary.

Considering section 1040 first, we find that it really has no application to the problem

before us. It merely provides for distribution in a proper case to a domiciliary estate from an ancillary estate being probated here. It does not deal with situs, as does section 946. It states, in effect, that where there is domiciliary administration "and it is necessary in order that the estate, or any part thereof, may be distributed according to the will, or it is for the best interests of the estate, that the estate in this state or any part thereof, should be delivered to the executor or administrator in the state of the decedent's residence, the court may order such delivery to be made, and, if necessary, direct a sale of the real property and a like delivery of the proceeds. Such sale must be made in the same manner as other sales of real property of decedents." The section deals with procedure only.

Section 231 provides, in part: "If the decedent leaves no one to take his estate or any portion thereof, under the laws of this state, the same escheats to the state as of the date of the death of the decedent." Is this "law to the contrary" of section 946, Civil Code? We think not. It is a general section on escheat, to the effect that if the decedent leaves no one to take any portion of his estate *under the laws of this state* it escheats to California. Moreover, "under the laws of this state" it is expressly provided in section 946 that personal property follows the person of its owner. There is nothing in section 231, Probate Code, indicating an intention of the Legislature to abrogate the effect of section 946. Particularly is this so when we remember that succession to personal property under the common law and the ascertainment of the person entitled thereto was governed by the domicile of the intestate at the time of death. As stated in *Estate of Barton*, *supra*, 1925, 196 Cal. 508, 512, 238 P. 681, and *Whitney v. Dodge*, 1894, 105 Cal. 192, 199, 38 P. 636, this rule is embodied in section 946. In *Estate of Lund*, 1945, 26 Cal.2d 472, 477, 159 P.2d 643, 162 A.L.R. 606, the court in deciding the question of legitimacy of a child and its right to succeed to its claimed father's estate, pointed out that in the case of movables the question of whether a child shall succeed to the estate of his father is determined by the law

of the father's domicile, unless there is law to the contrary at the situs of the property. As pointed out above, the same rule was applied in *Estate of Barton*, supra, 196 Cal. 508, 238 P. 681, in determining whether a legacy of personal property had lapsed and its disposition. It was also applied in *Whitney v. Dodge*, supra, 105 Cal. 192, 197, 38 P. 636, in determining the validity of a testamentary trust. The rule in question is not merely a maxim; it is rule of law and a part of the conflict of laws. To constitute law to its contrary there must be some expression of the Legislature indicating that the particular act is so intended. Section 231, Probate Code, contains no such expression. An illustration of what is required appears in *Estate of Lathrop*, 165 Cal. 243, 131 P. 752. There the court was considering an attempted disposition of personal property situated in California which was valid in the state of the testator's domicile but void in California because in violation of section 1313, Civil Code (limiting charitable bequests). The court recognized the rule governing disposition of personal property, but pointed out that charitable bequests came within the exception to the rule because in California there was *positive* law to the contrary in section 1285, Civil Code, which provided that a will made outside California was invalid if it did not comply with section 1313. The "law to the contrary" set forth in sections 1285 and 1313 clearly appeared. In *Estate of Apple*, 66 Cal. 432, at page 434, 6 P. 7, 9, the court states that the rule applies "in the absence of *positive* law to the contrary * * *." (Emphasis added.)

The history of section 946, Civil Code, and section 231, Probate Code, is interesting. The basic escheat law set forth in the latter section was originally a part of the succession act of 1850, and was incorporated in the Civil Code of 1872. Section 946, Civil Code, was first enacted in 1872. It was repealed (apparently inadvertently) by Code Amendments 1873-74, p. 223, and reenacted by Code Amendments 1875-76, p. 78. It is difficult to understand how a general escheat law first adopted long prior to the adoption of the conflict of laws section could be interpreted as "law to the contrary" of the

latter. It should be pointed out, also, that section 231 is under the general division of the code headed "Succession." It does not purport to deal with personal property of nonresidents. It has the same applicability or nonapplicability to property of nonresidents as do all the other sections in that division of the code. Neither it nor section 1027, Probate Code, is under the division entitled "Estates of Nonresidents" Div. 3, chap. 16, art. 4.

Section 1027 provides in part: "If the court, at the time set for the hearing of the final account, or such time thereafter to which the matter may be continued, does not distribute the proper balance of the estate remaining for distribution to known heirs, devisees or legatees entitled to succeed thereto, it must distribute to the State of California that portion of such estate not distributed to such known heirs devisees or legatees." It is merely procedural, providing for notice of application for distribution and providing for distribution to the state of such portion of the estate as is not distributed to known heirs and that such distribution shall vest title in the state. It further provides procedure for claimants to make claim within five years. It obviously is not "law to the contrary" of section 946, merely providing for distribution to the state in a proper case.

It is suggested that the Montana domiciliary administrator does not fall within the classification mentioned in section 1027, "known heirs, devisees or legatees", and hence is not entitled to distribution. If this argument were followed to its logical conclusion no distribution of an ancillary estate could be made in California to the administrator of a domiciliary estate in another state. Distribution to a domiciliary administrator is not made under section 1027 but under section 1040, Probate Code, which expressly provides therefor.

That portion of the decree of distribution distributing to the State of California the sum of \$16,386.81 and any other estate not now known in the State of California or that may hereafter be discovered, other than real property, is reversed, and the probate

court is directed to enter a decree distributing the same to the domiciliary administrator.

PETERS, P. J., and FRED B. WOOD, J.,
concur.



135 Cal.App.2d 33

William N. BUSH, Plaintiff and Appellant,
v.

Paul VERNON and Ethel M. Vernon,
Defendants and Respondents.
Civ. 16367.

District Court of Appeal, First District,
Division 1, California.
Aug. 15, 1955.

Action for breach of contract to purchase leasehold interest in hotel. The Superior Court, City and County of San Francisco, William F. Traverso, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held, inter alia, that obligation under oral agreement to pay agreed price for leasehold interest constituted consideration for novation or substitution of oral agreement for sublease and that sublessee had the legal right to rescind oral agreement for failure of holder of leasehold interest to perform his obligations under agreement.

Judgment affirmed.

1. Landlord and Tenant ⚡74

In action for breach of contract to purchase leasehold interest in hotel, finding that written agreement for sale and assignment of lease had been abandoned and mutually rescinded because lessor refused to consent to assignment was amply supported by the evidence.

2. Contracts ⚡253, 254

An executory written bilateral contract may be rescinded by mutual consent of the parties, and such consent may be oral or

may be manifested by conduct and need not be in writing.

3. Escrows ⚡8(2)

Landlord and Tenant ⚡74

Where written agreement for sale and assignment of lease of hotel provided that it was subject to approval of lessor and lessor refused to consent to such assignment, agreement never became effective, and cancellation by purchaser of order on escrow holder for payment of purchase price was legally justified.

4. Landlord and Tenant ⚡74

In action by holder of leasehold interest in hotel for breach of sublease, findings that sublease had been orally rescinded and that intended sublessee had taken possession under parol agreement, the terms of which were embodied in unexecuted escrow agreement and agreement of sale were supported by the evidence.

5. Novation ⚡1

While a written contract may be altered only by a contract in writing or by an executed oral agreement, an oral novation may extinguish a written agreement. West's Ann.Civ.Code, § 1698.

6. Novation ⚡3

Where written contract is partially executory on both sides, oral novation extinguishing such contract is supported by adequate consideration, since in mutually cancelling executory contractual rights, each party suffers a legal detriment.

7. Landlord and Tenant ⚡74

All obligations under written agreement for sale and assignment of leasehold interest, including obligation to pay agreed purchase price, were terminated by mutual abandonment and rescission of agreement.

8. Novation ⚡4

Where written agreement for sale and assignment of leasehold interest in hotel for \$5,000 had been mutually rescinded and intended purchaser took possession under oral agreement, the terms of which were embodied in unexecuted escrow agreement, obligation under oral agreement to pay \$3,500 for leasehold interest constituted consideration for the novation or substituti-

tion of such oral agreement for written sublease. West's Ann.Civ.Code, § 1698.

9. Landlord and Tenant ⚖️74

Where holder of leasehold interest in hotel refused to proceed through escrow and failed to perform obligations under oral agreement for sale of leasehold, purchaser had the legal right to rescind oral agreement.

10. Landlord and Tenant ⚖️74

By taking possession of leased premises without consent of lessor, sublessee waived the securing of such consent as a condition precedent, but she did not thereby waive absolutely and for all time the securing of such consent which was essential to the validity of agreement to sell leasehold interest to sublessee through escrow, and when it became apparent that such consent could not be secured, sublessee had legal right to rescind agreement.

11. Landlord and Tenant ⚖️74

Sublessee, seeking to rescind agreement to purchase leasehold interest in hotel for failure of holder of leasehold interest to perform his obligations under agreement, was required to restore or offer to restore everything of value received under agreement, including value of use of leased premises while sublessee was in possession thereof. West's Ann.Civ.Code, § 1691 subd. 2.

12. Landlord and Tenant ⚖️74

In action for breach of agreement to purchase leasehold interest in hotel which sublessee sought to rescind for failure of holder of leasehold interest to perform his obligations under agreement, evidence established that sublessee had offered to restore the value of her possession of leased premises. West's Ann.Civ.Code, § 1691 subd 2.

13. Landlord and Tenant ⚖️74

In action for breach of agreement to purchase leasehold interest in hotel, evidence established that throughout all of the transactions intended purchaser's son acted only as agent for his mother and that holder of leasehold interest knew that he was acting only in a representative capacity.

14. Principal and Agent ⚖️136(1)

Where holder of leasehold interest in hotel knew that sublessee's son was acting

only as agent for his mother, sublessee's son was not personally liable on sublease, though he signed sublease as one of the sublessees for the accommodation of owner of premises. West's Ann.Civ.Code, § 2343.

William H. Penaat, San Francisco, for appellant.

Donovan, Stuhr & Martin, Laurence M. Donovan, San Francisco, for respondent Paul Vernon.

No appearance on behalf of respondent Ethel M. Vernon.

PETERS, Presiding Justice.

By the first cause of action in his amended complaint, plaintiff, William N. Bush, charged defendant Paul Vernon and his mother, Ethel Vernon, with breach of a contract to purchase a sublease for \$5,000, and in a second cause of action charged the failure to pay \$1,500 in rent. Judgment was entered in favor of defendants and plaintiff appeals.

The case is primarily a factual one. Plaintiff owned a leasehold interest in a hotel in San Francisco. Ethel Vernon desired to purchase that interest. In September of 1952 her son Paul, on her behalf, began to negotiate with plaintiff for such purpose. These negotiations resulted in a written agreement signed by plaintiff, and by Paul as the representative of his mother, for the sale of the leasehold interest for \$5,000. The purchase price was to be paid through an order of Paul Vernon on funds held by the Kern County Title Company for Mrs. Vernon. This contract was undated, but required that the \$5,000 be paid before October 17, 1952, and also provided that Mrs. Vernon could take possession October 1, 1952. It expressly stated that the "Deal subject to approval of Lessor."

Paul Vernon executed an order on the title company on September 30, 1952, and delivered it to plaintiff. When plaintiff presented it for collection on October 9, 1952, it was returned to him unpaid because Mrs. Vernon had rescinded it. Paul testified that the order was rescinded because the attorney for the lessor refused on behalf of the lessor to consent to the assignment unless Mrs. Vernon deposited \$3,000 as

security, which she was not willing to do. The attorney, who had full authority to act for the lessor, suggested a sublease instead of an assignment. Thereafter, this attorney drafted a sublease, dated October 31, 1952, which contains the signature of plaintiff as lessor, and the signatures of both defendants as sublessees. As part of this transaction the attorney for the lessor drafted a consent to the sublease, to be delivered to the parties in the event that plaintiff deposited with the attorney \$1,500 in cash as security for the original lease. This \$1,500 was never deposited with the attorney, so that this consent to the sublease was never delivered.

Plaintiff admitted that this sublease was intended as a substitute for the originally contemplated assignment, and that the parties mutually agreed to abandon the assignment transaction.

The sublease provided that Mrs. Vernon was to take possession November 1, 1952. She actually took possession on November 4, 1952. In October or November, 1952, an "Escrow Agreement and Agreement of Sale" was prepared, bearing a date of "_____ November, 1952," by and between Ethel Vernon and plaintiff, and a named escrow holder, whereby plaintiff agreed to sell the leasehold to Mrs. Vernon for \$3,500 payable by an order on the Kern County Title Company. Whether this agreement was signed or delivered by Bush, and whether it was signed by the escrow holder, are facts in dispute. The escrow holder was to prepare a "Notice of Intended Sale," and record and publish it. The escrow holder was to pay the claims of the creditors of plaintiff. The plaintiff, however, testified that this was intended to be a cash transaction; that he did not proceed to go through escrow; that he did not contact the escrow holder, although, admittedly, part of the proceeds of the escrow were to furnish the \$1,500 security necessary to secure the consent of the lessor to the sublease.

Plaintiff admitted that there were "approximately a couple of thousand dollars" in outstanding bills against the hotel, and that in a prior transaction with the defendants involving a hotel lease, claims for un-

paid bills exceeded the proceeds from the sale by a substantial amount. Plaintiff also admitted that he told the broker in the transaction: "I can't sign that agreement, I can't have an escrow in that deal, \$3500 wouldn't be a drop in the bucket against the claims filed." In a deposition plaintiff admitted that he had "refused to some extent" to go through escrow, and at the trial conceded that he had never got in touch with the escrow holder, nor deposited any papers with him. He conceded that he reduced the price from \$5,000 to \$3,500 because he needed money badly to pay his creditors.

Paul Vernon testified that he deposited the \$3,500 order with the escrow holder, but that plaintiff never signed or delivered a copy of the escrow agreement.

On December 9, 1952, Mrs. Vernon quit the premises because the consent to the sublease had not been received and she felt, quite properly, that she was in possession illegally. Mrs. Vernon paid no rent for the period she was in possession—November 4, 1952, to December 9, 1952—but she did pay some of the outstanding bills. Paul Vernon offered plaintiff \$300 as rent, the amount he computed was due after proration, but "he told me to hang on to it until the whole thing was complete." Plaintiff admitted that between November 1 and 4, 1952, he collected \$307.81 as rent which he did not turn over to defendants. Plaintiff resumed possession on December 9, 1952, and kept it until January 31, 1953, when he ceased to be the lessee.

Both Paul and Mrs. Vernon testified that Paul at all times was acting solely as agent for Mrs. Vernon, and plaintiff admitted that he had never been told that Paul was to be a partner in the enterprise, or had any interest therein.

On these facts the trial court found a mutual abandonment and rescission of the original assignment of September, 1952, based upon the fact that the lessor refused to consent to such assignment; that Mrs. Vernon took possession in November, 1952, under an oral contract under which plaintiff undertook to secure and deliver a written consent of the lessor to a sublease; that because of the failure to secure and deliver

such a written consent, and because of plaintiff's refusal to perform the terms and conditions of the oral agreement, that is, his refusal to consent to the recordation and publication of the intended notice of sale, defendant Ethel Vernon relinquished possession on December 9, 1952, and plaintiff retook possession. The court concluded that Paul acted solely on behalf of his mother in the transactions, that the assignment was mutually rescinded, and the sublease was of no effect. Based on these findings and conclusions judgment was entered for defendants.

[1-3] There can be no doubt that the finding that the original agreement for the sale of the lease and providing for its assignment was abandoned and mutually rescinded because the lessor refused to consent to such assignment, is amply supported by the evidence. In fact, appellant admitted that this was true. Of course, an executory written bilateral contract may be rescinded by mutual consent of the parties. Such consent need not be in writing but may be oral or may be manifested by conduct. *Treadwell v. Nickel*, 194 Cal. 243, 228 P. 25; *San Roque Properties, Inc., v. Pierce*, 18 Cal.App.2d 379, 63 P.2d 1198. Moreover, the assignment of the lease expressly provided "Deal subject to approval of Lessor." The evidence demonstrates that this condition precedent was not performed, so that the agreement never became effective. Thus, there can be no doubt that the cancellation of the order on the escrow holder for the \$5,000 was legally justified.

The present action is not predicated upon the assignment but upon the October 31, 1952, sublease. The legal effect of this document must be considered together with the "Escrow Agreement and Agreement of Sale," which was never properly executed.

The trial court found that Ethel Vernon took possession of the hotel under an oral agreement, and that under this oral agreement appellant was to obtain the written consent of the lessor to the sublease, and was to consent to recordation and publication of a notice of sale; that because of the nonperformance of these conditions Mrs. Vernon relinquished possession of the property.

[4-6] These findings, in substance, are to the legal effect that there was a mutual rescission of the sublease and a parol agreement prior to possession, the terms of which were embodied in the unexecuted "Escrow Agreement and Agreement of Sale." There is ample evidence to support a finding that the sublease was orally rescinded. Appellant admitted that this agreement in November, 1952, was terminated and abandoned by mutual consent, and was cancelled out by the agreement reducing the price to \$3,500. While it is true that a contract in writing may be altered only by a contract in writing or by an executed oral agreement, § 1698, Civ.Code, and while it is also true that here we do not have an executed oral agreement that would constitute an effective modification of the sublease, it is equally true that an oral novation may extinguish a written agreement. *Pearsall v. Henry*, 153 Cal. 314, 95 P. 154, 159; *Klein Norton Co. v. Cohen*, 107 Cal.App. 325, 290 P. 613; *Producers Fruit Co. v. Goddard*, 75 Cal.App. 737, 243 P. 686. The required consideration for the novation is present when the contract is partially executory on both sides, for in mutually cancelling the executory contractual rights, each party has suffered a legal detriment. *Sass v. Hank*, 108 Cal.App.2d 207, 238 P.2d 652; *King v. Gerold*, 109 Cal.App.2d 316, 240 P.2d 710. Since Mrs. Vernon, according to the supported finding, went into possession under the oral agreement, the terms of which were set forth in the "Escrow Agreement and Agreement of Sale," the sublease obviously was executory when it was rescinded and the oral arrangement substituted. The oral agreement had materially different terms from those in the sublease. The sublease did not require any lump sum payment, but only provided for a rental of \$500 a month. The oral agreement, on the other hand, provided for a purchase price of \$3,500.

[7, 8] In apparent realization that these principles are decisive, if supported by the record, appellant argues that the sublease was a mere modification of the original sale and assignment of the leasehold, and that this original assignment provided for a purchase price of \$5,000, which was auto-

matically carried over as an implied obligation of the sublease agreement. Therefore, so it is argued, the promise to pay \$3,500 provided in the oral agreement (embodied in the unexecuted "Escrow Agreement and Agreement of Sale") merely constituted a promise to pay less than defendants were already obligated to pay, and could not constitute a lawful consideration. The difficulty with this argument is that it is contrary to the facts as found by the trial court, which facts are amply supported by the record. As already pointed out, the trial court found that the original agreement for the sale of the leasehold had been abandoned and rescinded. This means that all obligations under it, including the obligation to pay \$5,000, were terminated. The evidence to support this finding is overwhelming. This being so, and the evidence supporting the findings that Mrs. Vernon took possession under an oral agreement, the terms of which were embodied in the unexecuted escrow agreement, the agreement to pay \$3,500 found in that agreement was consideration for the novation or substitution of the oral agreement for the sublease.

[9,10] It is equally clear that respondents had the legal right to rescind the oral agreement. Appellant clearly failed to perform his obligations under that agreement. He refused to proceed through the escrow, failed to perform the obligations required of him by the terms of the oral agreement, and failed to secure the required consent of the lessor to the sublease. Appellant argues that, because Mrs. Vernon took possession without the consent of the lessor, she waived this provision of the agreement. It is true that by taking possession she waived the securing of the consent as a condition precedent, but it approaches absurdity to argue that by taking possession she waived absolutely and for all time the securing of the very consent that was essential to the validity of the agreement. She waited until December 9, 1952, to receive the required consent. The agreement necessarily contemplated the delivery into escrow of the consent as a major portion of the consideration she was to receive for her \$3,500. There is ample evidence, including an admission of appellant, that the

debts owed by appellant exceeded \$2,000, so there would not have been \$1,500 left out of the \$3,500 to give the lessor as security, which sum was required by the lessor as a condition to granting consent to the sublease. When it became apparent that such consent could not be secured, Mrs. Vernon rescinded, as she had a legal right to do.

Appellant next contends that a party in default under a contract cannot rescind for a breach by the other party. *Fairchild-Gilmore-Wilton Co. v. Southern etc. Co.*, 158 Cal. 264, 110 P. 951. That is an interesting and probably correct statement of the law, but it has no application to the facts of this case. Defendants were not in default. They were required to draw on the Kern County escrow for \$3,500 payable to the escrow holder. Paul Vernon testified that he did so.

[11,12] Appellant next contends that rescission was not available to Mrs. Vernon because she did not restore or offer to restore the reasonable rental value of the premises while she was in possession, or the rents she collected while in possession. Undoubtedly section 1691(2) of the Civil Code requires the party seeking to rescind to restore or offer to restore everything of value received by such party. *Loud v. Luse*, 214 Cal. 10, 3 P.2d 542. Undoubtedly this requires the restoring or offering to restore the value of the use of the property while in possession. *Heintzsch v. LaFrance*, 3 Cal.2d 180, 44 P.2d 358. But here the evidence shows that Paul Vernon did offer to restore the value of the possession and was told by appellant "to hang on to it until the whole thing was complete."

[13,14] It is also urged that Paul Vernon is personally liable on the sublease, which he signed. The evidence demonstrates that throughout all of the transactions Paul was acting only as agent for his mother, and that appellant knew this. This was the finding of the trial court, which finding is supported by well nigh overwhelming evidence. Both Paul and his mother testified that Paul acted at all times in a representative capacity. Appellant admitted that he had never been told that Paul had any interest in the transaction.

The original assignment contract was between Bush and Mrs. Vernon, with Mrs. Vernon's signature being affixed "by" Paul Vernon. By stipulation it was agreed that the purchase price of the sublease was to come from money owed to Mrs. Vernon and in the Kern County escrow. The escrow agreement was in Mrs. Vernon's name only and was signed by her and not by Paul Vernon. The only part of the transactions that does not expressly recognize that Paul acted in a representative capacity, is his signature on the sublease as one of the sublessees. Paul explained that he did this for the accommodation of the owner of the premises and not to benefit Bush. The trial court obviously believed this testimony. Quite clearly, at all times appellant knew that Paul was acting in a representative capacity, and looked only to Mrs. Vernon for payment. Under such circumstances the agent is not personally liable. § 2343, Civ.Code; *La Rosa v. Glaze*, 18 Cal. App.2d 354, 63 P.2d 1181; see discussion and cases collected 2 Cal.Jur.2d 818, § 132.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



135 Cal.App.2d 52

Aloha R. JONES, Plaintiff and Respondent,
v.

Earle L. JONES, Defendant and Appellant.
Civ. 16492.

District Court of Appeal, First District,
Division 1, California.

Aug. 15, 1955.

Hearing Denied Oct. 13, 1955.

Wife's action for divorce on ground of cruelty. The Superior Court, Alameda County, A. J. Woolsey, J., granted a decree to the wife and the husband appealed. The District Court of Appeal, Peters, P. J., held that corroborative evidence produced

by the wife, although it was slight, was legally sufficient to sustain the decree.

Affirmed.

1. Appeal and Error ⇨995

An appellate court is not bound by testimony which cannot by any possibility be true or testimony which is inherently impossible.

2. Appeal and Error ⇨1010(1)

Normally, weight of evidence is for trier of the facts, and an appellate court can upset a finding based on evidence only when supporting evidence is incredible.

3. Divorce ⇨127(1)

In wife's action for divorce, her testimony was not inherently incredible and rejection of it by trial court was not required.

4. Divorce ⇨127(4)

Corroboration of complainant's testimony as required in divorce proceeding may be by direct or circumstantial evidence. West's Ann.Civ.Code, § 130; West's Ann.Code Civ.Proc. § 1839.

5. Divorce ⇨127(4), 184(4)

Main purpose of rule requiring corroboration in divorce proceeding is to prevent collusion, and in hotly contested case, wherein it is obvious that no collusion exists, corroboration required is slight and its sufficiency is largely for the trial court. West's Ann.Civ.Code, § 130; West's Ann.Code Civ.Proc. § 1839.

6. Trial ⇨105(2)

Hearsay which is not objected to may be sufficient to establish a fact.

7. Divorce ⇨127(4)

In wife's action for divorce on ground of cruelty, corroborative evidence, although slight, was sufficient to sustain decree in her favor. West's Ann.Civ.Code, § 130; West's Ann.Code Civ.Proc. § 1839.

8. Husband and Wife ⇨264

In divorce proceeding, testimony that parties filed joint income tax returns during all their married life was entitled to some weight in determining whether property from which the income was earned was separate, community, or otherwise.

9. Husband and Wife ⇨262(1, 2)

In divorce proceeding, form of joint tenancy deeds to husband and wife raised rebuttable presumption that property was in fact held in joint tenancy, and placed burden on party claiming it to be community or separate to prove that fact.

10. Evidence ⇨461(4)

Husband and Wife ⇨264

Though deeds to property are in joint tenancy, a husband or wife can testify to an oral agreement to hold property as community, and if testimony is believed such evidence will support a finding that the property is community.

11. Husband and Wife ⇨264

In divorce proceeding, evidence sustained trial court's finding that household furnishings, two automobiles, a promissory note and equity in certain real estate were community property.

12. Divorce ⇨150(2)

Findings upon all material issues must be made by the court in a divorce case as in other cases.

13. Divorce ⇨150(2)

In divorce cases, though court must make findings of fact, it is only required to find ultimate facts and is not required to find probative facts.

14. Divorce ⇨239

In divorce case, circumstances of the parties, i. e., husband's ability to pay and the wife's needs were merely probative of ultimate fact of alimony, and did not need to be found as facts, so that mere finding that defendant should pay \$175 per month for wife's support and maintenance and alimony was sufficient to sustain order. West's Ann.Civ.Code, § 139.

15. Divorce ⇨240(3)

In divorce proceeding, trial court's finding that defendant should pay to his wife for support and maintenance and alimony \$175 per month was sustained by evidence. West's Ann.Civ.Code, § 139.

16. Divorce ⇨240(2)

Principles which trial judge must apply in awarding alimony are few and necessarily general in nature and circumstances

which court may take into account include practically all factors which have legitimate bearing on present and prospective matters relating to lives of both parties. West's Ann.Civ.Code, § 139.

17. Divorce ⇨235

In making award of alimony, trial court had a wide discretion. West's Ann.Civ.Code, § 139.

18. Divorce ⇨240(2)

In making award of alimony, court may consider needs of parties and abilities of parties to meet such needs, property owned and obligations to be met as well as ability to earn and actual earnings. West's Ann.Civ.Code, § 139.

19. Divorce ⇨226

In divorce case, court's provision in decree that husband should pay wife's attorney \$300 as and for additional attorney's fees was finding of ultimate fact and was not invalid for want of findings to support it.

20. Divorce ⇨226

In divorce proceeding, evidence of reasonable value of attorney's fees was necessary before trial court as it heard case and direct evidence of reasonable value was unnecessary.

21. Divorce ⇨223, 286

Reasonableness of fee awarded to attorney in divorce case is question of fact, and trial court in fixing fee has a wide discretion which can be upset only for an abuse thereof.

22. Divorce ⇨223

Award of \$300 as and for additional attorney's fees in wife's action for divorce was not an abuse of discretion under circumstances of the case.

Robert H. Kroninger, Oakland, for appellant.

Suren Toomajian, Oakland, for respondent.

PETERS, Presiding Justice.

This action was brought for a divorce. The husband answered and cross-complained. The trial court granted the inter-

locutory decree to the wife on the ground of cruelty, found certain specified property to be the community property of the parties and divided it between them, and awarded the wife \$175 per month alimony and \$300 attorney's fees. The husband appeals, challenging each major ruling made by the trial court.

The parties were married in April of 1939 and separated in August of 1953. There are no children. In addition to testifying that during the last couple of years the parties had lived together the appellant had become critical and cold, that he had, on occasion, called her vile names, and had struck her several times, respondent described, in some detail, a brutal beating inflicted upon her by her husband on the night of August 2-3, 1953. August 2nd was a Sunday, a day on which respondent worked as a drug clerk from 10 a. m. to 6 p. m. She testified that she arrived home at about 6:15 p. m. and found appellant working on some lodge papers for her benefit; that she had a mild argument over appellant's failure to have dinner prepared; that she then had one drink at appellant's request; that at dinner a jacket on a tooth broke which upset her because she had several lodge appearances to make; that she started to cry; that appellant became abusive and ridiculed her, whereupon she decided to go to bed; that at about 9:30 p. m. appellant came into the bedroom, grabbed her by the hair and struck her, and then left the room; that shortly after midnight she heard a commotion downstairs, and heard her husband calling; that she came downstairs and found him holding the neck of a broken whiskey bottle in his hand advancing toward her in a threatening fashion; that she threw a plant and ash tray at her husband and ran from the room; that appellant caught her and brutally beat her, later telling her that he hated her. The next morning respondent went to the home of her friend, Mrs. Angle, and was treated three times by a physician for her many bruises, contusions and sprains. It took several weeks for her to recuperate. Respondent testified that she had not seen her husband drinking that day or night, but

concluded he had been drinking from the way he acted.

The only corroboration of this testimony proffered by respondent was through the testimony of Mrs. Angle. This witness testified that she came to the home of respondent about 9 a. m. on August 3, 1953, and found respondent in a state of shock; that respondent was then badly bruised and very nervous; that she took respondent to her home and called a doctor; that she cared for respondent until she recuperated from the beating; that respondent had told her how she had received the bruises, and, in particular, had said that she had received a bruise on her back caused when "Earle had pulled her bra off."

Appellant denied this story, testifying that respondent was frequently drunk; had become drunk on the night in question when she drank most of a fifth of whiskey; had tripped over a telephone cord and fallen down the stairs; had refused his offer to call a doctor; had become abusive; had thrown the flower pot and ash tray at him; had wanted some more to drink, whereupon he broke the whiskey bottle to prevent her from drinking any more, and had forcefully put her to bed. In corroboration of this story he produced a witness, a lodge acquaintance of his wife, who testified that early in August of 1953 respondent had telephoned her and told her that she, respondent, could not attend a lodge function because she had tripped over the telephone cord, fallen down the stairs, and received serious bruises. But this witness also testified that later the same month, after the witness had been subpoenaed to testify at a preliminary hearing, respondent told her that this story was not true, that her husband had beaten her, and that she had told the witness a false story because she was embarrassed in having the lodge members learn about the family discord.

[1-3] Appellant first attacks the testimony of respondent on the ground that it is incredible and unworthy of belief. It is true that an appellate court is not bound by the testimony of witnesses that "cannot by any possibility be true, or when their testimony is inherently impossible," *Austin v.*

Newton, 46 Cal.App. 493, 497, 189 P. 471, 472, but, as that and many other cases have pointed out, normally the weight of the evidence is for the trier of the fact, and the appellate court can upset a finding based on evidence only when the supporting evidence is incredible. See *Neilson v. Houle*, 200 Cal. 726, 254 P. 891; *Estate of Jepson*, 178 Cal. 257, 172 P. 1107. We cannot say that the testimony of respondent is inherently incredible.

Appellant next contends that respondent was impeached by the testimony of the lodge friend who testified that respondent had told her that she had been bruised when she fell down the stairs after tripping over a telephone cord. But the trial judge must have believed the explanation offered to the witness a short time later, to the effect that she had told this story because she was embarrassed to have her lodge friends learn of the true facts about her domestic difficulties. This explanation is certainly not incredible. Its sufficiency was a trial court problem.

[4] The only substantial question presented on this phase of the case is whether the testimony of respondent was sufficiently corroborated to comply with the requirements of section 130 of the Civil Code. See also § 1839, Code Civ.Proc. There are many cases interpreting and applying section 130. In *Ungemach v. Ungemach*, 61 Cal.App.2d 29, 34, 142 P.2d 99, 101, this court stated: "It is true that some of the charges made by the respondent were not corroborated, but this is not required under the law of this state. A single act of cruelty, if corroborated * * * is sufficient. [Citation.] It is not required that the evidence be corroborated as to every fact and circumstance appearing in the record. If there is corroborative evidence of one or more facts which is, or are, sufficient to show cruelty, that is sufficient. [Citation.]" See also *Cooper v. Cooper*, 88 Cal. 45, 25 P. 1062; *Andrews v. Andrews*, 120 Cal. 184, 52 P. 298; *Crum v. Crum*, 57 Cal.App. 539, 207 P. 506; *Percy v. Percy*, 188 Cal. 765, 207 P. 369; *Avery v. Avery*, 148 Cal. 239, 82 P. 967; *Blanchard v. Blanchard*, 10 Cal.App. 203, 101 P. 536. The corroboration may be by direct or circumstantial evi-

dence. *Thoele v. Thoele*, 102 Cal.App. 387, 282 P. 1001; *Andrews v. Andrews*, 120 Cal. 184, 52 P. 298.

[5] It is also well settled that the main purpose of the rule requiring corroboration "is to prevent collusion. In a case which is hotly contested, as the one here involved, it is obvious that no collusion existed. In such a case the corroboration required is slight and its sufficiency is largely for the trial court." *Ungemach v. Ungemach*, 61 Cal.App.2d 29, 36, 142 P.2d 99, 103; see also *Wilson v. Wilson*, 124 Cal.App. 655, 13 P.2d 376; *Keller v. Keller*, 132 Cal.App. 343, 22 P.2d 798; *LaVigne v. LaVigne*, 96 Cal.App. 2d 531, 216 P.2d 75; *Serns v. Serns*, 70 Cal. App.2d 527, 161 P.2d 417; *Hellman v. Hellman*, 108 Cal.App.2d 588, 239 P.2d 458.

In *Price v. Price*, 71 Cal.App.2d 734, 163 P.2d 501, the corroborating witness testified that she had heard defendant threaten to strike the plaintiff, and had seen marks and bruises on plaintiff which plaintiff had told her were caused by defendant. In holding this evidence sufficiently corroborative it was stated, 71 Cal.App.2d at page 736, 163 P.2d at page 503:

"This testimony constituted sufficient corroboration of plaintiff's testimony as to defendant's cruelty in view of the established law in California that if there is corroborative evidence of one or more facts showing cruelty, such evidence is sufficient to satisfy the requirements of section 130 of the Civil Code. [Citation.]

"It is also to be noted that in such a case as the present, where the action is contested and it is apparent that no collusion exists, the corroboration required is slight and its sufficiency is largely for the determination of the trial judge."

A case closely in point is *Dowd v. Dowd*, 111 Cal.App.2d 760, 245 P.2d 339. There a friend of the plaintiff testified that she had seen the defendant drunk on two occasions and had seen bruises on plaintiff that the latter had told her had been inflicted by the defendant. Except as to the fact of drunkenness the case is very similar to the one here involved. This court held the corroboration sufficient, stating, 111 Cal.App.2d at page 763, 245 P.2d at page 341:

"* * * Mrs. Quinn's testimony as to the results of blows and her statement that she had seen the defendant while in a state of intoxication is some corroboration, though slight.

"The existence of corroboration of material facts given in evidence by the respondent is, of course, a question of fact. The sufficiency of the corroboration should be determined in the light of the purpose of the requirement for corroboration, the prevention of collusion. That, too, presents a question of fact. 'The principal object of the corroboration rule is to prevent collusion between the parties, and where it is clear from the evidence in a contested action that there is no collusion the court is justified in granting the decree upon evidence which is only slightly corroborative if otherwise the court is satisfied that the prevailing party is entitled to a decree.' *Tompkins v. Tompkins*, 83 Cal.App.2d 71, 76, 187 P.2d 840, 842."

[6, 7] In the instant case Mrs. Angle testified that on the morning of August 3rd she saw the physical marks of brutality on the body of respondent, and was told by respondent how these bruises had been inflicted. Even if this was hearsay it came in without objection; in fact, the testimony about the bruise caused by appellant pulling the bra off of respondent came into the record as a result of questions asked of Mrs. Angle on cross-examination. Unobjected to hearsay is, of course, sufficient to establish a fact. See cases collected 19 Cal.Jur.2d 238, § 474; see also *Keim v. D. B. Berelson & Co.*, 105 Cal.App.2d 154, 163, 233 P.2d 123; *Baley v. J. F. Hink & Son*, 133 Cal. App.2d 102, 283 P.2d 349.

Tested by these standards the corroboration, although slight, is legally sufficient.

The appellant next challenges the sufficiency of the evidence to support the findings in reference to community property. The trial court found that an equity in a piece of property referred to as the Taurus Avenue property, its furnishings, a Buick and a Ford, and a promissory note on which \$11,044.32 was due and which was pledged

to secure an indebtedness of the parties in the sum of about \$1,500, were community property. The trial court awarded the Taurus Avenue property, the furniture, and the 1934 Ford to respondent, and awarded appellant a 1949 Buick, the promissory note and certain tools and photographic equipment. It is these findings that are challenged by appellant.

It is not disputed that appellant owned a substantial estate before his marriage to respondent, and that their present acquisitions can be traced to this original separate property. It is also not disputed that most of the properties at the time of trial were held in joint tenancy. It is respondent's position that the properties found by the trial court to be community were in fact converted into community property by agreement of the parties. It is our conclusion that the findings of the trial court on this subject are supported.

Prior to his marriage appellant owned a ranch in Mendocino County. In 1938 he exchanged it for an equity of \$22,500 in the Hopkins Court Apartment, assuming two mortgages totalling \$27,500. In April of 1939 appellant and respondent were married. Thereafter, respondent helped to manage the apartment house. After marriage the two mortgages were refinanced, the refinancing agreement being signed by both appellant and respondent.

In October of 1944 the apartment house was sold, \$24,528.16 in cash being received on the deal. The check for this was made out to both parties, and deposited in appellant's account. With \$6,000 of this money the Norton Avenue property was purchased, title being taken in joint tenancy, and two mortgages assumed which were subsequently paid off with some of the proceeds of the sale of the apartment house. Paid for from the same source were \$8,500 in improvements. Subsequently, the Norton Avenue property was sold for \$14,600, the sellers taking back a note payable to both parties for \$11,900. This note was later pledged to the bank to secure a loan of \$2,000. This note was found to be community property and awarded to appellant.

With the cash portion of the proceeds of the Norton Avenue sale, which were paid

to both parties, they purchased the Taurus Avenue property, title being taken in joint tenancy and both assuming the obligation of an outstanding deed of trust. At the time of trial there was due on this deed of trust \$7,414.93, and the equity, found to be community property and awarded to respondent, was somewhere between \$1,500 and \$6,000.

The Buick was purchased with money realized from the sale of the apartment and was in appellant's name. Admittedly, appellant had made a gift of the Ford to respondent. Appellant was employed a major portion of his married life, and where this income, admittedly community, went, is not clear from the record. Respondent testified that, as to all of the properties, she had managed them and had personally done much of the maintenance work because her husband's job required him to be away from their home on many occasions. It was she who first decided to sell the apartment house and the Norton Avenue properties.

Appellant testified that in all of the transactions in which his wife joined or was named as a joint tenant, the form of the transaction was forced upon him against his will by the banks, title companies, or other parties to the transactions; that he told several of these agencies, in the presence of his wife, that he wanted to keep his property separate, but they nevertheless insisted on the joint tenancy form, and that prior to marriage he and respondent orally agreed, because of an unfortunate prior marital experience he had had, that all of his separate property was to remain separate after marriage.

[8] Respondent testified, however, that the property found by the trial court to be community was in fact community because of a post marriage understanding she had with her husband; that she had never agreed that the property was to remain separate, and never heard appellant so state. When asked if there had been any agreement with appellant when the various properties were purchased after marriage respondent replied: "It was always a half and half possession, we were partners, we called ourselves partners." When asked if she understood the meaning of the words

"joint tenancy," she replied: "Well, I assume that it is a fifty-fifty proposition of community property, that is what I understand it." Admittedly, the parties filed joint income tax returns all during their married life. This latter fact is entitled to some weight in determining the nature of the property from which the income was earned. Estate of Raphael, 91 Cal.App. 2d 931, 206 P.2d 391.

[9, 10] There can be but little doubt that the evidence would clearly support a finding that the properties involved were held in joint tenancy. The form of the title deeds raised a rebuttable presumption that the property was in fact held in joint tenancy, and placed the burden on the party claiming it to be community or separate to prove that fact. King v. King, 107 Cal. App.2d 257, 236 P.2d 912; Delanoy v. Delanoy, 216 Cal. 23, 13 P.2d 513; Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905; Walker v. Walker, 108 Cal.App.2d 605, 239 P.2d 106; In re Rauer's Collection Co., 87 Cal.App.2d 248, 196 P.2d 803; Edwards v. Deitrich, 118 Cal.App.2d 254, 257 P.2d 750. There is evidence that would support a finding that the property remained separate, in spite of the form of the deeds. This evidence was contradicted and disbelieved by the trial court. The real question is whether there is sufficient evidence to support the finding that the property was community. It is now too well settled to require extended discussion that, even though the deeds to property are in joint tenancy a husband or wife can testify to an oral agreement to hold the property as community, and if the testimony is believed such evidence will support a finding that the property is community. LaMar v. LaMar, 30 Cal.2d 898, 186 P.2d 678; Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905; see cases collected 10 Cal.Jur.2d 731, § 56 et seq. One of the most recent cases dealing with this problem is Linville v. Linville, 132 Cal.App.2d 800, 283 P.2d 34. There the problem involved was whether the evidence supported a finding that certain property was community, the property admittedly having once been separate property of the husband, and the evidence that it was intended to be community being all

oral. Starting at page 801 of 132 Cal.App. 2d, at page 35 of 283 P.2d, the following appears:

"It is first urged that the evidence fails to establish an oral agreement transmuting appellant's separate funds into community property. In other words, that the finding respecting such agreement is not supported by the record.

"In disposing of such a contention, this court's power begins and ends with a determination as to whether there is any substantial evidence to support the findings.' Estate of Raphael, 91 Cal.App.2d 931, 936, 206 P.2d 391, 393. * * *

"Whether the statements of respondent and the conduct of appellant indicated an intent on the part of the latter to transmute his separate property into a community interest with respondent was a question for the trier of fact. [Citations.]

"As stated in Estate of Raphael, 91 Cal.App.2d 931, 939, 206 P.2d 391, 395: 'All that is required to show an executed oral agreement of transmutation is proof of the parties' acts and conduct in dealing with their property. * * * The object of the oral agreement of transmutation was fully performed when the agreement was made for it immediately transmuted and converted the separate property of each spouse into community property, and nothing further remained to be done.'

"In the cited case, the widow Raphael testified that decedent told her "we were partners * * * and we had to file taxes, and he said that everything he had was mine, and everything I had was his; that we were partners in everything, and everything was fifty-fifty.'" * * *

"And as stated in Estate of Sill, 121 Cal.App. 202, 204, 9 P.2d 243, 244:

"It clearly appears * * * that the agreement or understanding between the parties is not required to be in any particular words and need not be attended with any particular for-

mality as long as it may be fairly inferred from all of the circumstances in evidence that a community interest was intended by the parties.'"

[11] It will be noted that in the instant case the evidence as to the oral agreement was very similar to that in Estate of Raphael, referred to in the Linville case, and, as in the Raphael case, the parties filed joint income tax returns. For these reasons it must be held that the findings as to community property are supported.

[12-14] Appellant next attacks the finding "That defendant should pay to plaintiff as and for her support and maintenance and alimony the sum of One Hundred Seventy Five Dollars (\$175.00) per month" as being insufficient because the court did not find the husband's ability to pay or the wife's needs. The finding is sufficient. While it is true that the court must make findings on all material issues in a divorce case as in other cases, and that the determination of alimony is a question of fact, the trial court is only required to find ultimate facts and is not required to find probative facts. In *LaMar v. LaMar*, 30 Cal. 2d 898, 900, 186 P.2d 678, 679, it was stated to be the rule that in divorce cases the duty to make findings "is to find ultimate rather than probative or evidentiary facts. Findings of ultimate facts are controlling unless drawn as conclusions from findings of probative facts that do not support them. [Citations.]" The circumstances of the parties—i. e., the husband's ability to pay and the wife's needs—are merely probative of the ultimate fact of alimony. This was clearly inferred if not directly held in *Hall v. Hall*, 42 Cal.2d 435, 267 P.2d 249. The finding was sufficient.

[15-18] That the finding is amply supported is apparent. Respondent has part time employment as a drug clerk, earning about \$100 a month. She has expenses, including a payment of \$79.50 on her house, of about \$289 per month. Appellant has a steady job earning him, before taxes, \$5,300 a year, or a little more than \$425 a month. In addition, he has a net income from the deed of trust of \$46.50 per month. After payment of the \$175 alimony, appellant,

before taxes, will have an income of about \$300 per month. He claims that his expenses are \$320 per month. Under these circumstances the finding is supported. As was said in *Hall v. Hall*, 42 Cal.2d 435, 442, 267 P.2d 249, 253: "The principles which the trial judge must apply in awarding alimony are few and necessarily general in nature. An allowance for support must be made 'having regard for the circumstances of the respective parties'. Civil Code, § 139. In making that award the trial court has a wide discretion. [Citation.] 'Circumstances' includes 'practically everything which has a legitimate bearing upon the present and prospective matters relating to the lives of both parties.' *Lamborn v. Lamborn*, 80 Cal.App. 494, 499, 251 P. 943, 945. 'It refers to the needs of the parties and the abilities of the parties to meet such needs; and in measuring such circumstances, consideration should be given to property owned and obligations to be met as well as to ability to earn and actual earnings.' *Becker v. Becker*, 64 Cal.App.2d 239, 242, 148 P.2d 381, 383."

[19-22] The trial court also made a finding that appellant should pay respondent's attorney \$300 "as and for additional attorney's fees * * * forthwith." Appellant charges that this is neither a finding nor conclusion, and that to support such an award there must be evidence produced and findings made. Neither appears here, according to appellant. The error in appellant's reasoning is that this finding is one of ultimate fact similar to the one in reference to alimony. Direct evidence of the reasonable value of the attorney's fee did not have to be introduced. Evidence as to such reasonable value of the services is necessarily before the trial court when it hears a case. The trial judge, being a lawyer, can readily ascertain from the presentation of the case the approximate time spent in preparation and trial, and the relative financial circumstances of the parties. The reasonableness of the fee awarded is, of course, a question of fact. *Hardy v. Hardy*, 117 Cal.App.2d 86, 255 P.2d 85. The trial court has a wide discretion in fixing the fee, *Smith v. Smith*, 85 Cal.App.

2d 428, 193 P.2d 56; *Hardy v. Hardy*, 117 Cal.App.2d 86, 255 P.2d 85, which can be upset only for an abuse of discretion. No abuse here appears.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.



The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Vincent Raymond WALSH and Joseph M.
Stewart, Defendants and Appellants. *

Cr. 5365.

District Court of Appeal, Second District,
Division 3, California.

Aug. 11, 1955.

Rehearing Denied Aug. 19, 1955.

Hearing Granted Sept. 8, 1955.

Defendants were convicted of bribery. The Superior Court, Los Angeles, Ralph K. Pierson, J., rendered judgment, and defendants appealed. The District Court of Appeal, Shinn, P. J., held that where it did not appear that prosecuting witnesses' bias, prejudice or vengeful motive was of recent origin, admission of notations witness-victims had made on checks and check stubs, consistent with testimony at trial, was error.

Judgments and orders reversed.

1. Criminal Law 432

In bribery prosecution, wherein there was testimony that victims had cashed checks immediately before making accused payments and had used the money received to make payments, checks were admissible. Pen.Code, § 68.

2. Witnesses 395

Evidence will not be received that a witness has previously made statements
* Opinion vacated 301 P.2d 247.

the same or consistent with his testimony on stand, except where witness has been charged with bias, prejudice or vengeful motive.

3. Witnesses $\S$ 395

To warrant admission of a witness' previous consistent statements, he must be charged with bias, prejudice or vengeful motive, and it must appear that witness did not hold the claimed bias, prejudice or vengeful motive at time of making prior statement, and facts must appear from which it may be inferred that witness has recently fabricated his testimony.

4. Witnesses $\S$ 395

In bribery prosecution, wherein it did not appear that prosecuting witnesses' bias, prejudice or vengeful motive was of recent origin, admission of notations witness-victims had made on checks and check stubs, consistent with testimony at trial, was error. Pen.Code, $\S$ 68.

5. Criminal Law $\S$ 1170 $\frac{1}{2}$ (1)

In bribery prosecution, wherein testimony of prosecuting witnesses was not otherwise corroborated, improper admissions of witnesses' consistent previous statements, under instruction that statements were admitted to prove witnesses' state of mind, to refute inference that they were testifying from evil motives and to prove that their testimony was not fabrication, was reversible error.

6. Criminal Law $\S$ 814(1)

Error of inapplicable instructions rests in fact that they pertain to points not pertinent to issues and contain matters of law for jury's consideration not necessary for their information, and, therefore, instead of enlightening, tend to confuse and mislead jury.

7. Criminal Law $\S$ 1172(6)

In bribery prosecution, wherein there was no evidence of entrapment, giving of instructions on law of entrapment was harmful to defendants.

8. Criminal Law $\S$ 422(6)

In bribery prosecution, evidence was sufficient to make prima facie showing of existence of conspiracy between the two defendants, and warranted admission of

testimony of a victim concerning his conversation with first defendant out of presence of second defendant.

9. Criminal Law $\S$ 427(5)

In order to render admissible the declarations of one defendant against his co-defendant, it is not necessary that there be more than a prima facie showing of existence of a conspiracy.

10. Criminal Law $\S$ 736(2)

In prosecution of two defendants for taking bribes, evidence was sufficient to take to jury question whether there had been a conspiracy. Pen.Code, $\S$ 68.

11. Bribery $\S$ 10

Criminal Law $\S$ 1170(2)

In bribery prosecution of two plaster inspectors, exclusion of evidence as to whether one of the jobs in question had been approved was error, but not prejudicial where other evidence to this effect had been introduced without objection. Pen. Code, $\S$ 68.

12. Witnesses $\S$ 277(2)

In bribery prosecution, cross-examination of a defendant concerning his appearance before grand jury and his refusal to answer questions there was not improper where defendant was permitted to explain at great length his refusal to answer all the questions that were asked of him.

Robert M. Fisk and Richard P. B. Tyson, Pasadena, for appellant Walsh.

Max Solomon and John J. Bradley, Los Angeles, for appellant Stewart.

Edmund G. Brown, Atty. Gen., Clarence Linn, Chief Asst. Atty. Gen., Raymond Momboisse, Deputy Atty. Gen., San Francisco, S. Ernest Roll, Dist. Atty., William E. McGinley, Deputy Dist. Atty., Los Angeles, for respondent.

SHINN, Presiding Justice.

Joseph Stewart and Vincent Walsh were jointly accused by indictment of the crime of bribery in violation of section 68 of the Penal Code. It was charged that the accused were inspectors of plaster and other building materials in the County of Los

Angeles; they received \$125 from Arnold Stubblefield for the purpose of influencing their action and opinion in matters then pending before them in their official capacity. The indictment also contained a second count charging the accused with having accepted \$50 from Edward A. Griffin for a like purpose. Defendants were convicted in a jury trial and their motions for new trial were denied. They appeal from the judgments and the orders.

There was evidence of the following facts. On February 5, 1954, defendants inspected an apartment building at 516-22 West 38th Street, San Pedro, and found certain of the plastering to be unsatisfactory. They acted together in making an order "Remove non-conforming interior plaster or submit test holes of interior plaster at spots indicated by plastering inspector. * * *" One copy was tacked to the stairs on the job and another was sent to the general contractor. No response having been received, Walsh, at the request of Stewart, contacted the general contractor and also spoke to Stubblefield by telephone. Walsh then wrote a duplicate order. By this time the job had been completed. On March 5 Stubblefield met Walsh and Stewart at the job. Stubblefield was told that four tests would be required at a cost of \$60 each. Walsh then said: "I heard that you were willing to fix the job up." Stubblefield asked if the price of one test would be all right but Walsh said he thought \$125 would take care of it. Walsh, in the presence of Stewart, told Stubblefield that if he would work with them he would not have to worry about other jobs—that they could have a job fixed anywhere in the city except part of the San Fernando Valley. Stewart and Walsh drove Stubblefield to a bank where Stubblefield cashed a check for \$125; he entered the car and gave the money to Walsh in the presence of Stewart; Stubblefield had no tests made on the plaster; nothing further was done with the plastering and on March 8 Walsh made a record entry "Cured O.K. 3/8/54 Walsh," indicating that the plaster had hardened or cured and that the job was satisfactory.

There was evidence of the following facts with respect to the Griffin job. One Margiotti was a general contractor; Griffin a plastering contractor. On March 10 all the plastering had been done. Stewart placed a "stop order" on the job and Griffin phoned Stewart at the latter's home. It was arranged for Griffin to meet Stewart or another inspector the following morning at the job site. In the meantime Griffin had been advised through a building material company that he had better pay off the inspectors and \$50 was suggested as an amount that would probably satisfy them. On March 11, Walsh and not Stewart appeared and met Griffin. Walsh said the plastering must be rejected; Walsh said: "Well, these jobs usually are taken care of" and set a price of \$50 which was paid by Griffin, and Walsh said "Well, this should handle you for a while to come." Nevertheless the job was not approved up to the time of trial, although the plastering withstood several tests. Griffin telephoned Walsh and asked why the job had not been approved and Walsh said "You know why, you son of a bitch" and hung up the phone. Both Walsh and Stewart denied having accepted any money either from Griffin or Stubblefield.

[1] Over the objections of the defendants the People introduced in evidence the \$125 check cashed by Stubblefield and the \$50 check cashed by Griffin. It is contended that the evidence was improperly received. We think the ruling was not erroneous. It was proper for the court to receive the testimony of Stubblefield and Griffin that they cashed checks immediately before meeting the respective defendants. The checks were not evidence of any additional facts and no objection was made to the testimony of Stubblefield and Griffin that they did cash checks. In view of the evidence that the checks were drawn immediately prior to the meetings with the defendants and that the identical money withdrawn was paid to the defendants, the checks themselves were evidence of no fact other than that Stubblefield and Griffin had in their possession the amounts of money which they claimed to have paid to the de-

endants. There was no error. *People v. Vollmann*, 73 Cal.App.2d 769, 167 P.2d 545.

We believe, however, that grave error was committed in the introduction in evidence over the objections of the defendants of certain writings of Stubblefield and Griffin, namely, a memorandum written by Stubblefield on the back of his check and a notation made by Griffin upon the counterfoil of his check. Stubblefield testified that when he drew the check he made an endorsement on the back of it. The notation reads: "Paid Vince Walsh \$125.00 for fixing job 38 & Pacific, San Pedro job." Griffin testified that at the time he cashed a check for \$50 he wrote on the counterfoil of the check the word "pay-off." The People offered these writings in evidence and to such offers the respective defendants registered sufficient objections, which were overruled.

[2, 3] It is a general rule that evidence will not be received that a witness has previously made statements the same as or consistent with his testimony on the stand; his testimony cannot be bolstered in that fashion. There are exceptions to the rule, namely, that where a witness has been charged with bias, prejudice, a vengeful motive which is claimed to have influenced his testimony, his statements consistent with such testimony may be proved, provided it be shown that at the time of the making thereof the witness did not hold the claimed bias, prejudice or vengeful motive and the exception is applicable where facts are shown from which it might be inferred that the witness has *recently* fabricated his testimony in which case evidence will be received of consistent statements if it appears that they were made prior to the event from which an inference of recent fabrication may be drawn. However, the claim of recent fabrication must consist of something more than prior statements inconsistent with the testimony given.

The entire rule assumes that there is a claim that the testimony of the witness is of recent contrivance. Whether the claim be that the witness has recently developed bias or prejudice toward a party, or has been persuaded or influenced to color his

testimony adversely, there is an implication that but for the bias or other influence the testimony would have been different. But if, from cross-examination, or otherwise, it appears that the witness is merely accused of lying, or if his former contradictory statements are proved in order to impeach him, evidence of former statements consistent with his testimony are inadmissible. *Davis v. Tanner*, 88 Cal.App. 67, 76, 262 P. 1106.

In his work on Evidence, section 1128, Wigmore says: "A consistent statement, at a *time prior* to the existence of a fact said to indicate Bias, Interest, or Corruption, will effectually explain away the force of the impeaching evidence; because it is thus made to appear that the statement in the form now uttered was independent of the discrediting influence. The former statements are therefore admissible." "The charge of Recent Contrivance is usually made, not so much by affirmative evidence as by negative evidence that the witness did *not* speak of the matter before" etc. § 1129. Section 1130 says that a witness who identifies a defendant in the courtroom will be allowed to testify that he identified him at a former time such as at the time of the arrest, the reason being that the courtroom identification may have been influenced by the surroundings.

In many situations the courts when considering the admissibility of former consistent statements have distinguished between statements made prior to the existence of facts tending to create bias or other influence and those made under conditions not different from those existing at the time the testimony was given. The invariable rule is that consistent statements made prior to the existence of the conditions creating bias are admitted; statements made under conditions not different from those at the time the testimony is given are rejected. IV, Wigmore on Evidence, 197, 202, §§ 1126, 1127; *People v. Doetschman*, 69 Cal.App.2d 486, 490-491, 159 P.2d 418; *People v. Kynette*, 15 Cal.2d 731, 753-754, 104 P.2d 794; *Board of Com'rs v. Vickers*, 62 Kan. 25, 61 P. 391; *State v. Dudoussat*, 47 La. Ann. 977, 17 So. 685; *Lanasa v. State*, 109 Md. 602, 71 A. 1058;

Commonwealth v. Nason, 252 Mass. 545, 148 N.E. 110; State v. Stogsdill, 324 Mo. 105, 23 S.W.2d 22; People v. Katz, 209 N.Y. 311, 103 N.E. 305, 312; Ferris v. Sterling, 214 N.Y. 249, 108 N.E. 406; In re McClellan's Estate, 21 S.D. 209, 111 N.W. 540, 543; Lewy v. Fischl, 65 Tex. 311, 318; Silva v. Pickard, 10 Utah 78, 37 P. 86, 89; State v. Carrington, 15 Utah 480, 50 P. 526, 527; Yarbrough v. State, 105 Ala. 43, 16 So. 758; McCord v. State, 83 Ga. 521, 10 S.E. 437; Gates v. People, 14 Ill. 433, 438; Hewitt v. Corey, 150 Mass. 445, 23 N.E. 223; Hayes v. Cheatham, 74 Tenn. 1, 10; Legere v. State, 111 Tenn. 368, 77 S.W. 1059; Anderson v. State, 50 Tex.Cr.R. 134, 95 S.W. 1037; Blackburn v. State, 78 Tex. Cr.R. 177, 180 S.W. 268, 270; Marable v. State, 87 Tex.Cr.R. 28, 219 S.W. 455, 457, 458; Coleman v. State, 90 Tex.Cr.R. 297, 235 S.W. 898, 899, 900; Nations v. State, 91 Tex.Cr.R. 112, 237 S.W. 570, 571; Tack-till v. Eastern Capitol Lines, 260 App.Div. 58, 21 N.Y.S.2d 14.

Robb v. Hackley, 23 Wend.N.Y. 50, discusses the development of the rule in England, its approval by Phillips, Starkie and other authorities and its acceptance in this country, and says:

"If an attempt is made to discredit the witness, on the ground that his testimony is given under the influence of some motive prompting him to make a false or colored statement, the party calling him has been allowed to show, in reply, that the witness made similar declarations at a time when the imputed motive did not exist.

"But as a general, and almost universal rule, evidence of what the witness has said out of court, cannot be received to fortify his testimony. It violates a first principle in the law of evidence to allow a party to be affected, either in his person or his property, by the declarations of a witness made without oath. And besides, it can be no confirmation of what the witness had said on oath, to show that he has made similar declarations when under no such solemn obligation to speak the truth. It is no answer to say, that such evidence will not be likely to gain

credit, and consequently will do no harm. Evidence should never be given to a jury which they are not at liberty to believe. * * * We have not in this state departed from that ancient and safe landmark in the law of evidence, which requires a witness in all cases to speak under the solemn sanction of an oath, and I am unwilling to peril the lives, the fame, or the property of individuals, by adopting the contrary doctrine." At pages 52-53, 57.

The People contend that a different rule prevails in California. They say "As the cross-examination of both prosecuting witnesses led to the unavoidable conclusion that their testimony was fabricated and that *at the time of trial* they were biased and prejudiced against the appellants, it was proper to introduce prior consistent statements for the limited purpose of rehabilitation. This is the recognized law of this state as so often has been expressed by our courts." Citing People v. Kynette, 15 Cal. 2d 731, 104 P.2d 794; People v. Weatherford, 78 Cal.App.2d 669, 178 P.2d 816; People v. Nobles, 44 Cal.App.2d 422, 112 P.2d 651. Other cases discussing the point are Bickford v. Mauser, 53 Cal.App.2d 680, 128 P.2d 79 and Davis v. Tanner, 88 Cal. App. 67, 262 P. 1106. Thus, by omitting an essential element of the rule the People contend that if it appears that a prosecuting witness entertains at the time of trial bias and prejudice toward an accused it is permissible to fortify his testimony by proof of his former statements of the same general tenor and effect, even though the witness entertained the same feelings toward the accused at the time the statements were made. This is not the law. If it were it would be a rare case in which the accused would not be confronted with hearsay of the most damaging sort. In each of the cases cited by the People the courts clearly stated the rule under which prior consistent statements may be received. In Davis v. Tanner, supra, 88 Cal. App. at page 75, 262 P. at page 1109, it was said: "It is apparent from the record that appellants offered the former statement of the witness Hogg to impeach her, on the

theory that she had fabricated or colored her testimony given at the trial through the urgent inducement of respondent's attorneys, with whom a recent conference was developed by appellants, with the manifest inference that this interview was the cause of whatever conflict exists between her testimony at the trial and her former statement made to appellants." In *People v. Kynette*, supra, 15 Cal.2d 731, 104 P.2d 794, the court said: "When a witness has been charged with improper motives of interest, or improper influences, or with recent fabrication, the law allows hearsay statements to be introduced for the purpose of showing that the same and consistent statements had been made at a time prior to the fabrication or prior to the time the motive of interest existed. Such evidence is then admitted, not to prove the facts of the case, but as tending to show that the witness has not been controlled by motives of interest, and that he has not fabricated something for the purposes of the case." 15 Cal.2d at page 753, 104 P.2d 794, 806. In speaking of the cross-examination of a witness, Sakalis, who had testified that he had been taken into the hills and beaten by the defendants and later had been receiving \$50 every two weeks from the district attorney's office, the court said: "The undoubted purpose of such cross-examination was to impeach the credibility of the witness and to attempt to establish that his story was probably of *recent fabrication and perhaps influenced by the payments so received.*" 15 Cal.2d at page 753, 104 P.2d at page 805. (Emphasis added.) Accordingly the receipt of evidence of earlier statements of Sakalis consistent with his testimony was approved. There is nothing in the holding inconsistent with the court's statement of the law. In *Bickford v. Mauser*, supra [53 Cal.App.2d 680, 128 P.2d 83], it was said that the evident purpose of the cross-examination of the witness was to develop "that after he talked with defendants' counsel and visited the scene of the accident he changed his story." This was a charge of recent fabrication and the testimony was admissible in accordance with the holding in *Davis v. Tanner*, which the court quoted at some length. If it was the

intention to hold that such evidence is admissible in any case in which the testimony of a prosecuting witness is claimed to be false, wholly disregarding the element of *recent* fabrication, the holding would be out of line with the universal rule as demonstrated in the dissent of Presiding Justice Peters. In *People v. Nobles*, 44 Cal.App.2d 422, 112 P.2d 651, 653, the court stated: "It is a well known rule that, under ordinary circumstances, prior extra-judicial statements of a witness consistent with his testimony on the stand will not be admitted for the purpose of bolstering such testimony. But the exception to that rule is that such evidence is proper to rebut inferences created by the cross-examination of the witness and to rehabilitate his evidence following attempts to impeach him by endeavoring to show that his testimony is actuated by base or ulterior motives, or that his testimony in court is of recent fabrication." It was held to have been proper to receive evidence that a prosecuting witness had made statements to a deputy sheriff consistent with her testimony at the trial for the reason that an inference had been created that the testimony was influenced by a vengeful attitude toward the accused. From the facts stated in the opinion it does not appear whether the former statements were made at a time when the witness was not actuated by a motive of revenge. This is a prerequisite for the admission of former statements and we must assume that the court was mindful of that fact in approving the receipt of the evidence, since otherwise the holding would have been contrary to the settled rule in this and all other jurisdictions.

People v. Doetschman, 69 Cal.App.2d 486, 159 P.2d 418, supra, applied the rule as follows: It being claimed by the defense that the prosecuting witness was frightened when she was taken to the district attorney's office for questioning and when she testified before the grand jury, was threatened with perjury and with being taken from her parents and placed in a home, evidence that before the fears or threats were claimed to have been aroused or made, the statements of the witness consistent with her testimony were admissible, whereas

statements made to a doctor after the inception of the alleged fears or threats were clearly inadmissible. Other cases in point are *People v. Ferrara*, 18 Cal.App. 271, 122 P. 1069; *People v. Doyell*, 48 Cal. 85; *California Electric Light Co. v. California Safe Deposit etc. Co.*, 145 Cal. 124, 78 P. 372.

We have extended our discussion in order to impress upon the People that upon the trial and upon the appeal they have urged upon the courts an interpretation of the decisions of the California courts which is grossly erroneous and manifestly unsupportable.

[4.5] There was no evidence whatever of facts that would have justified the admission of the writings. Stubblefield and Griffin quite naturally were prosecuting the defendants in the hope they would be convicted; their attitude did not differ from that of accusers generally who feel they have been wronged by criminal means. Such feelings of animosity as they may have entertained had their origin in their transactions with the defendants. Nothing occurred thereafter to change their feelings or motives. It is not contended by the People that the hard feelings of the witnesses toward the defendants was of recent origin. Neither is it claimed that the testimony of the witnesses was given under pressure exerted by the authorities or under any other extraneous influence. The admission into evidence of the writing on the back of Stubblefield's check and the notation made by Griffin on his check stub was grave error. It was no doubt deemed by the jury to be credible corroboration of the testimony of the witnesses. The jury was admonished on more than one occasion that the evidence was not received for the purpose of proving the truth of the contents of the writings, but for the purpose of proving the state of mind of the witnesses, and to refute any inference that they were testifying from evil motives and to rehabilitate them and to prove that their testimony was not a fabrication. The admissions were erroneous and confusing. In view of the fact that the testimony of the prosecuting witnesses was not otherwise corroborated, we are satisfied that the error

requires a reversal of the judgments and orders.

At the request of the People the court gave four instructions on the law of entrapment. They set forth at length the features of that defense. It is not questioned that they were correct statements of the law. The contention of the defendants is that they were inapplicable to the case, tended to distract the jury from the only defense that was urged, namely, that the defendants accepted no money as bribes, and that the instructions in fact implied or at least suggested that the defendants had received money from Stubblefield and Griffin. The People endeavor to justify the giving of the instructions upon the theory that there was evidence which might have suggested to the jury that defendants were claiming that they had been entrapped. It is said that "*People v. Jackson*, 42 Cal.2d 540 [268 P.2d 6], supplies a complete answer to this argument of appellants." This is to say that the pertinent facts in that case were substantially the same as in the present case. This is not true. In the Jackson case there was evidence that the defendant, charged with offering bribes to two police officers, had conferences with those officers in which they gave encouragement to the scheme of protection of gamblers proposed by the defendant and led him on in the belief that his proposal was being seriously entertained. Defendant admitted having offered the bribes. His defense was that he was not in earnest and was only testing the honesty of the officers. There were no comparable facts in the present case. Griffin testified that he had conferred with the district attorney's office before paying the money and was advised to pay it. There was not the least semblance of entrapment as there was in the Jackson case. Moreover, the instructions were made applicable to the charge of receiving a bribe from Stubblefield and there was no evidence that the district attorney's office or any officers of the law had any knowledge of that transaction.

In *People v. Roe*, 189 Cal. 548, 558, 209 P. 560, 565, the court, after stating that it was the duty of the trial court to give

instructions upon all pertinent issues but that they should be confined to such issues, spoke as follows:

"This being so, the charge of the trial court may not, without error, even though correctly stating abstract legal principles, be extended beyond such limitation to the point of covering an assumed issue which finds no support in the evidence, or which the undisputed evidence in the case shows does not exist. Hughes' Instructions to Juries, § 80, p. 70; 1 Blasfield Instructions to Juries, 2d ed., § 82, pp. 183-186; Garcia v. State, Tex.Cr.App., 61 S.W. 122; State v. DeWolfe, 29 Mont. 415-426, 74 P. 1084; Aguirre v. Alexander, 58 Cal. 21; People v. Dallen, 21 Cal.App. 770, 132 P. 1064; Maines v. State, 35 Tex.Cr.R. 109, 31 S.W. 667; Comptoir etc. v. Dresbach, 78 Cal. 15, 20 P. 28; In re Calkins, 112 Cal. 296, 304, 305, 24 P. 577.

[6, 7] "The error of inapplicable instructions rests in the fact that they pertain to points not 'pertinent to the issue,' and contain matters of law for the jury's consideration not 'necessary for their information,' and therefore, instead of enlightening, tend to confuse and mislead the jury. This is so because such instructions, in effect, either create a false issue or constitute a misstatement of the real issue, thereby distracting the attention of the jury from and befogging the real issue."

The implications of the instructions on entrapment were unquestionably harmful to the defense.

[8-10] It is contended on behalf of appellant Stewart that error was committed in the admission over his objection of the testimony of Griffin concerning his conversation with Walsh out of the presence of Stewart. The ground of the objection was that there was no evidence whatever of the existence of a conspiracy between the defendants. There was no error. The defendants were working as inspectors in the same territory and they were working together on the Stubblefield and Griffin

jobs. There was evidence that they were together when Stubblefield paid Walsh \$125. There was also evidence that Griffin called Stewart to ask what could be done to straighten out the difficulty on his job and that Stewart after making an appointment for the following day sent Walsh to keep it. There was evidence from which it could have been inferred that a conspiracy existed to demand payment for the approval of plastering work. In order to render admissible the declarations of one of the defendants as against his codefendant it was not necessary that there be more than a prima facie showing of the existence of a conspiracy. People v. Steccone, 36 Cal.2d 234, 223 P.2d 17. Under proper instructions the court submitted to the jury the question whether the evidence was sufficient to prove the existence of a conspiracy. The giving of these instructions was not error. People v. Anderson, 35 Cal.App.2d 23, 94 P.2d 627.

[11] Defendants questioned a Mr. Thille, senior inspector of the Department of Building and Safety, whether after the meeting between Griffin and Walsh a further job order was issued by the department; an objection of the People was sustained and defendants offered to prove that the plastering had never been approved by the Department of Building and that at the time of trial no approval had been given or certificate of occupancy issued. An objection by the People to the introduction of this evidence was sustained. This was error. The offered evidence would have been pertinent to the question whether defendants acted in good faith in refusing to pass the plastering work without tests; however, there was other evidence introduced without objection that up to the time of trial the job had not been approved. The ruling was not prejudicial.

[12] Appellant Walsh was cross-examined with respect to his appearance before the grand jury. He denied to the grand jury having received any money as a bribe. It was shown in his cross-examination that he had refused to answer questions with respect to occurrences at or about the time of the alleged payment of the bribe. It was contended that it was

improper to elicit by means of this cross-examination that Walsh refused to answer certain questions before the grand jury upon the ground that his answers would tend to incriminate him. The cross-examination was not improper. *People v. Kyntette*, supra, 15 Cal.2d 731, 104 P.2d 794. Walsh was permitted to explain at great length his refusal to answer all the questions that were asked of him.

There are no other assignments of error which call for special consideration.

As we have stated, the testimony of Stubblefield and Griffin was uncorroborated except by the written memoranda which they claimed to have made immediately prior to the payment of the bribes. We think this evidence which was erroneously admitted was probably considered by the jury as credible evidence corroborating the testimony of Stubblefield and Griffin. This evidence alone could have influenced the jury to decide the question of credibility of the prosecuting witnesses adversely to the defendants. The errors we have discussed deprived the defendants of a fair trial.

The judgments and orders are reversed.

PARKER WOOD and VALLÉE, JJ.,
concur.



Arcadio MORENO, Plaintiff and Respondent,
v.

LOS ANGELES TRANSIT LINES, a corporation, and Harold Franzlick,
Defendants and Appellants.

Civ. 20542.

District Court of Appeal, Second District,
Division 3, California.

Aug. 11, 1955.

Hearing Granted Oct. 5, 1955. *

Action by motorist against street railroad and operator of streetcar for injuries sustained in collision. From adverse judgment of the Superior Court, Los Angeles County, Thomas J. Cunningham, J., the

* Dismissed pursuant to

railroad and operator of streetcar appealed. The District Court of Appeal, Ashburn, Judge pro tem., held that evidence was insufficient to justify an instruction on the last clear chance doctrine.

Judgment reversed.

Opinion, 283 P.2d 76, vacated.

1. Negligence ⇨138(4)

It is necessary for the court to inform the jury on the last clear chance doctrine when, on any valid theory, there is substantial evidence to support the application of the doctrine.

2. Negligence ⇨141(9)

In determining propriety of instruction on doctrine of last clear chance, trial judge must view evidence in light most favorable to application of doctrine and indulge in every reasonable inference in support thereof.

3. Negligence ⇨83.9

A defendant's duty to avoid an accident if he has a clear opportunity to do so begins with actual or imputed realization of fact that plaintiff cannot extricate himself from existing danger by use of due care.

4. Street Railroads ⇨103(3)

A streetcar motorman, whose inability to deviate from path marked by rails gives him a qualified right of way, is entitled to assume that a motorist, who is headed across his path, will exercise ordinary care and will stop before it is too late to avert a collision, and not until motorman is or should be alerted to probability of motorist failing to yield is he required to begin process of stopping his car, and mere fact that driver of automobile is looking in another direction is not necessarily enough to apprise motorman of the probability of a collision.

5. Street Railroads ⇨103(3)

Operator of a streetcar, who sees a motorist headed across his path, is not required at all times to make a correct analysis of the situation, to know the distance and speed of automobile and driver's intention, and until operator is aware, as an stipulation April 4, 1956.

ordinarily prudent man in his position should be, of fact that motorist is in a position from which he cannot extricate himself through use of due care, operator may assume that motorist will do so, but when knowledge is acquired in fact or imputed to operator because he should know it, he must begin to avail himself of a last clear chance, if there be one.

6. Street Railroads ⇨118(15)

In action by motorist for injuries sustained in a collision with a streetcar, portion of instruction on last clear chance doctrine requiring defendant to act to save plaintiff from himself immediately after defendant acquired "actual knowledge of plaintiff's perilous situation" was erroneous since defendant was not required to act until after he also knew or in exercise of ordinary care should have known that plaintiff was unable to escape the peril through exercise of ordinary care on his part.

7. Street Railroads ⇨103(3)

In action against street railroad and operator of streetcar for injuries sustained in collision by motorist, who twice looked and saw the approaching streetcar but who devoted his attention to the opposite direction from which no threat of danger was approaching and who gave no testimony that he thought he had time to cross ahead of streetcar and who claimed no forgetfulness or other lack of appreciation of the threat of danger, last clear chance doctrine could not be invoked on theory that motorist was totally unaware of the danger.

8. Street Railroads ⇨118(15)

In action by motorist against street railroad and operator of streetcar for injuries sustained in collision, evidence did not justify an instruction on the last clear chance doctrine.

Melvin L. R. Harris, Henry R. Thomas, and Henry F. Walker, Los Angeles, for appellants.

Sampson & Dryden, Patrick D. Horgan, and Jacob Swartz, Los Angeles, for respondent.

ASHBURN, Justice pro tem.

Personal injury action. Verdict for plaintiff. Defendants Los Angeles Transit Lines and Harold Franzlick, as appellants, made no claim of excessive damages. Counsel rely primarily upon a claim that it was error to instruct the jury upon last clear chance, and alternatively, that the instruction given erroneously stated that doctrine.

[1,2] It is necessary for the court to inform the jury on that matter "when, on any valid theory, there is substantial evidence to support the application of that principle. * * * if the facts be such that the doctrine *may be applied*, it is the duty of a trial judge to submit it to a jury by proper instructions * * *." Wright v. Los Angeles Ry. Corp., 14 Cal.2d 168, 179, 93 P.2d 135, 140, and the judge must view the evidence "in the light most favorable to the application of the doctrine and indulging every reasonable inference in support thereof". Daniels v. City & County of San Francisco, 40 Cal.2d 614, 617, 255 P.2d 785, 787.

The accident occurred at the intersection of Vermont Avenue and 110th Street in the City of Los Angeles. In that area Vermont, which runs north and south, has two roadways with defendant's private right of way intervening between them. The east roadway is for northbound traffic and the west one for southbound. Likewise the east car track carries cars going north and the west track is for those traveling south. Plaintiff's automobile, eastbound on 110th Street, was struck by defendant's northbound street car.

The only witnesses to the immediate facts of the accident were plaintiff, defendant Franzlick (the motorman), Mrs. Ella Lowry (a passenger on the street car) and Frank Simpson, who was leaving a cafe on the west side of Vermont and north of 110th Street. The accident occurred at or near the intersection of the northbound or east track with the center line of 110th Street. Plaintiff stopped at the stop sign on the west side of Vermont, waited for four or five southbound automobiles to pass; then started forward in low gear;

he testified that when he had almost cleared the west curb line and was some 75 feet from the point of impact, he looked to the right or south and saw the northbound car, which later struck his automobile; that it was then about 325 feet from the intersection; that he then looked left or north for traffic, automobile or street car, and saw none except a second group of southbound automobiles about 150 feet away; that he then looked to the south again and saw the street car when the front of his automobile was about 50 feet from the point of accident. He placed the street car some 255 feet to the south at that time (respondent's counsel says 225 feet). At or about that 50 foot distance he shifted into second gear, the car having a standard gear shift. His own speed was fixed by him at 12 miles or less, never more than 12. Plaintiff never made any estimate of the speed of the street car, either on the grounds or in court but did say that it was going a little more slowly when seen the second time. At all times before and after each of the occasions of looking at the street car, he had his head turned to the north and was looking that way though there was no traffic of any kind approaching from that direction except the group of automobiles which he had seen about 150 feet away. The motorman said that when first seen by him the plaintiff was looking to the north and continued to do so; that after first seeing plaintiff he continued to watch him. Plaintiff further testified that when he arrived practically at the northbound track he looked again to the right and the street car was almost upon him, some 15 feet away. His car was hit in the center and back of center. Plaintiff swore that he heard no gong or bell or other noise from the street car. The motorman Franzlick testified that he began to ring his gong as soon as he saw plaintiff, when the street car was 80-90 feet from the impact, and continued to do so until the collision occurred; that he also began at once to stop his car, began this as soon as he saw plaintiff. On his dep-

osition Franzlick testified he saw plaintiff when 180 feet, or three street-car lengths, from the point of impact; later he changed the deposition to say 180 feet from the automobile. No witness placed the speed of the street car at more than 25 miles at any time. At the trial Franzlick testified that he first saw plaintiff's automobile when the street car was a few feet south of the safety zone, some 80 to 90 feet from the point of impact; that he was then going about 20 miles an hour; that he saw plaintiff traveling at 20 to 25 miles and looking north, plaintiff being 80 to 90 feet from ultimate collision; that he, Franzlick, then began to ring his gong vigorously and applied his brake in an immediate and continuous effort to stop the car. Also that plaintiff slowed his auto slightly and then picked up speed at once (this may have been done in the process of shifting gears).

The passenger, Mrs. Ella Lowry, corroborated this version to a considerable extent. She was in the front section of the car, heard the bell start to ring fast when the car was near the south end of the loading zone, observed that the brakes were applied at the same time; that the car was then going only 20 miles an hour and its speed was down to 15 miles at the time of accident. She also said the automobile was increasing speed and going as much as 30 miles an hour.

After rehearing we have again concluded that this cause must be reversed, and we now place our ruling upon two grounds,¹ (1) that the instruction which the court gave upon the doctrine of last clear chance was erroneous and (2) that under the evidence in this case it was error to give any instruction on last clear chance.

The doctrine of last clear chance is stated in *Girdner v. Union Oil Co.*, 216 Cal. 197, 202, 13 P.2d 915, 917: "The necessary elements, as deduced from the well-considered cases, may be stated in substance as follows: That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary

1. Cf. *Coombes v. Getz*, 217 Cal. 320, 329, 18 P.2d 939; *Bank of Italy, etc., Ass'n*

v. Bentley, 217 Cal. 644, 650, 20 P.2d 940.

care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure." This language has been repeated so often in the decisions as to become a classic definition of the rule. The crucial part of it in the case at bar is this: "* * * a position of danger from which he cannot escape by the exercise of ordinary care * * * not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape."

The entire instruction as given (BAJI 205) reads: "There has grown up in our law a certain reasoning process that we sometimes call to our aid in analyzing the facts of an accident case, and which is known as the doctrine of last clear chance. It is permissible to use the doctrine only after we first find, and you may not use it unless and until you first shall have found, that in the events leading up to the accident in question, both the plaintiff and defendant were negligent.

"The doctrine of last clear chance may be invoked if, and only if, you find from the evidence that these six facts existed:

"First: That plaintiff, by his own negligence, got himself into a position of danger.

"Second: That, thereupon, either it was physically impossible for him through the exercise of ordinary care to escape from the danger, or he was totally unaware of impending danger in his position.

"Third: That the defendant had actual knowledge of plaintiff's perilous situation.

"Fourth: That it appeared to the defendant, or would have appeared to him in the exercise of ordinary care, that plaintiff

either was unaware of the danger impending in the situation or was unable to escape therefrom through the exercise of ordinary care.

"Fifth: That after the defendant acquired actual knowledge of plaintiff's perilous situation he had a clear opportunity to avoid the accident and could have done so by exercising ordinary care.

"Sixth: That the defendant did not avail himself of that opportunity, but by negligent conduct proximately caused the accident.

"If all the conditions just mentioned are found by you to have existed with respect to the accident in question, then you must find against the defense of contributory negligence, because under such conditions the law holds the defendant liable for any injury suffered by the plaintiff and proximately resulting from the accident, despite the negligence of the plaintiff."

Appellants' attack upon the instruction which was given centers upon the stated condition "Fifth: That after the defendant acquired actual knowledge of plaintiff's perilous situation, he had a clear opportunity to avoid the accident and could have done so by exercising ordinary care."

[3] Appellants' point is that "defendant is not called upon or required to take steps in such case until the time arrives when he realizes or ought to realize plaintiff's inability to escape" and that "the given instruction requires defendant to have taken such measures upon acquiring knowledge of plaintiff's position * * * instead of as of the time defendant realizes or ought to realize plaintiff's inability or unawareness." In other words, the argument is that clause Third requires actual knowledge of plaintiff's position and clauses Fifth and Sixth require defendant to avoid the accident if he has a clear opportunity to do so after acquiring knowledge of that position, whereas the law requires such activity on defendants' part to begin with actual or imputed realization of the fact that plaintiff cannot extricate himself from the existing danger by the use of due care. The authorities support the claim that defendants' duty to act arises at this later

time, if it be later in fact. *Starck v. Pacific Electric Ry. Co.*, 172 Cal. 277, 283-284, 156 P. 51, L.R.A.1916E, 58; *Johnson v. Southwestern Eng. Co.*, 41 Cal.App.2d 623, 626, 107 P.2d 417; *Palmer v. Tschudy*, 191 Cal. 696, 700, 218 P. 36; *Daniels v. City & County of San Francisco*, supra, 40 Cal.2d 614, 620-621, 255 P.2d 785; *Sills v. Los Angeles Transit Lines*, 40 Cal.2d 630, 637, 255 P.2d 795; see also, *Rest. of Torts*, § 480, comment (b) on page 1258; 21 Cal. L.Rev. p. 261. In *Doran v. City & County of San Francisco*, 44 Cal.2d 477, at page 488, 283 P.2d 1, at page 8, the court says: "What then is the main factor which may make plaintiff's negligence, in the eyes of the law, a remote cause rather than a proximate cause of the accident? It is obviously the existence of some such appreciable interval after the time that plaintiff has reached a state of helplessness as to enable defendant to gain actual knowledge of plaintiff's state of helplessness, and to have a last clear chance to avoid the accident."

[4,5] A motorman, whose inability to deviate from the path marked by the rails gives him a qualified right of way, *Scott v. San Bernardino Valley etc. Co.*, 152 Cal. 604, 610, 93 P. 677; *McHugh v. Market St. Ry. Co.*, 29 Cal.App.2d 737, 742, 85 P.2d 467, is entitled to assume that a motorist who is headed across his path will exercise ordinary care and will stop before it is too late to avert a collision; not until he is or should be alerted to the probability of the motorist failing to yield is he required to begin the process of stopping his car, *Thompson v. Los Angeles, etc., Ry. Co.*, 165 Cal. 748, 755, 134 P. 709; *Rasmussen v. Fresno Traction Co.*, 15 Cal.App.2d 356, 367, 59 P.2d 617; the mere fact that the driver of the automobile is looking in another direction is not necessarily enough to apprise him of the probability of a collision, *Rodabaugh v. Tekus*, 39 Cal.2d 290, 294, 246 P.2d 663; the motorman is not required at all times to make a correct analysis of the situation, to know the distance and speed of the automobile and the driver's intentions; until he is aware, as any ordinarily prudent man in his position would be aware, of

the fact that the automobilist is in a position from which he cannot extricate himself through use of due care, the motorman may assume that he will do so; when that knowledge is acquired in fact or imputed to him because he should know it, he must begin to avail himself of a last clear chance, if there be one.

[6] Clause First of the instruction presupposes that plaintiff's negligence has put him in a position of danger; Second, that he is unable to escape that danger because of physical impossibility or unawareness of the danger; Third requires that defendant have "actual knowledge of plaintiff's perilous situation." First and Second require plaintiff to be in a predicament from which he cannot escape by his own efforts. Third requires actual knowledge on defendant's part that plaintiff is in that particular position, but under the authorities actual knowledge is requisite only with respect to plaintiff's position, not his inability to rescue himself. On that latter phase of the situation actual knowledge is not necessary. In the language of *Girdner v. Union Oil Co.*, supra, 216 Cal. 197, 202, 13 P.2d 915, 917, it is requisite that defendant know "or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation." If clause Third were intended to mean that defendant must have actual knowledge of the factors set forth in both First and Second it would be erroneous. But it is not so intended for it is immediately followed by Fourth which sets out the requirement of actual or imputed knowledge of plaintiff's inability to extricate himself from danger. The structure of the instruction matches First with Third and Second with Fourth. Then Fifth and Sixth require defendant to act to save plaintiff from himself immediately after the defendant acquires "actual knowledge of plaintiff's perilous situation." This phrase of Fifth is quoted from Third and applies to plaintiff's dangerous position, rather than a realization, actual or implied, of his inability to extricate himself. It allows no time or opportunity for the realization covered by Fourth and accorded defendant by the applicable authorities above cited. Paragraph Fifth should read:

"That after the defendant acquired actual knowledge of plaintiff's perilous situation and knew or in the exercise of ordinary care should have known that plaintiff was unable to escape the peril through exercise of ordinary care on his own part, defendant had a clear opportunity to avoid the accident and could have done so by exercising ordinary care."

Respondent has relied upon the asserted fact of approval of a similar instruction in *Gillette v. San Francisco*, 41 Cal.App.2d 758, 765, 107 P.2d 627. The one there given bears number 56 in the record; it is referred to in the briefs as BAJI 111. An examination of the briefs shows that the differences between BAJI 205 and the one there discussed are such that the *Gillette* ruling cannot constitute a controlling precedent here. Specifically paragraph Fifth of the instruction there given read: "That the defendant had a clear opportunity to avoid the accident and could have done so by exercising ordinary care." It did not contain the words "after the defendant acquired actual knowledge of plaintiff's perilous situation," the phrase that appellants attack here.

In their petition for rehearing counsel for respondent, for the first time, urge that the following cases have held BAJI 205 to be a correct instruction, viz.: *Peterson v. Burkhalter*, 38 Cal.2d 107, 110, 237 P.2d 977; *Daniels v. City & County of San Francisco*, supra, 40 Cal.2d 614, 255 P.2d 785; *Root v. Pacific Greyhound Lines*, 84 Cal.App.2d 135, 136, 137, 190 P.2d 48; *Cole v. Ridings*, 95 Cal.App.2d 136, 142, 212 P.2d 597. To this list may be added *Alberding v. Pritchard*, 97 Cal.App.2d 443, 444-445, 217 P.2d 1012, which is cited in the *Daniels* case. Examination of the record in those cases discloses that the point raised on this appeal was not presented, and hence not decided, in any of them. None of the cases just mentioned serves as a precedent upon the question here raised as to the alleged error in paragraph Fifth of 205; this for the reason that that question was not presented to the court, discussed by it, or actually decided. "A decision cannot be regarded as authority for a legal proposition which upon the facts of the case might have been, but in fact, was

not raised or decided." *Wrenn v. Sutton*, 65 Cal.App.2d Supp. 823, 827, 150 P.2d 589, 591; cf. *Cate v. Fresno Traction Co.*, 213 Cal. 190, 203, 2 P.2d 364; *Estate of Pendell*, 216 Cal. 384, 386, 14 P.2d 506.

The instruction given at bar was erroneous.

In considering the question of whether any last clear chance instruction was permissible at bar, counsel stress the matter of unawareness and appellants cite authorities to the effect that "the theory that he (plaintiff) was oblivious to his danger because he did not again look toward the street car cannot be invoked to show his inability to escape * * *." *Rasmussen v. Fresno Traction Co.*, supra, 15 Cal.App.2d 356, 369, 59 P.2d 617, 623. Counsel also invoke this language of *Palmer v. Tschudy*, supra, 191 Cal. 696, 700, 218 P. 36, 38: "The rule * * * applies equally when she is wholly unaware of the danger and for that reason unable to escape it. But the rule also requires that if she is aware of the danger, or becomes aware of it, she must thereafter exercise ordinary care for her own protection. If, being aware of the danger and able to escape it by exercising ordinary care, she neglects to do so, she cannot invoke the last clear chance rule to place the burden of the resulting loss upon the other party."

[7] In the recent decision of *Doran v. City & County of San Francisco*, 44 Cal.2d 477, 283 P.2d 1, 5, the same thought is voiced as follows: "Total unawareness of danger, as contemplated by the doctrine, does not exist where the injured party is fully aware of the approach of an oncoming vehicle up to the instant before the collision and then shifts his attention to look in some other direction while proceeding directly into its path."

The facts in our case do not afford plaintiff the benefit of the "unawareness" phase of the rule. Plaintiff twice looked and saw the approaching street car, which he knew could not turn aside for him; he made no estimate of its speed, gave no testimony that he thought he had time to cross ahead of it; devoted his attention to the north, from which direction no threat of danger was approaching; gave no explanation of this;

claimed no forgetfulness or other lack of appreciation of the threat of danger from defendant's car; and he could have stopped his car in safety after seeing the street car the first time. Viewed only from the standpoint of unawareness it can only be said that plaintiff's own negligence was of a continuing nature which constituted one of the proximate causes of the accident. Lest it be thought that this ruling is contrary to that of *Peterson v. Burkhalter*, supra, 38 Cal.2d 107, 237 P.2d 977, we call attention to the fact that that opinion proceeds upon the assumption that, in point of fact, the plaintiff was unaware of his peril at all pertinent times.

[8] Next arises the question of whether, within the last clear chance doctrine, plaintiff was in danger from which he could not extricate himself by exercise of ordinary care. Of course, plaintiff "was not in a position of danger until he arrived at a point at which he could no longer stop or slow down in time to avoid a collision." *Rodabaugh v. Tekus*, supra, 39 Cal.2d 290, 294, 246 P.2d 663, 665. "Plaintiffs were not in a position of danger nor in a state of helplessness, within the meaning of the doctrine, until they had reached a point where they could no longer escape by the exercise of ordinary care." *Doran v. City & County of San Francisco*, supra, 44 Cal.2d 477, 283 P.2d 1, 8.

According to plaintiff's testimony he saw the street car three times before the actual impact, and he never traveled over 12 miles an hour. First the street car was seen some 300 to 325 feet south of point of impact when he was 75 feet to the west of it. At 12 miles an hour the automobile could be brought to a stop in 23-25 feet, and hence plaintiff was in a position to save himself by the slightest exercise of care. Plaintiff says he next saw the street car some 255 feet away from impact and he was then 50 feet back of that point; going at the 12 mile speed he could stop in 23-25 feet and hence was in no danger from which he could not easily save himself. When he last saw the street car, according to plaintiff, he was just entering the northbound car track and the street car was about 15 feet away. It could not stop in any such distance (at 15

miles an hour it would take 66 feet to make an emergency stop), and hence there was no last clear chance.

According to motorman Franzlick, he first saw the automobile when it was 80-90 feet away from impact; it was going 20-25 miles, then less, then more, and back up to 20-25 miles. He says the street car was traveling at the same rate, 20-25 miles, and was likewise 80-90 feet from point of impact. At 20 miles it would take him 110 feet to make an emergency stop. There was no last or clear or any chance for him to avoid an accident under these circumstances. But plaintiff who was back 80-90 feet and traveling at 20-25 miles could stop in ample time,—in 40 feet at 20 miles, or 64 feet at 25 miles. He was in no peril then. Mrs. Lowry's testimony is substantially the same as Franzlick's, though not so detailed. Simpson, who was in front of the cafe, saw very little, but he did say the street car and the automobile were traveling at about the same rate of speed.

When his deposition was taken Franzlick said in one place that he saw plaintiff's auto when the street car was about 180 feet from point of impact. But he has repeatedly asserted that the street car was going 20 miles an hour, the auto 20-25 miles, and that it was then 80-90 feet back of point of collision. The uncontradicted expert testimony establishes that the automobile when traveling at 25 miles could be stopped in 64 feet. In this factual situation plaintiff was in no danger and there was no reason for the motorman then to begin the process of stopping his car. At the trial Franzlick (who had previously changed the deposition) testified that he first saw plaintiff when the street car was 180 feet from the automobile (not point of impact), and that plaintiff was then 80-90 feet away from the northbound track. Plaintiff was in no danger as he could stop in 64 feet, and there was no occasion for Franzlick then to stop his car. The ringing of the gong under those circumstances (if it did begin there) would be only a warning to turn the head and exercise common care. If Franzlick had then begun to stop the car, being about 155 feet south of the crossing and going 25 miles an hour, he would just about have

made it with an emergency application of the brakes, and the time consumed would be 4 seconds. But plaintiff, going 20 miles, would in that 4 seconds have crossed the track and gone some 30 feet beyond it.

Respondent's counsel argue for a last clear chance upon the basis of a street car speed of 15 miles at the time the motorman first saw plaintiff; Franzlick did give this figure in his deposition; counsel are not explicit as to plaintiff's then location, but Franzlick said he first saw him at a point which scales on the map 90 feet west of the northbound track. The expert witness did testify that an emergency stop could be made by the street car in 66 feet if it was going 15 miles when the brake was applied; and Franzlick said he saw plaintiff when the street car was 80-90 feet from the point of impact, and he began the stopping process at once. If so, and if plaintiff was going 12 miles, as he says, he had ample time to stop (23-25 feet) and hence was not in the required position of peril; if plaintiff was traveling 25 miles (twice his own estimate) and was 80-90 feet west of the track he could stop in 64 feet and again he was not in peril except of his own making through failing to stop or slow down.

We have endeavored to view the facts in every light permissible under the evidence, but we call attention to the fact that any supposition that plaintiff's speed was in excess of about 12 miles per hour would be opposed not only to plaintiff's own testimony but also to that of his expert witness who testified that the maximum speed that could have been attained in 94 feet by plaintiff's car, a 1948 model, was 23 or 24 miles per hour, or a lesser speed, which he could not estimate, if plaintiff shifted gears. Plaintiff did shift gears and there was no evidence whatever that he pushed his throttle to the floorboards and kept it there during the crossing. Moreover, at an assumed speed of anything like 20 or 25 miles per hour he would have cleared the tracks in safety.

We have concluded that this case falls within the ambit of *Rodabaugh v. Tekus*, supra, 39 Cal.2d 290, 246 P.2d 663. The following quotations are pertinent. "Under any view of the testimony it is clear that

both cars were approaching the intersection at approximately the same time and at approximately the same speed. * * * It has been frequently stated that the last clear chance doctrine is ordinarily inapplicable under such conditions. * * * As was said in *Poncino v. Reid-Murdock & Co.*, supra, at 136 Cal.App. [223], at page 232, 28 P.2d [932] at page 936: 'Like many other cases involving collisions between moving vehicles, the accident may be said to have happened within the twinkling of an eye after the first indication of danger. While the doctrine of last clear chance has been applied in certain exceptional cases involving collisions between moving vehicles, we are of the opinion that it should not be applied to the ordinary case in which the act creating the peril occurs practically simultaneously with the happening of the accident and in which neither party can fairly be said to have had a *last clear chance* thereafter to avoid the consequences. To apply the doctrine to such cases would be equivalent to denying the existence of the general rule which makes contributory negligence a bar to recovery.'" 39 Cal.2d at pages 294-295, 246 P.2d at pages 665-666.

We deem it unprofitable and therefore do not pause to analogize or differentiate the factual situations involved in *Peterson v. Burkhalter*, supra, 38 Cal.2d 107, 237 P.2d 977; *Daniels v. City & County of San Francisco*, supra, 40 Cal.2d 614, 617, 255 P.2d 785; *Sills v. Los Angeles Transit Lines*, supra, 40 Cal.2d 630, 255 P.2d 795; *Rodabaugh v. Tekus*, supra, 39 Cal.2d 290, 294, 246 P.2d 663; *Sparks v. Redinger*, 44 Cal.2d 121, 279 P.2d 971; *Doran v. City & County of San Francisco*, supra, 44 Cal.2d 485, 283 P.2d 6. The principles there applied are consistent with the views herein expressed; and it is an unsatisfactory and misleading process to try to reason by analogy from one set of facts to another.

We have again concluded, upon both grounds hereinbefore discussed, that grave and reversible error is presented by the record of this case.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.

134 Cal.App.2d 466

Lucille E. HOAGLAND, Myrna L. Hoagland, Claudia Jean Eagle, Plaintiffs and Respondents,

v.

Joseph A. CHARGIN, III, Joseph A. Chargin, Jr., Defendants and Appellants.

Civ. 16378.

**District Court of Appeal, First District,
Division 2, California.**

July 21, 1955.

Rehearing Denied Aug. 19, 1955.

Hearing Denied Sept. 15, 1955.

Action by driver of and passengers in automobile southbound on divided highway, against driver and owner of northbound automobile which stopped in intersectional opening between lanes of divided highway before crossing southbound lane in execution of left turn, and then proceeded and collided with southbound automobile. The Superior Court, County of Santa Clara, Edwin J. Owens, J., rendered judgment on verdicts for plaintiffs, and defendant appealed. The District Court of Appeal, Kaufman, J., held, inter alia, that whether southbound automobile was immediate hazard was question for jury.

Judgments affirmed.

1. Automobiles ⇨171(5)

If automobile approaching intersection on divided highway was not sufficiently near to constitute immediate hazard, automobile which had stopped in intersectional opening in island between lanes of divided highway before crossing first automobile's lane in execution of left turn off divided highway had right of way to proceed across highway. Vehicle Code, § 551.

2. Automobiles ⇨245(14)

In action by driver of and passengers in automobile southbound on divided highway, against driver and owner of northbound automobile which stopped in intersectional opening between lanes of divided highway before crossing northbound lane in execution of left turn, and then proceeded and collided with plaintiff's southbound automobile, whether southbound automobile

was immediate hazard was question for jury. Vehicle Code, § 551.

3. Automobiles ⇨245(88)

Where passenger in automobile southbound on divided highway saw another automobile 250 to 300 feet ahead, stopped before crossing southbound automobile's lane of traffic, but failed to warn driver since automobile was presumably within driver's line of vision, passenger was not contributorily negligent as matter of law.

4. Judgment ⇨112

Where default resulting in default judgment is intentional, it admits allegations of complaint.

5. Attorney and Client ⇨77, 85

Attorney does not have implied authority to surrender any substantial right of his client, and may not confess judgment against client without client's consent.

6. Judgment ⇨957

In action by driver of and passengers in automobile southbound on divided highway, against driver and owner of northbound automobile which stopped in intersectional opening between lanes of divided highway before crossing southbound lane in execution of left turn, and then proceeded and collided with southbound automobile, evidence entitled court to determine that default judgment obtained against driver and owner of southbound automobile by passenger in northbound automobile was due to inadvertence and excusable mistake, was never intended as admission, and should be excluded.

7. Appeal and Error ⇨1170(7)

In action by driver of and passengers in automobile southbound on divided highway against driver and owner of northbound automobile which stopped in intersectional opening between lanes of divided highway before crossing southbound lane in execution of left turn, and then proceeded and collided with southbound automobile, evidence of admissions derived from fact that passenger in northbound automobile had obtained default judgment against driver and owner of northbound automobile was only cumulative, and any error in excluding

it could not be considered as prejudicial. West's Ann.Const. art. 6, § 4½.

8. Appeal and Error ⇐1170(9)

In action by driver of and passengers in southbound automobile against driver and owner of northbound automobile for injuries resulting from intersectional collision, instruction that, if plaintiffs were to recover, they had to establish that defendant driver was negligent, just as in order to sustain defense of contributory negligence, defendant had to establish that plaintiffs were negligent, while incomplete in form due to failure to indicate that plaintiffs' evidence could be considered in deciding issue of contributory negligence, could do no harm. West's Ann.Const. art. 6, § 4½.

9. Automobiles ⇐246(60)

In action by driver of and passengers in automobile southbound on divided highway, against driver and owner of northbound automobile which stopped in intersectional opening between lanes of divided highway before crossing southbound lane in execution of left turn, and then proceeded and collided with southbound automobile, wherein there was evidence in support of plaintiffs' theory of case that southbound automobile was dangerously close to intersection and defendant driver attempted to cross in front of it, instruction that general human experience justified inference that when one looks in direction of clearly visible object, he sees it, was properly given.

10. Appeal and Error ⇐1170(9)

In action by driver of and passenger in automobile southbound on divided highway against driver and owner of northbound automobile which stopped in intersectional opening between lanes of divided highway before crossing southbound lane in execution of left turn, and then proceeded and collided with southbound automobile, wherein court instructed that violation of basic speed provision of Vehicle Code was negligence, but refused to instruct that if southbound driver violated provision and if such violation was neither justified nor excusable, then she was guilty of negligence as matter of law, and that such negligence would be sole proximate cause of accident, any error in such refusal was not prejudi-

cial to defendant. Vehicle Code, § 510; West's Ann.Const. art. 6, § 4½.

11. Automobiles ⇐246(9)

In action arising out of intersectional collision, requested instruction which purported to paraphrase portion of Vehicle Code section providing that when driver turning left has yielded and signaled, oncoming drivers should yield right of way but which stated that, if necessary, oncoming driver must stop to permit driver turning left to proceed, was erroneous in giving impression that if oncoming automobile could be stopped within remaining distance it could not be considered an immediate hazard, and refusal to give or modify instruction was not error. Vehicle Code, § 551(a, b).

12. Automobiles ⇐246(9)

In action arising out of intersectional collision, wherein court instructed that it was duty of person using highway to exercise ordinary care and elsewhere in instructions defined ordinary care, refusal to instruct on subject of common law duty of driver was not error.

13. Appeal and Error ⇐1170(9)

In action arising out of intersectional collision, where instruction on damages repeatedly used language indicating that damage instructions were contingent on finding of liability, refusal of instruction advising that fact that instructions on damages were given did not mean that court believed that damages should or should not be given, was not prejudicial error. West's Ann.Const. art. 6, § 4½.

Campbell, Custer, Warburton & Britton, Frank L. Custer, San Jose, W. R. Dunn, Burlingame, of counsel, for appellants.

Keith, Creede & Sedgwick, Scott Conley, San Francisco, for respondents.

KAUFMAN, Justice.

Defendants appeal from judgments in favor of plaintiffs rendered after jury verdicts in favor of all three plaintiffs against both defendants. The action arose out of an automobile accident on Bayshore Highway when the automobile driven by defend-

ant Joseph Chargin, III, and belonging to Joseph Chargin, Jr., was struck by plaintiff's automobile as the Chargin car was executing a left turn at the intersection of said highway with Story Road.

It was plaintiffs' and respondents' theory at the trial that appellant driver stopped between the islands on Bayshore Highway, and then cut across the southbound lanes thereof in a westerly direction without keeping a lookout for approaching vehicles. Appellants contended that defendant driver looked for traffic, saw only a truck approaching from the north, and proceeded to cross ahead of it when respondents' car came out from behind the truck and collided with appellant.

The collision occurred some time between 10:30 and 11:00 o'clock on a clear dry day as respondent Myrna Hoagland was driving a Chrysler sedan owned by her mother, Lucille Hoagland, southward on Bayshore Highway. The third respondent, Claudia Jean Eagle, was a guest in the Hoagland car. All three were in the front seat.

Bayshore Highway, at the point where the accident occurred, is a divided highway having two lanes northward bound and two lanes southward, separated by a large grassy strip. At the Story Road intersection, the grassy strip is narrowed on the north side to admit a third southbound lane as a turnout for vehicles going eastward on Story Road. Although there is no similar additional lane for vehicles turning westward, as was the appellant driver, there was an area as wide as the grassy strip in which cars could come to a stop outside the lanes of traffic before turning left.

Defendant and appellant, Joseph Chargin, III, had been driving northward on Bayshore, in a yellow Mercury convertible belonging to his father Joseph Chargin, Jr., and was attempting to negotiate a left turn westward into Story Road when the cars collided. He was accompanied by two girls, Laverne Lawrence and Barbara Benassi. He testified that he came to a complete stop between the "island" before continuing left across the southbound lanes of Bayshore.

Lucille Hoagland testified that the Chrysler had been proceeding southward in the inner lane next to the dividing strip for at least a mile before reaching this intersection at a speed of between 50 and 55 miles per hour. She saw no traffic on Bayshore immediately in front of them. She said that when her car was 250 to 300 feet from the intersection she saw defendant's car in the intersection "or in the island cut out there where there is a division there for the traffic to cut through and he was—I saw this yellow car sitting there and he seemed to be either moving very slowly or actually stopped." She then looked away saying that she sensed no emergency because it was seemingly stationary. She did not call her daughter's attention to the car. Mrs. Hoagland next noticed appellant's car when she felt her car swerve and the brakes being applied. The Chargin car was then less than 50 feet away. The impact occurred in the outside southbound lane, the cars coming together "in a sort of V formation" with the left front fender of the Chrysler coming in contact with the right front of the Mercury.

Joseph Chargin, III, stated that as he stopped in the bay between the islands he saw a truck coming from the north in the outside southbound lane at a distance of about 400 or 500 feet. He started to cross the highway when the truck was about 200 feet distant. Chargin testified that he never saw the Chrysler until it was right on top of him. After he started across the highway he did not again look northward, but looked straight ahead until Miss Lawrence called his attention to it when it was just a few feet away. He put his foot on the accelerator in an attempt to avoid the collision but did not turn his car.

Laverne Lawrence, a passenger in the convertible, stated that when they were stopped in the intersection she saw a truck approaching from the north at a distance somewhere between 42 and 84 feet in the outer lane. When they were just about across the intersection, she saw the Chrysler pull out from behind the truck, at a speed of between 60 to 70 miles per hour. Neither she nor Joseph Chargin, III, were able to give any description of this truck.

Barbara Benassi, the other passenger in the Mercury, testified that their car stopped between the islands. She had only a fleeting view of the Chrysler before the collision.

Myrna Hoagland, the driver of the Chrysler, suffered a retrograde amnesia, hence was unable to describe any of the events immediately leading up to the accident. Claudia Eagle, the third respondent, first saw the Mercury when it was about 300 or 400 feet away, traveling northward on the other side of the divided highway. She did not continue watching it, and saw it again when it was 35 or 40 feet away, when it seemed to be "popping out" in front of them.

Tony Costa, a witness called by plaintiffs, testified that he had stopped his car at the easterly border of Bayshore at the Story Road intersection, intending to drive across the highway westward. He saw the Chrysler coming from the north at about 50 miles per hour, but did not see any trucks in the vicinity. He had seen the Mercury traveling in the inner lane proceeding northward, but as he was looking northward on Bayshore to see if there were any cars behind the Chrysler he did not actually see the cars collide.

Defendants' witness Francis Prowse stated that he was approaching Bayshore from the west on Story Road. He saw the commotion ahead, but did not actually see the collision occur. Immediately after the accident he noticed a truck parked about a block and a half south of the intersection, and that its driver walked back to the scene.

Officer Edward Lee of the State Highway Patrol testified that the Chrysler left 36 feet of skid marks on the highway. He said that immediately after the accident Joseph Chargin, III, told him that he was northbound on Bayshore and into San Jose, "going about 25 miles per hour slowing down to make a left turn. It looked like it was clear, so I started to make left turn go across when other car hit me."

All of the occupants of both cars except Claudia Eagle were thrown out by the

impact, and the driverless cars went into the ditch to the right of the southbound lane.

The jury returned unanimous verdicts against both defendants. Following proceedings for a new trial, Lucille's verdict was reduced from \$12,500 to \$10,500; Myrna's from \$20,000 to \$16,000; and Claudia's from \$20,000 to \$13,000.

[1] Appellants contend that their motion for a nonsuit should have been granted, since there is no evidence that the Chrysler was dangerously near when defendant driver undertook to complete his left turn in the intersection. If the Chrysler was not sufficiently near to constitute an immediate hazard, the driver of the Mercury had the right of way to proceed across the highway. Vehicle Code, sec. 551. Appellants cite *Couchman v. Snelling*, 111 Cal.App. 192, 295 P. 845, to the effect that where a car has actually entered an intersection first, the driver of the first car has the right to assume that he will be given the right of way and that the other car will slow down if necessary and yield the right of way. The intersection involved in the *Couchman* case was that of two city streets, and the court was discussing the rule applicable to traffic entering the ordinary intersection. Under Section 550(a) of the Vehicle Code, at such an intersection the driver approaching the intersection shall yield the right of way to the vehicle which has already entered the intersection. Although it is true the language of the *Couchman* case which is quoted by appellants, was cited with approval in *Osgood v. City of San Diego*, 17 Cal. App.2d 345, 62 P.2d 195, which was a case involving a left turn, still it is clear that from section 551 of the Motor Vehicle Code, that the person first in the intersection, if he is about to make a left turn, does not necessarily have the right of way. He has such right of way only if no car is within the intersection or approaching so close thereto as to constitute an immediate hazard. Whether or not the driver of the Mercury should have realized that the Chrysler was an immediate hazard appears to be in the present case a question of fact for the jury to decide. In the *Osgood* case, the verdict for plaintiff was reversed, the court stating

that the evidence was not conflicting, that defendant had given the proper signal, had entered the intersection first when plaintiff was about 130 feet away traveling at 35 miles per hour. The court did not discuss the effect of the language in the statute which required defendant to yield the right of way to cars which were an immediate hazard. That language was added in 1929, and was applicable to this case which arose in 1935. Apparently the court felt that the only inference that could be drawn was that a car 130 feet away, whose driver admitted seeing the signal, and who slowed down, then speeded up again when plaintiff hesitated, defendant interpreting this as a yielding by plaintiff of the right of way to him, was guilty of negligence as a matter of law. This evidence also clearly demonstrated that defendant was at such a distance and driving a sufficiently slow speed that plaintiff could assume defendant was not an immediate hazard.

[2] It is to be noted that in the present case, we are dealing with a through highway in the open country not with city streets, as in the Couchman and Osgood cases, *supra*. Whether or not a driver is negligent in making a left turn in front of a car approaching at 50 to 55 miles per hour on such a highway, appears to be a jury question. If the car maintained a speed of 55 miles per hour it would travel 80.3 feet per second reaching the intersection in 3.1 seconds. The words "immediate hazard" are not defined in the statute. The definition given to the jury in this case is that a vehicle is so close as to constitute an immediate hazard "whenever if a reasonably prudent person were in the position of the driver intending to make a left turn he would apprehend the probability of an accident were he then to attempt crossing the path of the approaching vehicle." Hence, in a case such as this, it is clearly for the jury to decide whether or not the respondent's car was an immediate hazard. It is to be noted that in the Osgood and Couchman cases, as well as the recent case of Grasso v. Cunial, 106 Cal. App.2d 294, 235 P.2d 32, cited by appellants, there was testimony by the drivers of both cars concerning their conduct, whereas in the present case the plaintiffs' driver was

unable to testify because of retrograde amnesia. The only evidence we have of her conduct is the application of the brakes and the swerving of the car.

There was also in the present case the testimony of Mr. Costa, who was waiting to cross the intersection at the same time that defendant was attempting to negotiate the left turn. He was allowing the Chrysler to clear the intersection before he would attempt to cross, which is also some evidence from which it might be inferred that the oncoming car was an immediate hazard. Therefore the nonsuit was properly denied.

[3] It is contended that Lucille Hoagland, the owner of the Chrysler, and the mother of the driver, Myrna Hoagland, was contributorily negligent as a matter of law because she saw the Mercury in the intersection when her car was 250 to 300 feet distant and failed to warn her daughter. We know of no case that holds that there is a duty on the part of a passenger to warn a driver of other cars of objects presumably within the driver's line of vision, or that a failure to do so is contributory negligence as a matter of law. The case of *Du Bois v. Owen*, 16 Cal.App.2d 552, 60 P.2d 1019, cited by appellants, only holds that the owner of the car, asleep in the back seat at the time of the accident, may be held liable for the driver's negligence on the theory of permissive driving or agency.

Appellant contends that evidence of defaults entered in a suit filed by Laverne Lawrence, a passenger in defendants' Mercury, and her father, against Myrna and Lucille Hoagland, should have been admitted in evidence as admissions on the part of those plaintiffs in this action. Respondents objected that one cannot make an admission of facts of which he has no knowledge and offered to prove by respondents' attorney that the default had been taken because of the attorney's inadvertence, mistake and excusable ignorance. The court ruled that there was a preliminary question of fact for it to decide, and outside the presence of the jury heard the testimony of respondents' attorney that he first learned that a default had been entered when he moved to consolidate the Lawrence action with another that had been filed by Miss Benassi, the

other passenger in defendants' Mercury. He stated that because more than six months had elapsed, the default could not be set aside.

The only California case which appears to be in point on this question is *In re Estate of McCarthy*, 127 Cal.App. 80, 15 P.2d 223, in which a default entered several years previously was allowed in evidence to prove that a widow had no community property interest in certain property of an estate. In a divorce action which at one time had been filed by her deceased husband, he had alleged that there was no community property, and she had failed to answer. The McCarthy case was followed by the 9th Circuit of Appeals in a case arising in the Northern District of California, *Thiel v. Southern Pacific Co.*, 149 F.2d 783, 787. This case was later reversed by the United States Supreme Court, but not on the issue with which we are here concerned.

[4] Respondents contend that in the McCarthy case it does not appear that the default was entered due to the inadvertence of counsel and that there the defendant intentionally defaulted. It is clear that where the default is intentional it admits the allegations of the complaint.

In *Wigmore on Evidence*, sec. 1066, it is said: "A default in another suit, leading to judgment on default, would make admissible against the then defaulting party in a subsequent case the essential allegations on which the default was entered."

[5, 6] It is true as respondents say, that an attorney does not have implied authority to surrender any substantial right of the client. *Redsted v. Weiss*, 71 Cal.App.2d 660, 663, 163 P.2d 105. An attorney may not confess judgment against his client without his client's consent. *Pfister v. Wade*, 69 Cal. 133, 140, 10 P. 369. It has been held that an unverified complaint in another action could not be admitted in evidence because it was unverified and it was not shown that plaintiff had knowledge of its contents. *Solari v. Snow*, 101 Cal. 387, 35 P. 1004. In *Zelayeta v. Pacific Greyhound Lines*, 104 Cal.App.2d 716, 232 P.2d 572, the court held that a purported admission by counsel in an affidavit filed

for another purpose could be regarded as an admission only if intended to be one. Respondents say that here the default was not therefore admissible in evidence because entered due to the inadvertence of counsel, was not sanctioned by the client, and was never intended as an admission. With this contention we agree. It was for the trial court to determine under the facts preliminarily whether there was evidence to show any intention to make an admission and whether the default was entered because of inadvertence and excusable mistake. Here the trial court was entitled to determine under the evidence before it that the default was due to inadvertence and mistake and there was no intention to suffer a default.

Appellants contend the case of *Bohn v. Watson*, 130 Cal.App.2d 24, 278 P.2d 454, is controlling on this point. Under the facts of that case Bolin permitted a default judgment to be taken against her on advice of her counsel. This is not the situation here where the default was taken by reason of inadvertence of counsel and without respondents' knowledge and consent.

[7] Furthermore this evidence of admissions was only cumulative and any error in excluding it cannot be considered as prejudicial within the meaning of Article VI, sec. 4½ of the State Constitution.

[8] It is urged that reversible error was committed in giving the following instruction:

"Now, we have said that in order that the plaintiffs may recover against the defendant, it is necessary that they establish that the defendant Joseph Chargin, III, was negligent in the operation of his Mercury, and that that operation was a proximate cause of the accident just as in order to sustain the defense of contributory negligence urged on the part of the defendant with respect to any one or all of these plaintiffs, it is necessary for the defendant to establish in your minds that the plaintiffs were negligent and that their negligence or the negligence of one or more of them

contributed or was a proximate cause of the accident."

Appellants argue that the jury may have been led by this instruction to conclude that evidence produced by plaintiffs was not to be considered in deciding whether contributory negligence was proven. While it is stated in *Blanton v. Curry*, 20 Cal.2d 793, 804, 129 P.2d 1, 8, that the true rule is that "negligence on the part of a plaintiff is a matter of defense to be proved affirmatively by a defendant unless it can be inferred from the evidence given in the plaintiffs' case", the court held that an instruction such as the one given here, while incomplete in form, could do no harm, and that appellant had offered no additional instruction on the subject. And, see *Ostertag v. Bethlehem, etc., Corporation*, 65 Cal.App.2d 795, 803, 151 P.2d 647. There is no merit in this contention.

[9] The following instruction, while admitted to be correct in form, is criticized by appellants as being inapplicable and hence prejudicial in this case, since they contend that respondents' car was not *dangerously* close before defendant driver attempted to cross in front of it. "General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it, and that when he listens, he hears that which is clearly audible. When there is evidence to the effect that one did look, but did not see that which was in plain sight, and which he might have seen in the exercise of ordinary care, it follows either that there is an irreconcilable conflict in such evidence or the person was negligently inattentive." This argument goes back to the argument made on the question of nonsuit. That was a fact question, on which there was evidence under plaintiffs' theory of the case, hence the instruction was properly given. The jury was also properly instructed immediately following the instruction objected to on the meaning of proximate cause.

[10] Appellants make several claims that error was committed in rejecting certain instructions offered by them. The court read section 510 of the Vehicle Code

to the jury and stated that a violation of such rule is negligence, and then refused to instruct that if the jury found a violation of the section on the part of Miss Hoagland, and such violation on her part was neither justified nor excusable, then she was guilty of negligence as a matter of law, and such negligence would be the sole proximate cause of the accident.

Respondents point out that the instruction as given was more favorable to appellants than the one requested since it did not contain the elements of excuse or justification. Any error that was committed was certainly not prejudicial to appellants, and they cannot complain that the court did not instruct that such negligent speed might be the sole proximate cause, since the jury was fully instructed on the meaning of negligence and proximate cause.

[11] Next appellants complain that the court, having given an instruction in the language of Section 551(a) of the Motor Vehicle Code, failed to give their instruction paraphrasing subsection (b) of the same section.

That section reads as follows:

"(a) The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard.

"(b) Said driver turning left having so yielded and having given a signal when and as required by this code may make such left turn and the drivers of all other vehicles approaching the intersection from said opposite direction shall yield the right of way to the driver making the left turn."

Appellants did not ask that subsection (b) of Section 551 be read to the jury but asked that his instruction be given:

"Where a motorist intending to make a left hand turn has given a signal as required by law, and has entered an intersection before another approaching it, said other vehicle being far enough away as not to constitute an im-

mediate hazard, such motorist making such left hand turn has the right-of-way over the vehicle approaching the intersection, and it is the duty of the motorist approaching the intersection to slow up and yield the right-of-way and, if necessary, stop in order to permit the party desiring to make the left-hand turn to complete his left-hand turn."

Appellant correctly contends that he was entitled to an instruction on his theory of the case which was that respondents' car was not an immediate hazard when he attempted his turn, and if this were true he had the right of way which respondents must yield to him. That his right of way prevailed over plaintiffs' in such case was not emphasized to the jury, although it is certainly implied in subsection (a) that the driver making the left turn has the right of way if the approaching driver does not. However, subsection (b) makes it clear that the driver making the left turn has the right of way over drivers who are not immediate hazards.

The instruction offered however, instead of subsection (b), is objectionable in that it might lead the jury to believe that if a car can be brought to a stop within the remaining distance, it cannot be considered an immediate hazard. Even if it would have been advisable to instruct on subsection (b), the requested instruction being erroneous in part, the court was not in error in refusing to give or to modify the requested instruction since the jury was otherwise properly instructed as to the law of the case. 24 Cal.Jur. pp. 802-804, sec. 77.

It is charged that error was also committed in refusing appellants' instructions relating to their right to assume that the driver of the Chrysler would obey the law and yield the right of way. The instruction given on this subject was correct and covered the matter fairly and adequately.

[12] Again error is claimed in the refusal of an instruction requested on the subject of the common law duty of a driver. The court instructed that "it is the duty of every person using the public highway to exercise ordinary care at all times

to avoid placing himself or others in danger and to exercise ordinary care at all times to avoid a collision." "Ordinary care" was defined in another part of the instructions; hence there was no error in refusing appellants' more elaborate instruction.

[13] Finally, appellants contend that prejudicial error was committed in the refusal of an instruction advising the jury that the fact that the judge has given instructions on damages does not mean that he believes that damages should or should not be given. In *Rasich v. Gladding, etc. Co.*, 90 Cal.App.2d 241, 243, 202 P.2d 576, it was held that the refusal of such an instruction was prejudicial error. However, in that case it appears that there were other irregularities, such as the fact that the court thought it possible that the jury had been improperly instructed by the bailiff.

The court in its numerous instructions on damages again and again used the language "should you determine", "if you should determine", "if you should find", "if it should be in favor of", "if you believe from the evidence", etc. The court made it clear that the damage instructions were contingent upon the jury first finding liability. It is difficult to see how the failure to give the requested instruction could be prejudicial error.

It is said in 5 C.J.S., Appeal and Error, § 1775, p. 1164, that "The giving of cautionary instructions stands on a different footing from the giving of instructions on the law of the case and is a matter very much within the discretion of the court."

This case was fully and fairly tried. No prejudicial error appears in the record before us and we are convinced that the jury's verdict finds ample support in the evidence and record.

NOURSE, P. J., concurs.

DOOLING, Justice.

I concur in the judgments. I am not satisfied that the trial court's action in excluding the default judgment was not error. Whether the default was acquiesced in by the Hoaglands was a question of fact and fact questions in a jury trial should be

left to the jury. By accepting the evidence that the default was due solely to counsels' inadvertence the trial court took this fact question from the jury. However I agree that on the record before us this was not prejudicial.



135 Cal.App.2d 122

In the Matter of the ESTATE of Katherine MOORE, Deceased.

Sarah Alice McCORMICK, Appellant and Cross-Respondent,

v.

Sallie M. LOVERIDGE and Homan Loveridge, Respondents.

Anna M. Davis, Cross-Appellant,

Citizens National Trust & Savings Bank of Los Angeles, Cross-Respondent.

Civ. 20846.

District Court of Appeal, Second District, Division 3, California.

Aug. 18, 1955.

Action to determine heirship. The Superior Court, Los Angeles County, John Gee Clark, J., rendered judgment from which testatrix' heir and a beneficiary appealed. The District Court of Appeal, Ashburn, J. pro tem., held, inter alia, that where testatrix made general devise of real estate but, before her death, sold property, taking cash and a purchase-money note and trust deed, there was no ademption, in absence of evidence that testatrix had intended property to pass to testatrix' heir.

Judgment affirmed.

1. Wills ⇐767

An "ademption" of a legacy or bequest is accomplished when a change with respect to subject-matter takes place, which results in satisfaction or abolishing of the gift.

See publication **Words and Phrases**, for other judicial constructions and definitions of "Ademption".

2. Wills ⇐767

Where testatrix made general devise of real estate but, before her death, sold property, taking cash and a purchase-money note and trust deed, there was no ademption, in absence of evidence that testatrix had intended property to pass to testatrix' heir. Probate Code, §§ 73, 78, 121, 161; West's Ann.Code Civ.Proc. § 580b.

3. Wills ⇐767

An alteration of subject-matter of bequest which does not wholly destroy its identity is insufficient to adeem it.

4. Mortgages ⇐137, 145

A mortgage is not regarded as a conveyance to mortgagee of any actual title to real property, but it does create an interest in property to extent of attachment of a lien to secure enforcement of obligation.

5. Wills ⇐449

A construction of will is preferred which leaves no intestacy as to any part of estate.

6. Wills ⇐764

Sometimes an ademption may occur without specific intent of testator.

7. Wills ⇐439

Actual intent of testator will be effectuated so far as it can be discerned.

8. Mortgages ⇐138

A trust deed represents an interest in land, with title in trustee for benefit of creditor.

9. Mortgages ⇐138

In case of a trust deed, title does not pass to buyer but rests in trustee for primary benefit of seller.

10. Statutes ⇐226

Where, although statute was adopted from another state and had been theretofore construed by courts of that state, California court, in previous decision, refused to follow the foreign decisions, court had duty to follow California decisions construing statute, rather than those of foreign state.

11. Wills ⇨194, 767

Testatrix' sale of land upon contract did not effect an ademption or revocation. Probate Code, § 77.

12. Wills ⇨522

A "class gift" is a gift of an aggregate sum to a body of persons uncertain in number at time of gift, to be ascertained at a future time, who are all to take equal or some other definite proportions, the share of each being dependent for its amount upon ultimate number. Probate Code, § 29.

See publication Words and Phrases, for other judicial constructions and definitions of "Class Gift".

13. Wills ⇨523

Where gift is made to named devisees and states particular share that each should receive as much, the bequest is a gift or devise individually, as tenants in common, and not a "class gift". Probate Code, § 29.

14. Wills ⇨523

Where words which, standing alone, would be effectual to create a class, are followed by equally operative words of devise to devisees by name and indefinite proportions, law infers that devisees are to take individually and as tenants in common.

15. Wills ⇨523

In absence of showing of contrary intention, it is presumed that a gift is not one to a class where will designates takers by name or identifies them by their number.

16. Wills ⇨488

Will provision devising realty formerly owned by testatrix' brother-in-law to brother-in-law's sister and her sister, equally divided, was not ambiguous and evidence allegedly tending to show that testatrix had intended gift to be a class gift was properly excluded, particularly where evidence merely went to reason for gift and would not have changed result.

17. Wills ⇨523, 865(1)

Will provision which gave realty, which had been acquired from testatrix' brother-in-law, to brother-in-law's sister and this sister's sister, equally divided, did not make a "class gift", and where one of the sister-beneficiaries predeceased testatrix, one half

of the property passed under laws of intestacy. Probate Code, § 29.

Frye & Yudelson, North Hollywood, for appellant and cross-respondent Sarah Alice McCormick.

Richard A. Perkins, Los Angeles, for respondents Sallie M. Loveridge and Homan Loveridge.

Olson & Millikan, Pasadena, for cross-appellant Anna M. Davis.

Arthur E. Pugh, Jr., Los Angeles, for cross-respondent Bank.

ASHBURN, Justice pro tem.

This case presents two appeals from different portions of a judgment determining heirship. With commendable brevity counsel have presented their appeals on a single agreed statement of the case.

Decedent, Katherine Moore, made her last will, a holographic one, on April 27, 1939 and died on January 5, 1953 without having made any change in the will. She was about 80 years of age. She had been adjudged incompetent on January 13, 1947 and was never restored to competency; however this impairment of legal capacity plays no part in the solution of the issues raised on appeal.

At the time the will was made Miss Moore had two living first cousins—Jessie M. Loveridge and Sarah Alice McCormick—and no other relatives of equal or closer degree. Jessie M. Loveridge predeceased Miss Moore, leaving two surviving children, Sallie M. Loveridge and Homan Loveridge. Sarah Alice McCormick survived the testatrix. She is not mentioned in the will, but as sole heir and next of kin would take any intestate property left by decedent; the will contains no residuary clause. In this capacity she claims there was an ademption of a certain devise made to Mrs. Loveridge and that she inherits that property. The court decided against her and she appeals from that ruling.

The will also makes a devise to Carrie D. Griffin and Anna M. Davis, "equally divided." Neither of these persons was related to testatrix. Carrie D. Griffin pre-

deceased her and Anna M. Davis survived her. Davis claims that this was a class gift and that she takes the entire property by survivorship. Sarah Alice McCormick asserts it was not a class gift, that it lapsed as to the Griffin half, and she, McCormick, takes that half as intestate property. The court upheld this claim and Davis appeals from that ruling.

The will in its entirety reads as follows:

"Los Angeles, California
"April 27, 1939

"I, Katharine Moore, testify that this is my latest Will and that I declare all previous Wills null and void.

"All real estate formerly owned by Dr. William Seymour Davis and his wife, Alice Moore Davis, in Corona, California, I leave to Carrie D. Griffin and her sister, Anna M. Davis, equally divided.

"All other real estate owned by me outside of Corona, I leave to Mrs. Jessie Moore Loveridge now residing on Lenox Ave., Oakland, California.

"I appoint Roger S. Page of Los Angeles as the Executor, without bond, of my entire Estate—and will to him Fifteen Hundred Dollars (\$1,500.00) for his legal services, closing my Estate, and for my appreciation of his kindness to me.

"The dear ones mentioned above are precious to me beyond words—

"God sparing my life, I hope to add other dear friends in my will as heirs, later I am blessed physically and mentally with the best of health—

"Katharine Moore
"1325 Glendale Blvd.
"Los Angeles, Calif."

Roger S. Page also predeceased testatrix and he was not a relative. The McCormick appeal will be considered first.

McCormick Appeal. Question of Ademption.

When the will was made testatrix owned a parcel of Corona real estate which was devised to Griffin and Davis. She also owned several parcels situated outside of

Corona and answering the description of the Loveridge devise. One of them, designated in the statement as the "Spring property" was sold by decedent in April 1946 for part cash and a purchase money note and trust deed in the sum of \$4,000. At the time of her death the balance of unpaid principal was \$2,458.20, and there was a small amount of accrued interest. It is this sum, the Spring note, which constitutes the subject matter of the McCormick appeal. Distribution was made to the surviving children of Jessie Moore Loveridge, and, as stated above, Mrs. McCormick argues that the said sale worked an ademption, a revocation, of this devise and, as there is no residuary clause, she takes as sole surviving heir.

[1,2] This claim of ademption invokes a word of varied connotations. Without undertaking a discussion of whether this case involves a true ademption question, we accept that meaning of ademption which is expressed in *Estate of McLaughlin*, 97 Cal.App. 485, at page 488, 275 P. 875, 876; "An ademption of a legacy or bequest is accomplished when a change with respect to the subject-matter takes place, which results in the satisfaction or abolishing of the gift." And the devise to which it is to be applied here is a general one, not specific. "All other real estate owned by me outside of Corona." See Probate Code, § 161; *Estate of Marinos*, 39 Cal.App.2d 1, 5-6, 102 P.2d 443; *Matter of Estate of Woodworth*, 31 Cal. 595, 615; *Estate of Ratto*, 149 Cal. 552, 554-555, 86 P. 1107; *Estate of Painter*, 150 Cal. 498, 505, 89 P. 98; *Estate of Jones*, 60 Cal.App.2d 795, 798, 141 P.2d 764; *Estate of Blackmun*, 98 Cal.App.2d 314, 317, 220 P.2d 30; 57 Am.Jur. § 1404, p. 938; 88 A.L.R. 553, 560 annotation. The case is not one of complete elimination of the subject matter of the gift from decedent's estate, as in *Estate of Benner*, 155 Cal. 153, 155, 99 P. 715 and *Estate of Sorensen*, 46 Cal. App.2d 35, 37, 115 P.2d 241, where it is held that a conveyance of the entire estate is necessarily inconsistent with a bequest of the property. It is a case of alteration of the testatrix' property interest, not its annihilation. The statement indicates that the property was sold for \$5,000, of which only

\$1,000 was represented by cash and \$4,000 by purchase money note and trust deed.

Section 73 of the Probate Code says: "If the instrument by which an alteration is made in the testator's interest in any property previously disposed of by his will expresses his intent that it shall be a revocation, or if it contains provisions wholly inconsistent with the terms and nature of the testamentary disposition, it operates as a revocation thereof, unless such inconsistent provisions depend on a condition or contingency by reason of which they do not take effect." And section 78: "Neither a charge or encumbrance placed by a testator upon property previously disposed of by his will, for the purpose of securing the payment of money or the performance of any covenant or agreement, nor a conveyance, settlement, or other act of a testator, by which his interest in any such property is altered, but not wholly divested, is a revocation of the disposal; but the property, subject to such charge or encumbrance, or the remaining interest therein, passes by the will." Considered independently of precedent the correct application of these statutes to the facts seems clear. Section 78 qualifies section 73 to the extent of specifying certain transactions which are not "wholly inconsistent with the terms and nature of the testamentary disposition", one of which is "a conveyance * * * by which his interest in any such property is altered, but not wholly divested." Unless it can be said that the purchase money transaction wholly divested all of decedent's interest in the property there cannot be any escape from the application of section 78.

It is true that the preponderance of authority throughout the states is to the effect that a sale for part cash with a note and *mortgage* taken to represent the balance of the purchase price effects an ademption upon the theory that land ownership has ceased and personalty in the shape of a chose in action has been taken in its place; and the cases are based upon statutes similar to

ours. See 57 Am.Jur. § 1594, p. 1093; 65 A.L.R. 632, 640 annotation; 69 C.J. § 2207, p. 1007; § 2215, p. 1013. But that line of reasoning has not yet found acceptance in this state.

[3, 4] Estate of McLaughlin, 97 Cal.App. 485, 275 P. 875, 876, involves the same problem but reaches a different result from the majority of rulings elsewhere.¹ It presents the obverse side of our factual picture. Testatrix there bequeathed to her husband "all of my interest in that certain mortgage against the east half" etc. "occupied by Rose Ann Callahan." She at that time held a note secured by trust deed² which answered the description. Later she accepted a conveyance of the property in satisfaction of the debt and owned that property at the time of her death. A claim of ademption was rejected by the court, although the legacy was a specific one. Intent of the testatrix was held to be controlling, 97 Cal.App. at pages 488-489, 275 P. 875, as indicated by the fact, among others, that she had made no residuary bequest. At page 489 of 97 Cal.App., at page 877 of 275 P. it is said: "An alteration in the subject of the bequest which does not wholly destroy its identity is insufficient to adeem it. * * * While in California it is true that a mortgage is not regarded as a conveyance to the mortgagee of any actual title to the real property (17 Cal.Jur. 714, § 19), yet it does create an interest in the property to the extent of the attachment of a lien to secure the enforcement of the obligation for the payment of which it is executed. (17 Cal.Jur. 709, § 16, and p. 712, § 18.) * * * The only change that occurred in the character of the property was technical in its nature. She accepted a deed to the mortgaged land in lieu of her equitable lien, and in satisfaction of the debt. Since she thereafter made no change in her will, it may reasonably be inferred that she assumed the mortgaged land would be substituted for 'all of my interest in the mortgage.'" At page 492 of 97 Cal.App.,

1. A companion case, reported in 97 Cal. App. at page 481, 275 P. 874, should not be confused with it, as appellant's reply brief has done; they do not decide the same question.

2. No distinction is drawn in the decision between a mortgage and trust deed; the discussion proceeds upon the basis of a mortgage security.

at page 878 of 275 P.: "It is true that the acceptance of the deed to the mortgaged land did involve a complete change in the parties to the legal title, but this combined property right of debt and mortgage lien was not wholly divested by the accepting of the deed for the exact amount of the debt. The equitable interest of the testatrix was merely enlarged to a fee title. The extinguishment of the debt was the accomplishment of an important part of the very thing which was devised, and by means of which that devise was made more certain and valuable. This did not constitute an ademption of the devise or a revocation under the provisions of section 1303 of the Civil Code. It was clearly the purpose of the testatrix to convey this land to her husband by this clause of her will." This case has been cited with approval by the Supreme Court in *Estate of Stevens*, 27 Cal.2d 108, 116, 162 P.2d 918, 922 to the effect that "Proof of such intent is necessary to establish an ademption." Also in *Estate of Cline*, 67 Cal.App.2d 800, 805, 155 P.2d 390. Though it probably represents the minority view with respect to the law of ademption as applied to its own facts (see 65 A.L.R. at page 640) its reasoning seems sound and it undoubtedly represents the law of California. The principles it enunciates are equally applicable at bar.

[5] So far as intent is concerned it appears that Mrs. Loveridge was one of testatrix' "dear ones * * * precious to me beyond words." Mrs. McCormick was barely known to her except by name. She made no residuary devise or bequest and did not mention Mrs. McCormick in the will. If she had wanted her to have anything she would have said so. The will was never changed although it was almost eight years later that incompetency intervened. The McLaughlin opinion says, concerning intention, that "ordinarily the purpose will appear by a construction of the terms of the will in the light of subsequent acts and conduct of the testator." 97 Cal.App. at page 488, 275 P. at page 877. There is nothing to indicate that Miss Moore desired Mrs. McCormick (or any one else) to have this property, or any other into which it might be converted, in

preference to Mrs. Loveridge who was "precious to [her] beyond words." And a "construction of a will is preferred which leaves no intestacy as to any part of the estate." *Estate of McLaughlin*, supra, 97 Cal.App. at page 489, 275 P. at page 877; see also *Estate of Olsen*, 9 Cal.App.2d 374, 379, 50 P.2d 70.

There is considerable merit in respondents' argument that the trust deed would pass under this holographic will as a part of "real estate owned by me." It is conceded that Miss Moore had no legal advice, merely the help of a friend, that both of them were unskilled in drafting wills; and the fact that testatrix was not familiar with legal terms and concepts appears from her expressed "hope to add other dear friends in my will as heirs." It is fair inference that testatrix in exchanging four-fifths of the value of her property for a trust deed upon the same considered that she had aptly described it as "real estate owned by me" and that is the reason she did nothing further about that aspect of the will. This view finds support in *Estate of Olsen*, supra, 9 Cal.App.2d 374, 379-380, 50 P.2d 70; *Estate of Carrillo*, 187 Cal. 597, 203 P. 104.

[6, 7] Sometimes an ademption may occur without specific intent of the testator, *Estate of McLaughlin*, 97 Cal.App. at page 488, 275 P. 875. And that is the basis of the rulings in other states, especially New York, upon which appellant relies. For instance the opinion in *In re Keeler's Estate*, 225 Iowa 1349, 282 N.W. 362, 367, after discussing and disagreeing with *Estate of McLaughlin*, supra, says "if testatrix had known the consequences, we feel she would have changed her will." *Beck v. McGillis*, 1850, 9 Barb., N.Y., 35, 55, says: "In the case before us, there is very little reason to suppose that it was the design of the testator, when he converted the lot he had devised to Mrs. McGillis, into a bond and mortgage, that the security should take a different direction. But it is the office of a judge to declare the law, strictly and truly as he finds it to be, and not to amend or improve it." But California has outgrown this ancient doctrine in favor of

effectuation of the actual intent of the testator so far as it can be discerned.

[8, 9] Moreover, there are aspects of California law which make the majority rule here inapplicable even if we were disposed to subordinate actual intention to one arbitrarily imputed to a testator under doctrines inherited from England a century ago. The cases reflecting the majority rule proceed, as we have stated, upon the theory that a mortgage taken as security for a purchase money note is but a chose in action, strictly personalty, representing no interest in the land, and that substitution of personal property for real property annihilates the subject of the realty gift and hence works an ademption. Indeed, *Adams v. Winne*, 1838, 7 Paige, N. Y., 97, 101-102 holds that this was the rule of the common law and that the New York statute (from which ours was borrowed) was not intended to change that rule. Be that as it may, a mortgage in California is not a mere chose in action. As shown by the above quotation from *Estate of McLaughlin*, supra, it does create "an interest in the property to the extent of the attachment of a lien." In *Childs Real Estate Co. v. Shelburne Realty Co.*, 23 Cal.2d 263, 268, 143 P.2d 697, 699, it is said: "Under California law, a mortgagee also has a security interest in the nature of an equitable lien." And a trust deed definitely does represent an interest in the land, for the title is in the trustee for the benefit of the creditor. *Bank of Italy Nat. Trust & Sav. v. Bentley*, 217 Cal. 644, 655, 20 P.2d 940; *Hagge v. Drew*, 27 Cal.2d 368, 376, 165 P.2d 461; *Snyder v. Western Loan & Bldg. Co.*, 1 Cal.2d 697, 701, 37 P.2d 86; *Py v. Pleitner*, 70 Cal.App.2d 576, 579, 161 P.2d 393; *Mortgage Guarantee Co. v. Lee*, 61 Cal.App.2d 367, 375, 143 P.2d 98. This has been the rule here ever since 1859. *Koch v. Briggs*, 14 Cal. 256; *Bank of Italy etc. Ass'n v. Bentley*, 217 Cal. at page 655, 20 P.2d 940. Though the trust deed has been analogized to a mortgage, especially between debtor and creditor, whenever necessary to avoid harshness in the application of the rule, it still remains true that the title does not pass to the buy-

er but rests in the trustee for the primary benefit of the seller. And any rule that rests upon the assumption that the holder of a trust deed note does not have any interest in the land finds no substantial basis in California law. But that is not all.

The legislature has taken a hand in the matter and, through passage in 1933 of section 580b Code of Civil Procedure, has forbidden a deficiency judgment for default on any purchase money paper such as a deed of trust or mortgage. And the Supreme Court has held that the effect is that "for a purchase money mortgage or deed of trust the security alone can be looked to for recovery of the debt." *Brown v. Jensen*, 41 Cal.2d 193, 198, 259 P.2d 425, 427. While the debt technically survives a default so that enforcement of collateral securities may be had, *Mortgage Guarantee Co. v. Sampsell*, 51 Cal.App.2d 180, 185, 124 P.2d 353, the seller who takes back only a note secured by trust deed has nothing to which he can resort but the land and in a real sense has converted his entire ownership into a lesser interest in the real estate. The conveyance to the buyer and the purchase money trust deed cannot be divorced; they come into being simultaneously and must be viewed realistically as a single transaction. But if a segregation were possible, the same result would be dictated by section 121 Probate Code, which says: "Any estate, right, or interest in lands acquired by the testator after the making of his will, passes thereby and in like manner as if title thereto was vested in him at the time of making the will, unless the contrary manifestly appears by the will to have been the intention of the testator." The vendor's interest in the property has been "altered, but not wholly divested" by a sale with trust deed back.

A persuasive analogy is presented by *Connecticut Trust & Safe Deposit Co. v. Chase*, 75 Conn. 683, 55 A. 171. In that instance a mortgage note was so drawn as to exclude personal liability. It was held that sale of devised land and acceptance of the note and mortgage for the unpaid balance of the purchase price did not work an ademption. The court said in part:

"The legacies given in clause 7 of the will were not adeemed by the sale of the Ft. Pleasant avenue property. The purchase price was not fully paid and by reason of the mortgage back the testatrix remained always invested with a legal title to the land. *Searle v. Sawyer*, 127 Mass. 491, 34 Am.Rep. 425. The balance due her, and evidenced by the mortgage note, no one was originally under any personal obligation to pay. The declaration of trust was so referred to in the note as virtually to become a part of it, and excluded any personal liability on the part of the trustees. The testatrix could only look to the funds and property of the Riverview Heights Company, and it does not appear that it owned anything except what it acquired by the purchase from her. * * *

"The finding shows that her dealings with the subject of the bequest have changed its form, but not its substance. The same land remains under the power of her executor. He can use it to satisfy the legacies, not indeed, in the first instance, by selling it, but by requiring its present owners, as a condition of their retaining title, to pay to him a sum sufficient to discharge them. * * *

"A loan, strictly speaking, whether secured or unsecured, only exists when something has been lent to one who is under an obligation to return it. That may, in a secondary sense, be called a loan secured by mortgage which is merely an indebtedness of the vendee for all or part of the price of property sold, secured by a mortgage back to the vendor. *Day v. Cohen*, 165 Mass. 304, 43 N.E. 109. To describe by such terms a mortgage in favor of a vendor upon land sold, when there is no one personally indebted or liable for the sum secured, would be to employ them in a sense still more unreal and remote." 55 A. at pages 173, 174.

[10] Counsel for appellant contends that our Probate sections 73 and 78 (formerly Civil Code sections 1302-1304), were taken from a New York statute which had been previously construed in that state and that they are presumed to have been adopted with the New York interpretation inhering

in them; they cite *Estate of Dwyer*, 159 Cal. 664, 677, 115 P. 235, which does so hold. But the New York decisions which had been rendered before our adoption of the statute (in 1872) do not deal with deeds of trust or with notes which carry no personal duty to pay, being collectible only out of the land itself. The New York cases theretofore decided are *Adams v. Winne*, 1838, 7 Paige, N.Y., 97; *McNaughton v. McNaughton*, 1866, 34 N.Y. 201; *Beck v. McGillis*, 1850, 9 Barb., N.Y., 35; *Brown v. Brown*, 1852, 16 Barb., N.Y., 569; *Bartow v. Goodwin*, 1853, 2 Bradf.Sur., N.Y., 413. In this connection the following language of *Coombes v. Getz*, 217 Cal. 320, 330, 18 P.2d 939, 943, is pertinent: "As to the decisions of the courts of the state of New York construing the Code section of that state, which plaintiff claims furnished the model from which section 359 of the Code of Civil Procedure was patterned, it must be presumed that the court had these cases before it when it decided the case of *Royal Trust Co. v. MacBean*, supra [168 Cal. 642, 144 P. 139], but refused for reasons then deemed sufficient to follow them. Under such circumstances we consider it our duty to follow the decisions of our own court construing our statute rather than those of the state of New York upon the same subject." The same assumption is fair as to the *McLaughlin* case, supra, and we feel justified in following its doctrine rather than that of New York, especially as it rests upon the actual rather than an imputed intention of the testator, and upon what we consider the common sense interpretation of the statute as applied to our local concepts of mortgages and trust deeds. See also *Estate of Matthiessen*, 23 Cal.App. 2d 608, 611, 73 P.2d 1267.

The holding that there was no ademption of the devise to Mrs. Loveridge is not erroneous.

Appeal of Davis. Question of Class Gift.

The subject bequest is again quoted. "All real estate formerly owned by Dr. William Seymour Davis and his wife, Alice Moore Davis, in Corona, California, I leave to Carrie D. Griffin and her sister, Anna M.

Davis, equally divided." Neither of the devisees was related to testatrix. Carrie D. Griffin died before Miss Moore; Anna M. Davis survived her. The court held that this was not a class gift and distributed one-half the proceeds of this property to Davis and one-half to Sarah Alice McCormick as intestate property.

[11] This Corona realty had been originally acquired from the earnings of Dr. William Seymour Davis, whose wife, *Alice Moore Davis* was a sister of testatrix; the property was in joint tenancy and passed to the wife as survivor on Dr. Davis' death. She willed it to Miss Moore, who in turn made the quoted devise in favor of Carrie D. Griffin and *Anna M. Davis*, both of whom were sisters of Dr. Davis, sisters-in-law of Alice Moore Davis,—no relation to Miss Moore. The property had been sold by testatrix before her death upon contract, part of the purchase price, \$5,612.69, remained unpaid, and constitutes the subject matter of the Davis appeal. Of course, that contract did not effect an ademption or revocation. Probate Code, § 77.

Appellant's counsel argue that, as the Corona property originated with Dr. Davis and came to Miss Moore through his wife, the devise to his two surviving sisters indicated an intention that the property should go back to the Davis family as a class gift notwithstanding the concluding phrase "equally divided." Stress is laid upon the reference to former ownership and the phrase "Carrie D. Griffin and her sister, Anna M. Davis." The normal interpretation of this devise, whether considered segmentally or as an entirety, is that testatrix has disclosed her reason for giving the property to strangers to the blood, and that the reference to Anna M. Davis as "her sister" is merely descriptive. In the face of the phrase "equally divided" there is nothing to suggest a class gift unless that intention be assumed as a basis for further argument. This the authorities in this state forbid.

[12] The definition of a class gift, taken from Jarman on Wills, is thus stated in *Estate of Murphy*, 157 Cal. 63, 67, 106 P.

230, 232; "As to a gift to a class, the rule is stated as follows: 'In legal contemplation a gift to a class is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or some other definite proportions, the share of each being dependent for its amount upon the ultimate number.'" Section 29 Probate Code says: "A devise or legacy given to more than one person vests in them as owners in common, unless the will otherwise provides." And the cases do not permit a ruling that the instant will does "otherwise provide." This appeal is controlled by *Estate of Murphy*, 157 Cal. 63, 67, 106 P. 230; *Estate of Hittell*, 141 Cal. 432, 435, 75 P. 53; *Estate of Henderson*, 161 Cal. 353, 360, 119 P. 496; *Estate of Sullivan*, 31 Cal.App.2d 527, 529, 88 P.2d 225.

[13-15] In the *Murphy* case the residuary clause left realty and personalty to "go to, and be equally divided among the four children of my late sister Catherine F. Flynn, deceased; that is to say: I give, devise and bequeath all the rest of my personal property and all my real estate of whatsoever kind and whereso[e]ver situate, share and share alike, to Timothy J. Flynn, William D. Flynn, Mary Jane Logan and Kate I. Prendergast." 157 Cal. at page 64, 106 P. at page 231. William D. Flynn died before the testator, his legacy was held to have lapsed and to be distributable to his heirs as intestate property. This holding was made in reversing a distribution based on the theory of a class gift. The language of the opinion is peculiarly applicable to the facts at bar. After quoting Jarman's definition of a class gift the court said further in 157 Cal. at page 67, 106 P. at page 232: "There is nothing on the face of the devise indicating any uncertainty in the number of persons who were to take the property, or that they were to be ascertained at a future time, or that the share of the residuary estate which the devisees were ultimately to have was to be determined as to the amount by the number of those who would survive the testator. All the persons who are to take were specifically named and the share of each was

designated. In fact, it is not only quite apparent that under the rule relied on this devise cannot be said to contain any of the elements which should characterize a gift to a class, but the plain impression which one would receive by reading the clause is that the testator intended to give to each individual an equal portion of his estate." At page 68 of 157 Cal., at page 232 of 106 P.: "In determining whether a devise is to a class or to individuals great importance is attached in the solution of the question to the fact that the gift is to the devisees *nominatim* and that the particular share they shall each receive is mentioned, and, when this appears, the bequest is held to constitute a gift and devise individually as tenants in common, and not as a devise to a class. *Savage v. Burnham*, 17 N.Y. 561; *Hornberger v. Miller*, 28 App.Div. 199, 50 N.Y.S. [1079] 1085; *Rockwell v. Bradshaw*, 67 Conn. 8, 34 A. 758. But, assuming, however, that the language used in the clause in question is capable of two different legal meanings resulting from the testator devising his estate to the four children of his late sister, followed by other words of express devise to each of the children by name and in equal proportions, still this mention of them by name and a devise to them in equal shares will control the description of them as children of his deceased sister. If words, which, standing alone, would be effectual to create a class, are followed by equally operative words of devise to devisees by name and in definite proportions, the law infers from the designation by name and mention of the share each is to take that the devisees are to take individually and as tenants in common, and that the descriptive portion of the clause (children of a deceased sister) is intended merely as matter of identification." *Estate of Sullivan*, supra, 31 Cal.App.2d 527 at page 529, 88 P.2d 225, 226: "The rule or presumption is that the gift is not one to a class where the will designates the takers by name, or identifies them by their number; and this inference will be given effect in the absence of anything to show a contrary intention. Thus, where property is expressed to be given to four named devisees, the

survivors do not take the share of one who predeceased the testator. Nor does the rule in avoidance of intestacy overcome the presumption that the devisees or legatees were intended to take as individuals and not as a class. *Estate of Pence*, 117 Cal.App. 323, 4 P.2d 202."

Appellant also complains of exclusion of certain parol evidence. The *Murphy* case, supra, says 157 Cal. at page 69, 106 P. at page 233: "It is true that these rules of construction are not absolute, but must give way to the manifest intention of the testator, which is always paramount, as that intention may be gathered from a consideration of all provisions of the will, or when the language of the will is not sufficiently clear to remove all doubt as to its intention, by a consideration of the circumstances surrounding the making of it (exclusive of the oral declarations of the testator) in so far as they may throw light on that intention. Civ.Code, § 1318; *Estate of Langdon*, 129 Cal. 451, 62 Pac. 73." The proffered evidence was to the effect that Josie G. Powell, who concededly advised and assisted testatrix in making the will, would testify that she explained to Miss Moore how to write a will as she did not have such knowledge; that Miss Moore outlined her testamentary plans and said she wanted all the Davis property in Corona to go to the Davises; that Josie G. Powell participated in choice of language used in the will, including that of the first paragraph; that "[i]n suggesting * * * the language 'equally divided', Josie G. Powell believed the property would all be given to the Davises"; that Miss Moore said that the property "belonged to the Davis family and her sister had given it to her only to use during her lifetime"; that in 1943 and 1944 Miss Moore refused to sell the property because it belonged to the Davis family; that her attorney Roger Page finally prevailed upon her to sell; that she said it was not true when told of Carrie D. Griffin's death which occurred in January 1951. It will be noted that the only "belief" included in the offer was that of Josie G. Powell, not testatrix, and it was merely that "the property would all be given to the Davises." The offer in its entirety

does not more than explain the reasons for the gift to non-relatives, or at best to suggest a motive for a class gift had one been attempted. The Murphy opinion again applies aptly to this case. At pages 70-71 of 157 Cal., at page 233 of 106 P.: "But these facts throw no more light on the intention of the testator than appears upon the face of the devise itself. All that this evidence discloses is just what the clause of the will does. It furnishes a reason generally why the testator devised his estate to these four devisees in preference to his other nieces and nephews, and a particular reason why, having an equal affection for all of them, he made no distinction between them in his bequest, but gave to each an equal share in his estate. Giving this evidence the greatest force that can be claimed for it, it discloses at most that the intention of the testator was just as compatible with the devise to these children individually as to them as a class. But this cannot aid the respondents. It would simply leave the intention of the testator as much in doubt after a consideration of these intrinsic facts as before. This evidence throws no more light on the intention of the testator than appears upon the face of the devise itself, and so we are still remitted to the application of the general rule that when in a devise a class and individuals are both mentioned, and nothing appears from other clauses of the will or extraneous evidence requiring a different construction, the devise will be construed as one to devisees individually and not to them collectively—to them as tenants in common and not to them as survivors of a class."

[16] The Moore will is not ambiguous and the proffered evidence was properly rejected. If received it could not have changed the result.

[17] It appearing that there is no error in either of the portions of the judgment from which appeals have been taken, the judgment is affirmed.

PARKER WOOD, Acting P. J., and VALLÉE, J., concur.

135 Cal.App.2d 218

Leonard BLAKE, a minor, by his Guardian ad litem, Lawrence Piazza, Plaintiff,
Cross-Defendant and Appellant,

v.

Meta BLAKE, Defendant, Cross-Complainant and Respondent.

Civ. 5129.

District Court of Appeal, Fourth District,
California.

Aug. 24, 1955.

Action by husband for annulment or divorce. The wife filed a cross-complaint for divorce. The Superior Court, San Diego County, John A. Hewicker, J., granted an interlocutory decree of divorce to wife and husband appealed. The District Court of Appeal, Shell, J. pro tem., held that the evidence was sufficient to support finding that the parties were the parents of the child.

Affirmed.

1. Bastards ⚭6

In divorce action, evidence relating to dates of sexual intercourse and period of gestation sustained finding that husband and wife were parents of child.

2. Appeal and Error ⚭931(1)

On appeal in reviewing the evidence, all conflicts must be resolved in favor of respondent, and all legitimate and reasonable inferences must be indulged to uphold the judgment if possible.

3. Divorce ⚭179, 184(10)

Where no question of errors of trial court in ruling on admissibility of evidence was raised on appeal from judgment granting wife a divorce, reviewing court would determine whether there was sufficient evidence in record to sustain trial court's finding that child was son of husband and would not apply the statutory legitimacy presumptions which apply to admissibility of evidence in disputed legitimacy cases. West's Ann.Civ.Code, §§ 193-195; West's Ann. Code of Civ.Proc. § 1962, subd. 5.

4. Appeal and Error ⇨1071(5)

Where evidence is sufficient to sustain the findings necessary to support the judgment, unnecessary findings may be disregarded on appeal.

5. Evidence ⇨256

In divorce action, evidence was sufficient to sustain court's finding that document signed by wife purporting to be an admission that minor child was not the husband's child was signed by her under duress.

6. Divorce ⇨130

In divorce action, evidence was sufficient to sustain court's finding that the manner in which husband attempted to terminate the marriage and charges husband made against wife constituted extreme mental cruelty.

7. Divorce ⇨126

In divorce action, evidence was sufficient to sustain court's general findings that allegations in husband's complaint that consent for the marriage was obtained by fraud, that he was under the legal age of consent and did not have the consent of one qualified to consent to marriage were untrue.

Lewis, Signer & Burns and A. A. Goldstone, Los Angeles, for appellant.

David W. Hardin, San Diego, for respondent.

SHELL, Justice pro tem.

Plaintiff, by his guardian ad litem, filed an action for annulment or divorce against defendant, Meta Blake, a minor. Plaintiff in his complaint alleged that there were no minor children of the marriage. In her answer defendant denied that there were no children of the marriage and alleged that William Neale Blake was born as the issue of the marriage. In her cross-complaint for divorce she made a similar allegation as to the said child. She charged the plaintiff with cruelty in general terms. All the pleadings allege and the proof fully establishes that the parties were married on August 29, 1953, and that the date of birth of the child was February 12, 1954. Plaintiff's appeal is from the judgment. He urges insuffi-

ciency of the evidence to support certain findings and the judgment of the trial court.

The trial court found:

1. That the parties were married on August 29, 1953.

2. That the parties were father and mother of a child born 9 months and 12 days after the second and last of two acts of sexual intercourse between them prior to their marriage.

3. That the wife made a sincere attempt to "make a go" of the marriage; that the document signed by the wife purporting to be an admission that the minor child was not the husband's child was signed by her under duress used by the husband's mother.

4. That the manner in which the husband attempted to terminate the marriage and the charges he made against the wife constitute "extreme mental cruelty."

5. That the wife is a suitable person to have the custody of the minor child.

6. That all of the wife's allegations and denials in her answer and her cross-complaint are true.

7. That all the allegations and denials of the husband's complaint and his answer to the wife's cross-complaint inconsistent with the specific findings of fact are untrue.

The appellant urges that there is no substantial evidence to support findings numbers 2, 3, and 4. This contention is directed also to the catch-all findings, numbers 6 and 7.

[1] The average period of gestation is generally taken as 280 days. The trial court found that the birth of this child occurred 282 days after the last act of intercourse between the parties. Computation of the period of gestation as so found by the court results in a finding that the date of the last act of intercourse between the parties was approximately May 6, 1953. We can find no substantial evidence in the record to support this particular portion of finding 2. Respondent testified that there were two occasions of intercourse between her and appellant and that both such occasions were in March, 1953; that two weeks elapsed between the first and second occasion; that

she always had her menstrual period near the end of the month; that she missed her menstrual period at the end of April; that at the end of March she had a menstrual flow for one day; that this was after the first occasion of intercourse with appellant; that she had no menstrual flow thereafter; that she had never had sexual intercourse with any man before the first occasion with appellant and that she was sixteen years old at the time of that first occasion. We find, therefore, no substantial evidence in the record to support the finding of the court that the last act of intercourse between the parties was on the approximate date of May 6, 1953. Is there then sufficient evidence to support the finding that the parties were the father and mother of the child William Neale Blake? The trial court may well have found that the last act of intercourse between the parties took place as late as the 12th day of April, 1953. Between that date and February 12, 1954, 306 days, or 10 calendar months and 6 days elapsed.

In the case of *In re Estate of McNamara*, 181 Cal. 82, 183 P. 552, 7 A.L.R. 313, the Supreme Court of California was considering a period of gestation of 304 days. In that case the child involved had petitioned the probate court for partial distribution of the estate to him and to accomplish such distribution, it was necessary for him to show that he was in fact the illegitimate son of the decedent. The trial court found in his favor on that issue. The Supreme Court affirmed the finding, and say, 181 Cal. at page 90, 183 P. at page 555:

"* * * a reading of these same authorities makes it plain that any period in excess of 300 days is quite exceptional and that with each day over 300 the exceptional character of the case is much intensified. * * *

And in the same case the Supreme Court made the following observations, 181 Cal. at pages 89-90, 183 P. at page 555:

"The first question, while one of fact, is one as to the operation of natural laws, and therefore as to a fact of which the court may take judicial notice, and as to which it is not confined to the evidence in the record, but may

seek information elsewhere, and in particular in published technical works and articles by those recognized as authorities in this branch of human knowledge. An examination of recent medical textbooks and articles leaves no doubt as to two points: First, that 304 days is a possible period of gestation; and, next, that it is quite an exceptional one. While the average period of gestation is generally taken as 280 days, there are instances vouched for by reputable authorities where the period has exceeded 330 days, and there are instances, too well authenticated apparently to admit of reasonable question, where the period has exceeded 320 days."

The period of gestation in the instant case, if we are to affirm the judgment, must be held to have been possible even though exceptionally longer than the usual or normal period.

[2] The *Estate of McNamara* case serves to illustrate the rule on appeal that in reviewing the evidence all conflicts must be resolved in favor of respondent, and all legitimate and reasonable inferences must be indulged to uphold the judgment if possible. *Mattoon v. Steiff*, 123 Cal.App.2d 512, 513, 266 P.2d 920; *In re Estate of Bristol*, 23 Cal.2d 221, 223, 143 P.2d 689.

In *Dazey v. Dazey*, 50 Cal.App.2d 15, 122 P.2d 308, where an abnormally short period of gestation of 225 days was considered, the trial court applied the conclusive presumption of legitimacy in sustaining without leave to amend a demurrer to a complaint filed by a minor child seeking to determine which of two men was his father. The District Court of Appeal affirmed the order and petition to the Supreme Court for hearing was denied.

The case of *McGillis v. Hofeditz*, 101 Cal.App.2d 760, 226 P.2d 372, cited by appellant, was one in which the trial court found that the child involved was illegitimate and the District Court of Appeal affirmed the judgment, holding that the evidence was sufficient to justify the trial court's conclusion that no sexual intercourse

had occurred between the husband and wife for a period of more than a year before the birth of the child.

In the case of *Anderson v. Anderson*, 214 Cal. 414, 417, 5 P.2d 881, 882, cited by appellant, the trial court found the child involved to be legitimate, even though born only three and one-half months after marriage of the mother, there being no evidence establishing the fact of sexual intercourse between the mother and the man she married at a time within the normal limits of the period of gestation. The Supreme Court disapproved this finding of the trial court, stating:

"* * * we are here not called upon to weigh the probabilities, for we have a case where the fact of prenuptial pregnancy by a stranger is established beyond question, and the presumption of legitimacy no longer obtains."

The *Anderson* case is the only case cited by counsel in which a finding of the trial court as to legitimacy or illegitimacy was disapproved on appeal, and we believe, in view of the language cited above, is not decisive in the instant case.

[3] We believe that there is no necessity in this case to apply the presumptions established by sections 193, 194 and 195 of the Civil Code nor that declared in subdivision 5, section 1962 of the Code of Civil Procedure. The presumptions therein declared have to do with their application to the admissibility of evidence in cases of disputed legitimacy. In the instant case no question of errors of the trial court in ruling upon the admissibility of evidence is raised on appeal. We must here determine whether there is sufficient evidence in the record to sustain the finding of the trial court to the effect that William Neale Blake is the son of appellant.

We are not unmindful of the fact that in a letter to respondent, dated February 15, 1954, in evidence as defendant's Exhibit "E", appellant added the postscript: "P. S. Take care of my boy."; that in a letter written by him on February 18, 1954, in evidence as defendant's Exhibit "D", appellant said "How is Bill Neal Blake getting along. You be sure and take good care of

him."; that in a letter dated February 23, 1954, received in evidence as defendant's Exhibit "F", appellant wrote: "I am now laying here in the compartment thinking of you and the baby."; and "Tell Billy hello for me."; and that in a letter dated February 24, 1954, in evidence as defendant's Exhibit "G", appellant wrote: "How is Billy doing now. I can't wait to see him and you", and "Take care of Billy and yourself." It will be noted that each of these letters was written after the birth of the child.

The respondent admitted that she had intercourse with one Herb Lambert about the middle of May, 1953, but testified that she did not consent to that act; that Lambert forced her to permit the act, and that she had already missed her April menstrual period at the time of that act. She denied any acts of sexual intercourse other than the one with Lambert, and the two acts with appellant.

[4] That part of finding number 2 made by the trial court that the period of gestation was nine months and 12 days is unnecessary to support the judgment of the trial court. The portion of finding number 2 that the parties were the father and mother of the child, William Neale Blake; "* * * that said minor child was born as result of intercourse by plaintiff and defendant prior to the solemnizing of the marriage; that prior to the marriage of said parties they had intercourse on two different occasions" would be sufficient to support the judgment in that respect. Where the evidence is sufficient to sustain the findings necessary to support the judgment, unnecessary findings may be disregarded on appeal. *Bank of Perris v. Sandor*, 24 Cal.App.2d 349, 352, 75 P.2d 87; *Young v. Young Holdings Corp.*, 27 Cal.App.2d 129, 154, 80 P.2d 723. We believe the evidence in this record is sufficient to sustain the whole of finding number 2 except that portion thereof specifically fixing 9 months and 12 days as the duration of the period of gestation.

[5] Finding number 3 seems to us to be an unnecessary finding, but in passing we note that at the time the document was presented to the respondent for signature by appellant's mother, respondent was without

independent advice. She was occupied with her small child. Appellant's mother, Theresa Blake, was accompanied by her father, Mr. Piazza, a Mrs. Messer, and by appellant's father, who told respondent they had come to remove appellant's effects. Respondent testified that at that time appellant's mother told her that the document "was to drop the divorce proceeding"; that "I was scared and she told me to sign it or else"; and "I was alone with the baby there"; and that she was fearful for the safety of the baby. This evidence is sufficient to sustain the material portions of finding number 3.

[6] Appellant attacks finding number 4 made by the court. We believe that the evidence contained in this record as to the conduct of appellant in his refusal after the marriage to make a Navy allotment in his wife's favor, in refusing to obtain for her a card for treatment of herself and the child at the Naval hospital, she having no means of providing food, care and treatment for herself and child, in causing his parents to remove his clothing and personal effects from the home they had established in a Naval housing unit, in charging her with voluntary sexual intercourse with two other men, in causing other men to telephone to her home, in himself using profanity in the telephonic conversation referred to by respondent and her stepmother, and his participation in coercing respondent to sign the document, are sufficient to justify the trial court in making the material findings of fact contained in finding number 4.

[7] The trial court by its general findings numbers 6 and 7 found that the appellant's allegations in his complaint that consent to the marriage was obtained by fraud and that he was under the age of legal consent and did not have the consent of anyone qualified to consent to the marriage, were untrue. These findings are supported by the evidence.

The judgment is affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

James Gordon TAYLOR and Dewey Joseph
Martineau, Defendants and Appellants.

Cr. 5331.

District Court of Appeal, Second District,
Division 3, California.

Aug. 24, 1955.

Prosecution for armed robbery and kidnaping for purpose of robbery. The Superior Court, Los Angeles County, Joseph M. Maltby, J., entered judgments of conviction on both counts and defendants appealed. The District Court of Appeal, Vallée, J., held that evidence sustained convictions of armed robbery but it was prejudicial error to instruct jury that mere seizure or detention of victim during commission of robbery constituted kidnaping for purpose of robbery.

Judgments of conviction of robbery affirmed and judgments of conviction of kidnaping for purpose of robbery reversed.

1. Kidnaping ☞

Under statute respecting kidnaping for the purpose of robbery, mere detention of the victim during the commission of armed robbery is not sufficient to constitute offense. Pen.Code, § 209.

2. Criminal Law ☞1186(4)

Kidnaping ☞6

In prosecution for armed robbery and for kidnaping for the purpose of robbing, instruction that mere seizure or detention of the victim during commission of robbery constituted kidnaping for purpose of robbing, was substantial error within constitutional provision requiring reversal only in cases of substantial error. Pen.Code, § 209; West's Ann.Const. art. 6, § 4½.

3. Criminal Law ☞1188

Where defendant was convicted of robbery in the first degree, reviewing court could not direct trial court to permit defendant to file an application for probation

and to entertain and pass on the same. Pen.Code, §§ 211a, 1203.

4. Robbery ☞24(1)

Evidence sustained convictions of robbery in the first degree. Pen.Code, § 211a.

5. Criminal Law ☞1023(3), 1134(10)

Orders denying defendant's motion for a separate trial and refusing to remand disposition of his cause to juvenile court are not appealable, but are reviewable on appeal from the judgment.

Ernest L. Graves, Long Beach, James K. Turner, Beverly Hills, and Morris Lavine, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Doris H. Maier, and F. G. Girard, Deputy Attys. Gen., for respondent.

VALLÉE, Justice.

Defendants were convicted by a jury of armed robbery and of kidnaping for the purpose of robbery and it was found that they were armed at the time. Defendant Taylor appealed 1) from the judgment, 2) from the order denying his motion for a new trial, 3) from an order denying his motion for a separate trial, and 4) from an order refusing to remand disposition of his case to the juvenile court. Defendant Martineau appealed from the judgment. On a prior trial, a jury disagreed as to the guilt of defendants on both charges. Defendants do not attack the convictions of robbery. They challenge the convictions of kidnaping for the purpose of robbery.

[1] Prior to the amendment of section 209 of the Penal Code in 1951, kidnaping

for the purpose of robbery consisted not only of orthodox kidnaping for ransom or robbery, but also consisted of detention of the victim during the commission of robbery. Movement of the victim was not required. The statute made the act of seizure, for ransom, reward, or to commit extortion or robbery, a felony. Detention during armed robbery was kidnaping for the purpose of robbery. *People v. Knowles*, 35 Cal.2d 175, 179-181, 217 P.2d 1. In 1951 the Legislature amended section 209 to provide in material part, "Any person * * * who kidnaps or carries away any individual to commit robbery * * * shall suffer death or shall be punished by imprisonment in the state prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person * * * subjected to such kidnaping suffers * * * bodily harm." Under the statute as amended the mere detention of the victim during the commission of armed robbery is not punishable under section 209. *People v. Chessman*, 38 Cal.2d 166, 190, 238 P.2d 1001.

The acts charged against defendants as constituting kidnaping for the purpose of robbery were alleged to have been committed in 1954. The court, in instructing the jury in the present case, stated the law with respect to kidnaping for the purpose of robbery as it existed prior to the 1951 amendment.¹ The cause was submitted to the jury following the instructions. After the jury had deliberated about an hour, they returned to the courtroom and the following took place: "The Court: Who

1. The instructions read:

"Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever, with intent to hold or detain such individual for ransom, reward, or to commit extortion or robbery, or to exact from relatives or friends of such person any money or valuable thing, or who actually holds or detains such person for any such purpose, or who aids or abets any such act, is guilty of a crime.

"You will note that an essential element of crime charged against the defendant in (count two of) the information is a specific intent to hold or detain the person subjected to the offense

for ransom or reward, or to commit extortion or robbery, or to exact from relatives or friends of such person money or other valuable thing. This intent must be a motivating purpose of the action, although it need not be the only such purpose. Hence one cannot be guilty of such a crime unless his conduct is motivated by such an intent.

"When a person seizes another with intent to hold or detain him, or seizes him in the act of holding and detaining him, for ransom, reward, or to commit extortion or robbery, or to exact from relatives or friends of the seized person any money or valuable thing, such seizure constitutes a crime whether or not the person so seized is carried or

is the foreman? Mr. Brown: I am, your Honor. The Court: What was it you wanted? The Foreman: We specifically wanted to hear the instructions of the court on kidnapping. The Court: Mr. Bailiff, I will have to have Caljic. Will you get it for me? Beginning with the definition of kidnapping as defined in Penal Code Section 209, I shall, at the request of the foreman of the jury, read the instructions relating to kidnapping." The court then repeated the instructions previously given as copied in the margin. The foreman stated, "I think that clears up our problem"; and the jury returned to the jury room. Shortly thereafter the jury returned verdicts of guilty of armed robbery and of kidnapping for the purpose of robbery and found that defendants were armed at the time of the commission of the offenses.

[2] Manifestly the court erred in instructing the jury that mere seizure or detention of the victim during the commission of robbery constitutes kidnapping for the purpose of robbery. The error was prejudicial. The attorney general, with laudable candor, so concedes and says the error was substantial and is not saved by article VI, § 4½, of the Constitution. We have examined the record and agree.

[3,4] Defendant Taylor requests that this court direct the superior court to permit him to file an application for probation and to entertain and pass on the same. That this court cannot do. Taylor was convicted of robbery in the first degree, robbery perpetrated by a person being armed with a dangerous or deadly weapon. Pen. Code, § 211a. The jury also found he was armed at the time of his commission of the offense. The evidence supports the verdict and the finding. Penal Code section 1203 provides, "Probation shall not be granted to any defendant who shall have been convicted of robbery, * * * and who at the time of the perpetration of said crime * * * was himself armed with a deadly weapon (unless at the time he had

a lawful right to carry the same), nor to a defendant who used or attempted to use a deadly weapon upon a human being in connection with the perpetration of the crime of which he was convicted, * * *."

[5] The appeals of defendant Taylor from the orders denying his motion for a separate trial and refusing to remand disposition of his cause to the juvenile court are dismissed. Such orders are not appealable, but are reviewable on the appeal from the judgment. Taylor does not mention the points in his brief and they are deemed to have been abandoned. The judgments of conviction of robbery and the order denying Taylor's motion for a new trial relative to that conviction are affirmed. The judgments of conviction of kidnapping for the purpose of robbery and the order denying Taylor's motion for a new trial with respect to that charge are reversed.

PARKER WOOD, Acting P. J., and
ASHBURN, Justice pro tem., concur.



134 Cal.App.2d 843

GOLD SEAL PRODUCTIONS, Inc., a corporation, Plaintiff and Respondent,

v.

R. K. O. RADIO PICTURES, Inc., a corporation, Defendant and Appellant.

Civ. 20068.

District Court of Appeals, Second District,
Division 3, California.

Aug. 10, 1955.

Rehearing Denied Aug. 31, 1955.

Action was brought for breach of alleged oral contract whereby plaintiff was to produce moving picture and deliver it to

otherwise moved any distance from the place of the attack.

"Where a person is charged with the crime of kidnapping for the purpose of robbery it is not necessary to a conviction

that the proof show that such purpose was accomplished, for a crime of that nature is complete if and when the kidnapping is done for such a purpose."

defendant for distribution in consideration for payment by defendant to plaintiff of \$125,000 and 20% of the profits. The Superior Court of Los Angeles County, Joseph W. Vickers, J., entered judgment for plaintiff for \$397,486.55, and the defendant appealed. The District Court of Appeal, Parker Wood, J., held that evidence sustained finding that the parties entered into the contract, that picture rights and screenplay, which belonged to plaintiff, had a reasonable market value of \$250,000, that picture rights and screenplay were rendered valueless by acts of defendant, and that such damages were within contemplation of the parties, but that where plaintiff was awarded \$250,000 as damages for reasonable market value of plaintiff's picture rights and script, an award to plaintiff of additional \$125,000, the amount to be paid under the contract, was improper because an award of double damages with respect to the picture rights and script.

Judgment modified and, as modified, affirmed.

1. Contracts ⇨9(1)

It is not necessary that each term of an oral contract be spelled out in minute detail.

2. Contracts ⇨32

When parties orally agree on all terms and conditions of contract with mutual intention that it shall thereupon become binding, mere fact that formal written agreement to same effect is to be thereafter prepared and signed does not alter the binding validity of original contract.

3. Contracts ⇨32

Question whether oral agreement, including all essential terms and conditions thereof, which, according to mutual understanding of parties, is to be subsequently reduced to writing, shall take effect forthwith as a completed contract depends on intention of parties, to be determined by surrounding facts and circumstances.

4. Contracts ⇨45

In action for breach of alleged oral contract whereby plaintiff was to produce moving picture and deliver it to defendant

for distribution in consideration for payment by defendant to plaintiff of \$125,000 and 20 per cent of the profits, evidence sustained finding that parties entered into oral contract with intention that it be reduced to writing.

5. Principal and Agent ⇨123(3)

In action for breach of alleged oral contract whereby plaintiff was to produce moving picture and deliver it to defendant for distribution, evidence sustained finding that one who was in charge of defendant's studio, and who negotiated with plaintiff, had authority to bind defendant.

6. Frauds, Statute of ⇨113(3)

Where written memorandum contained basic terms of alleged oral contract whereby plaintiff was to produce moving picture and deliver it to defendant for distribution, such as the names of the parties, name of picture, recitation that screenplay has been approved, name of leading actor, amounts to be paid, and provided that all other terms and provisions, were the same as those in the last contract between the parties, written memorandum was sufficient to take alleged oral contract out of the statute of frauds. West's Ann.Civ.Code, § 1624.

7. Signatures ⇨2

A typewritten name may be adopted as a signature.

8. Frauds, Statute of ⇨113(2)

A note or memorandum under the statute of frauds need not contain all of the details of an agreement between the parties. West's Ann.Civ.Code, § 1624.

9. Frauds, Statute of ⇨158(4)

In action for breach of alleged oral contract whereby plaintiff was to produce moving picture and deliver it to defendant for distribution, evidence sustained finding that defendant was estopped to rely on the statute of frauds. West's Ann.Civ.Code, § 1624.

10. Contracts ⇨28(2)

In action for breach of alleged oral contract whereby plaintiff was to produce moving picture and deliver it to defendant for distribution, president of plaintiff corporation was properly permitted to testify

that when he and defendant's representative shook hands and stated that they had a "deal" it was his intention to enter into a binding oral contract.

11. Appeal and Error ⇨1056(1)

In action for breach of alleged oral contract whereby plaintiff was to produce moving picture and deliver it to defendant for distribution, exclusion of evidence tending to show that alleged oral contract could not be performed within one year and was therefore within statute of frauds was not prejudicial error, where there was a sufficient written memorandum of the alleged oral contract to satisfy the statute of frauds. West's Ann.Civ.Code, § 1624.

12. Contracts ⇨175(2)

In action for breach of alleged oral contract whereby plaintiff was to produce moving picture and deliver it to defendant for distribution, court did not err in rejecting evidence as to parties' understanding of word "negotiated" as used in a memorandum in a prior transaction between the parties, where it did not appear that circumstances in prior transaction with reference to the use of the word "negotiated" were similar to the present circumstances.

13. Appeal and Error ⇨1057(1)

In action for breach of alleged oral contract whereby plaintiff was to produce moving picture and deliver it to defendant for distribution, alleged error of court in refusing to permit defendant to inquire as to oral contracts defendant's representative claimed to have made on its behalf was not prejudicial error, in view of evidence that one in charge of the defendant gave defendant's representative instructions as to the alleged oral contract in question and also approved his acts.

14. Literary Property ⇨9

In action for breach of alleged oral contract whereby plaintiff was to produce moving picture and deliver it to defendant for distribution, evidence sustained finding that picture rights and screenplay based on best seller had a reasonable market value of \$250,000.

15. Literary Property ⇨9

In action for breach of alleged oral contract whereby plaintiff was to produce moving picture and deliver it to defendant for distribution, evidence sustained finding that picture rights and screenplay owned by plaintiff were rendered valueless by acts of defendant.

16. Literary Property ⇨9

In action for breach of alleged oral contract whereby plaintiff was to produce moving picture and deliver it to defendant for distribution, evidence sustained finding that damages resulting from destruction of value of picture rights and screenplay, which were owned by plaintiff, by acts of defendant were within contemplation of the parties.

17. Contracts ⇨89

In action for breach of alleged oral contract whereby plaintiff was to produce moving picture and deliver it to defendant for distribution, reference could be made to oral evidence in determining the consideration for the alleged oral contract.

18. Literary Property ⇨9

In action for breach of alleged oral contract whereby plaintiff was to produce moving picture and deliver it to defendant for distribution in consideration for payment by defendant to plaintiff of \$125,000 and 20 per cent of the profits, wherein plaintiff was awarded \$250,000 as damages for reasonable market value of plaintiff's picture rights and script, an award to plaintiff of an additional \$125,000, the amount to be paid under the contract, was improper because an award of double damages with respect to the picture rights and script.

19. Damages ⇨120(2)

In action for breach of alleged oral contract whereby plaintiff was to produce moving picture and deliver it to defendant for distribution, a proper element of plaintiff's damage for breach of the contract was the \$25,000 which, under the contract, was to be paid by plaintiff to its president as producer of the picture.

20. Literary Property ⇨9

Where, under oral contract whereby plaintiff was to produce moving picture and

deliver it to defendant for distribution, defendant was not to have an interest in the picture rights and script until principal photography was commenced, and contract was breached by defendant before there was any photography, defendant would not be deemed to have any interest in the picture rights and script in determining amount of damages to be recovered by plaintiff for defendant's breach of the contract.

Mitchell, Silberberg & Knupp, Guy Knupp, and Peery Price, Los Angeles, for appellant.

Belcher, Kearney & Fargo, Frank B. Belcher, and George M. Henzie, Los Angeles, for respondent.

PARKER WOOD, Justice.

Action for damages for breach of an alleged oral contract. Judgment was for plaintiff for \$397,486.55. Defendant appeals from the judgment.

Appellant contends that: (1) The evidence was insufficient to support the finding that the parties entered into a contract. (2) Mr. Rogell, who allegedly represented defendant in the negotiations, had no authority to bind defendant by such alleged contract. (3) The alleged "cause of action is barred by the Statute of Frauds." (4) The court erred in rulings regarding admissibility of evidence. (5) The award of damages was improper.

Plaintiff Gold Seal Productions, Inc., was engaged in the business of making motion pictures and acquiring literary "properties" for use in making such pictures. Jack H. Skirball, a motion picture producer, was president of plaintiff corporation, and Bruce Manning, a writer, was vice-president. The stock of plaintiff was owned by Skirball, his brother and Manning. They also owned the stock of Crest Productions, Inc., Loring Theatres, Inc., and Gwenaud Productions, Inc. Prior to making the alleged contract, involved herein, each of the three corporations had entered into a written contract with defendant RKO Radio Pictures, Inc. Pursuant to provisions in each contract, each corporation had made a

motion picture on defendant's lot and the pictures were distributed by defendant. Skirball, who was in charge of production of the pictures, occupied an office on defendant's lot. According to the testimony of Skirball, he "made the deal" for the second and third contracts with Sidney Rogell, who was the executive producer for RKO and was the "top man" on the lot. He was "second only" to Howard Hughes, who was "top man" in the RKO organization but had never been on the lot. Rogell, on behalf of RKO, negotiated for the purchase of stories and made commitments therefor, and he frequently employed actors and directors. He testified that it was his custom to obtain the approval of Mr. Hughes before purchasing a story; ordinarily he did not sign the contracts of employment or contracts for making pictures; they were usually signed by Gordon Youngman, who was vice-president in charge of the legal department and commitments; he (Rogell) negotiated the "production end" but not the "distribution end" of the three agreements (hereinbefore referred to); he did not read any of those agreements "through" and he did not sign contracts of that kind.

On March 21, 1950, while Skirball was making the picture for Gwenaud Productions, entitled "Payment on Demand," Rogell asked him what picture he had that he would like to do next. Skirball stated that he had "Appointment in Samarra," but he was waiting to do that as a leader of a group of pictures. Rogell stated that he was sure he could not get an "O.K." from Howard Hughes to do more than one picture at a time. Skirball then stated that Gold Seal would consider making "Appointment in Samarra," and Rogell asked him to send a copy of the script. Thereupon a copy of the script was sent to Rogell. "Appointment in Samarra" is a novel written by John O'Hara which was published about 1932. It was a best seller in the United States. Also, it was translated into several languages and it sold well in foreign countries. A script for making a motion picture from that novel was prepared by Manning, vice-president of Gold Seal, who (according to testimony) "is considered one

of the very top writers" in the motion picture industry. The average cost of a script by Manning was "around \$150,000."

About March 26, 1950, Rogell told Skirball that he had read the script for "Appointment in Samarra," that he liked it very much and would like to talk to him about it. About April 1, 1950, when Skirball was at Rogell's office, Rogell told him that he had talked with Hughes about the story, that Hughes liked the idea, and that he (Rogell) was ready to "start talking a deal" for the picture.

Skirball testified that after he had submitted the script to Rogell and prior to May 16, 1950, he had discussions with Rogell regarding "the extent of the rights in the literary material Appointment in Samarra" that Gold Seal was to convey to RKO; he explained to him that Gold Seal was obligated to pay John O'Hara 5 per cent of the profits of the picture; he also told him that when he signed the contract (with Mrs. O'Hara) he "advanced \$10,000 to O'Hara plus the cost of the story," and that every year in which he did not make the picture he "had to pay another \$10,000 which would go against the percentage," and up to that time he had advanced \$30,000 which meant that O'Hara would not participate in the first \$600,000 profit from the picture; he told Rogell that the first \$25,000 which he paid O'Hara was "payment on the story," and the "next \$10,000 from then on each year was to pay against the percentage of the picture," and his deal was that he had to make the picture and that he could not sell the "story" outright without the consent of the agent with whom he made the O'Hara deal; they also had a conversation regarding the cost of the picture and they figured, with a normal cast, it would cost around \$1,100,000.

Rogell asked Skirball how much he wanted. Skirball told him that Mark Hellinger had offered him \$250,000 for the "property" and a percentage of the profits; that Robert Montgomery had offered him \$150,000 for the book and 25 per cent of 95 per cent of the profits—the remaining 5 per cent of the profits was to go to O'Hara—and in addition that he (Skirball) was to get his regular fee of \$50,000 for his work

in producing the picture. Skirball then "suggested a deal" to Rogell of \$225,000 and 10 per cent of the profits of the picture, and suggested an "alternate deal" of \$175,000 and either 25 per cent or 40 per cent of the profits. Both of those deals included his services as producer, and he told Rogell that Gold Seal would stand the 5 per cent which was to go to O'Hara.

Rogell transmitted Skirball's offer to Hughes who said that those figures were too high. Skirball asked Rogell to discuss the offer with Hughes again and to dwell upon the Hellinger and Montgomery offers, and he stated that the deal he was offering RKO was predicated on the nice relationship with RKO, and he hoped to remain at RKO. Skirball asked Rogell to mention to Hughes that Skirball's agent was sure that he could make a deal with Paramount for "Appointment in Samarra." A few days later Rogell called Skirball and told him that Hughes wanted to know if they could work out a deal to pay Gold Seal a lump sum and Gold Seal would get no percentage of the profits. Skirball stated that they were not interested in such a deal.

During the next few days Skirball and Rogell talked about the cast. Skirball mentioned Bette Davis, Sullivan, Ford, Andrews, and Ryan. During the last two weeks in April, 1950, Mr. O'Shea, president of Vanguard Films, told Rogell that Gregory Peck could be made available to RKO. Vanguard had a contract with Peck, and it could assign or lend his services. Rogell told O'Shea that he was negotiating with Skirball for "Appointment in Samarra," and he would have to effect the Skirball deal before he could go ahead with such a deal with Vanguard. Rogell told Skirball that he had talked to O'Shea, and that Peck was available for the picture. Skirball replied that Peck was too expensive, that he understood that Vanguard wanted \$250,000 for Peck, and that he had heard that Peck did not want to be in the picture. Rogell said that it was the last picture on Peck's program for Selznick (Vanguard) and that he would make any picture. Rogell also said that Mr. Hughes was anxious to have Peck in the picture. Skirball said that he would just as soon have Robert Ryan,

who was under contract with RKO. Rogell asked what deal could be worked out if they used Peck.

Thereafter, about May 10, Skirball "offered a deal" of \$150,000 and 20 per cent of the profits, or \$125,000 and 25 per cent of the profits; which offer was to be submitted to Hughes by Rogell. Rogell discussed the offer with Hughes, who told Rogell to offer to Skirball "Gregory Peck plus \$100,000 and 25 per cent." Hughes also told Rogell to tell Skirball that he (Skirball) had had three deals with RKO wherein he had picked up over \$300,000 in cash, that it was a rich deal with Peck, that RKO and Skirball had gotten along very well, and RKO wanted him to stay there and make pictures. Rogell transmitted that offer and message to Skirball, who refused the offer.

On May 14, O'Shea told Rogell that he (O'Shea) had a deal for Peck (with someone else) and that he would hold Peck until 9:30 o'clock that night. Later, that deadline for getting Peck was extended to May 16, at noon. On May 15, Skirball said that they could make a deal, if they would do it "now," for \$150,000 plus 20 per cent or \$125,000 plus 25 per cent; and that he (Skirball) would take \$10,000 less with Peck, that is, \$140,000 plus 20 per cent. Skirball also said that he would be happy with Peck but he would just as soon have Ryan. Rogell related the offer to Hughes, who replied: "You can close the deal with Skirball with Peck at \$125,000 plus 20." On the morning of May 16, a "production meeting" was held in Rogell's office, which was attended by Rogell, Hastings (an assistant secretary of and attorney for RKO), Lockhart (general studio manager), and Youngman (vice-president in charge of commitments). During the meeting Rogell called Hughes and told him there was "a new deadline, a noon deadline from O'Shea on Gregory Peck." He also told Hughes that Skirball agreed to \$140,000 plus 20 per cent. Hughes told him to try for \$125,000 plus 20. Rogell telephoned Skirball, who was on the RKO lot, and told him they were in a meeting and they had to make up their minds regarding Peck by

noon of that day, and that Hughes had told Rogell to offer him \$125,000 and 20 per cent of the profits. Rogell also told him that if he would accept that they had a deal, otherwise they would not have Peck. Skirball started to argue, and Rogell asked him to come to the office. When Skirball arrived there, he said that he did not think it was a good deal. Rogell said that Hughes had asked him to say that Skirball had had a lush deal at RKO, that a future was there, and that if Skirball accepted this deal Hughes would make it up for Skirball on other pictures. Skirball said that he preferred Ryan. Rogell replied that Hughes had said that Skirball would make more money with Peck than with Ryan, and that with Peck Skirball's share of the profits should be half a million dollars. Rogell repeated the figures of the Hughes offer, and he also repeated the need for quick action if they were interested in Peck. Skirball asked Rogell, if outside the "particular terms of the picture," that is, the \$125,000 and 20 per cent, the deal was to be exactly the same as "Payment on Demand [the Gwenaud picture]," and if the deal is a deal with or without Peck. Rogell replied, "Yes." Then Skirball stuck out his hand and said, "We have a deal." Then Rogell stuck out his hand and said, "We have a deal." Those present "shook hands all around."

Rogell then telephoned O'Shea and said that he had effected his deal with Skirball and that he wanted to close for Peck. O'Shea said that he reaffirmed the starting date (June 8), the number of weeks involved (12 weeks), and the price (\$250,000); and he said, "We have a deal and there is no more trading, this is it," because I now have to call the other customer and tell him there is no possibility of making a deal (with the other customer). Rogell said, "[T]his is the deal." Then he reported to those present (the committee) that he had secured Peck for the picture.

After Rogell had had said conversations with Skirball and O'Shea, he telephoned Hughes and advised him that he had closed with Skirball on the basis of \$125,000 plus 20 per cent of the profits, and had

closed on Peck for \$250,000. Hughes replied, in substance, "O.K.," and told Rogell to publicize the deal.

At said morning meeting in Rogell's office or at a meeting there in the afternoon of that day, Skirball and Rogell discussed the budget for the picture. The previous total estimate was \$1,100,000, which included \$100,000 for the star of the picture. They added \$150,000, the extra cost for Peck, to the previous estimate which made a total budget of \$1,250,000.

About noon of May 16, after Hughes had told Rogell to publicize the picture, Rogell advised Lieber, the publicity director of RKO, about the picture and told him to release publicity on it. On May 20, 1950, a publicity release by RKO News Service stated in part: "Howard Hughes today completed negotiations to borrow Gregory Peck from David O. Selznick to star in the screen version of John O'Hara's Appointment in Samarra, which Jack Skirball and Bruce Manning will produce for RKO Radio." RKO placed an advertisement in the June 10th issue of the Motion Picture Herald, a weekly trade journal of national circulation, wherein it was stated that the picture would be produced by RKO. Also, in the June 10th issue of the RKO house organ, "Flash," which was distributed among theater agencies, there was an advertisement which stated: "And, looking ahead to 1951 * * * Appointment in Samarra, Gregory Peck starring in a dramatization of the best-selling novel by John O'Hara." Also, in the June 14th issue of Variety, a trade paper of national circulation, RKO placed "a spread" or advertisement similar to the ones in the other papers.

One of the duties of Youngman, a vice-president of RKO and an attorney, was to see that the legal department prepared the contracts. He signed most of the contracts on behalf of RKO. After the meeting on the morning of May 16, Rogell instructed Youngman to reduce the contract to writing. Youngman then prepared a document on a letterhead of RKO which was directed and delivered to Sidney Lipsitch, the resident attorney at the studio. The document stated that: "A new deal has been nego-

tiated with a corporation of Jack Skirball, Gold Seal Productions, for the production of a motion picture based upon the John O'Hara novel Appointment in Samarra. A screenplay has been submitted to the studio and approved. Gregory Peck is to portray the leading male role." The document also stated that Gold Seal Productions was to receive \$125,000 and 20 per cent of the profits; that the \$125,000 was payable in specified installments; that "All of the other terms and provisions are the same as those in the last contract [Gwenaud Productions, Inc.—"Payment on Demand"], * * *. Mr. Skirball is very anxious to have the contract executed by the end of this week if possible. For this reason, will you please expedite the drawing of the agreement." The name of Youngman was typewritten on the document and he initialed the document and adopted and used his typewritten name thereon, and on the copies, as his signature. A copy of the document was sent to Hastings, Rogell and others at the studio. Youngman prepared the document with the understanding on his part that Rogell had concluded the negotiations with Skirball.

Mr. Lipsitch delegated the writing of the contract to Mr. Knecht, another attorney in the legal department at the studio, who obtained a copy of the prior contract with Gwenaud Productions (referred to in Youngman's memorandum). He prepared a first draft of the contract, pursuant to Youngman's memorandum, without receiving any instruction from Skirball or any of plaintiff's representatives. RKO had a mimeographed form of production-distribution agreement, which form was used more or less for each picture. The legal department had a lot of the mimeographed pages. The first draft of the contract, made by Mr. Knecht, was ready on May 20, 1950. That draft followed substantially the provisions of two contracts which Skirball had previously negotiated with Rogell. The draft was submitted to George W. Cohen, attorney for plaintiff, by a letter of transmittal from Hastings in which it was stated that any enforceable agreement would be subject to the execution of a written contract.

On May 22, Cohen, Skirball and Hastings met at the studio and discussed suggestions which Cohen made regarding the draft. Some changes were made in the draft and on May 24, a second draft was submitted to Cohen. On that day Cohen and Skirball met with Hastings. Cohen said that he had checked the contract, that it was satisfactory and was in conformity with the deal, that as far as Gold Seal was concerned "this was the deal," that there were a few minor points which he would like to take up but they made very little difference to him and he did not care whether they were conceded. After he had finished going over those points, he reiterated that "this was the deal," that it was satisfactory. He said further that they wanted no more changes unless RKO wanted to give them. Hastings said that he understood that this was the contract, it was satisfactory, this was the deal, and the suggestions were not in the nature of counterproposals. When they started to leave, Hastings said that he understood there might be some question in Peck's mind as to whether he wanted to do the story. Cohen replied that it did not make any difference whether Peck wanted to do it, because the contract provided machinery for finding a substitute for Peck. Skirball said that he had a deal with or without Peck and that was his understanding with Rogell.

On May 24, about noon, a telegram from Peck addressed to Hughes, "care of Gordon Youngman," was received by Youngman. The telegram indicated that Peck was reluctant to make the picture. About half an hour after receiving the telegram, Youngman read it to Skirball by telephone. Youngman also talked to O'Shea, who said that: he could not hold Peck without a contract; that Vanguard had the right to lend Peck and had lent him and would do all in its power to see that he performed the role; that he (O'Shea) wanted the lending papers, which he had sent to RKO, signed and returned to him. Youngman told O'Shea that "they" were reluctant to sign the papers in the face of a wire that had been sent by Peck to Hughes. O'Shea asked if RKO deemed that O'Shea was

bound, and Youngman said, "Yes." O'Shea also said that he deemed that he was bound.

On May 25, Hastings, Skirball and Youngman held a conference regarding O'Shea's position. Youngman told Skirball that Hughes said the contract was not contingent upon getting Peck but he would not sign a commitment to be stuck for \$125,000 unless he had some leading man approved in advance.

On May 27, Youngman and O'Shea had another conversation which was, in substance: that each one said he had a deal; O'Shea had submitted a contract which provided that RKO would pay for Peck's services whether or not he performed; in view of the facts that Peck had indicated he was loath to perform and his commitment with Vanguard was running out, RKO was afraid that O'Shea might not be able to force him to perform and RKO would not sign the contract unless O'Shea eliminated the clause that RKO had to pay whether or not Peck performed; and O'Shea refused to eliminate the clause.

On June 2, O'Shea said that he could not promise to hold Peck for RKO, that he might have to take a contract for his services elsewhere. On June 7, Youngman asked O'Shea if he could take out said clause, and O'Shea replied that he could not do it. On June 8, O'Shea said that he had heard that Hughes had released Peck, and that he (O'Shea) was going to try to make a deal to lend his services elsewhere. Youngman replied that Hughes had not released Peck. Later that day, Youngman told O'Shea that "we stood by the deal we had made without this clause in it." O'Shea said he would not accept Youngman's position. Then they "both decided that all the arrangement was off." On June 12, Vanguard sent a telegram to RKO terminating negotiations for Peck's services. O'Shea testified that Peck "was expressing unhappiness to the fellows" and was trying to effect a substitute for the picture, but he had not refused to make the picture. O'Shea testified further that if Peck had refused to perform under his lending agreement, Vanguard could have suspended him.

Thereafter, Youngman said that the problem as to who would play the lead in the picture might be solved if Skirball would submit other names to Hughes. Skirball said that he would do it as a favor, but he felt that if Hughes did not like the names suggested the matter could go to arbitration according to the contract. Skirball submitted several names to Youngman and Hastings, but he did not receive a reply regarding them. In February, 1951, Mr. Tevlin, who had become a top man at the studio, told Skirball that Hughes did not want the picture made for RKO, that the deal was out, and that Skirball should leave the RKO lot. Skirball left the lot. The picture was never produced.

After RKO had decided not to make the picture, plaintiff Gold Seal paid an additional \$10,000 to Mrs. O'Hara in order to retain the motion picture rights another year. During that year Skirball and a motion picture agent tried to sell the picture rights to studios and others, but they were unable to get any offers. There was testimony by Mr. Work (plaintiff's witness), who was qualified to give an opinion as to the value of stories for use in motion pictures, to the effect that after RKO had so advertised the picture, and had cancelled the production of it, "the property [picture rights and script]" would have very little value, because no company wants to take another company's rejects, and no important artist or director as a general rule wants to become identified with a questionable production. When an additional payment of \$10,000 became due to Mrs. O'Hara for the picture rights, the payment was not made and plaintiff Gold Seal lost the picture rights.

The court found, in part, as follows: Plaintiff was the owner of the picture rights in "Appointment in Samarra" and in a screenplay based thereon. On or about May 16, 1950, plaintiff and defendant entered into an oral contract for the production and distribution of a motion picture based upon the novel "Appointment in Samarra." By the terms of said contract it was agreed, among other matters, that plaintiff would produce the picture and deliver it to defendant for distribution, and

that defendant would pay to plaintiff \$125,000 in cash and 20 per cent of the net profits from the distribution. By said contract the parties entered into an arrangement in the nature of a joint venture. Thereafter defendant caused memorandums in writing of said contract to be prepared and subscribed by its duly authorized officers and agents. On May 20, 1950, defendant submitted to plaintiff a written memorial of said oral contract. The parties orally agreed to certain amendments thereto. About May 24, 1950, defendant submitted to plaintiff an amended written memorial of the oral contract which incorporated said oral amendments. Said memorial, a copy of which is attached as an exhibit to the complaint, sets forth all the terms of said oral contract. On said May 24, the parties orally approved the contract set forth in said exhibit, and they agreed that said exhibit sets forth the terms of the oral contract between the parties. Subsequent to the entry into said contract and pursuant thereto, defendant negotiated, and on May 16, 1950, entered into, an agreement with Vanguard Films, Inc., pursuant to which said Vanguard Films agreed to lend the services of Gregory Peck to play the leading male role in the motion picture "Appointment in Samarra." During June, 1950, defendant, pursuant to said contract, publicly announced and advertised in the press that defendant would release said picture, starring Gregory Peck, during 1951. As a result of such announcements and advertisements, defendant and Peck became associated with the proposed picture within the motion picture industry. By reason of such announcements and advertisements, and of the breach of such agreement, defendant destroyed the market value of the motion picture rights in said novel and the screenplay based thereon and rendered them valueless, except as to a picture which would be distributed by defendant. Defendant intentionally led plaintiff to believe that the parties had an oral contract for the production and distribution of a motion picture based upon said novel. Plaintiff relied thereon, and employees of plaintiff prepared a preliminary budget for the picture on the basis of a

budget of \$1,250,000 and in general began preparation for the production of the picture. On or about July 6, 1950, defendant wilfully breached said contract and refused to perform the same. On or about August 1, 1950, defendant expressly advised plaintiff that it would not go forward with the performance of said contract, and defendant repudiated said contract. Thereafter it became a matter of general knowledge within the motion picture industry that defendant had refused to go ahead with the production of the picture. Plaintiff at all times has been ready, willing and able to perform said contract and has performed all conditions on its part to be performed, except as such performance has been prevented by the repudiation of said contract.

The court also found, in paragraph XIII of the findings, as follows: By reason of the acts of defendant, as stated in the findings, and by reason of the total destruction of the market for and value of the motion picture rights of said novel and the screenplay based thereon, plaintiff has suffered unjust and unconscionable injury and loss and has been damaged in the sum of \$250,000. Said rights and screenplay had a reasonable market value of at least \$250,000 at the time the oral contract was entered into and at all times thereafter and until defendant wilfully repudiated the contract. Said damages were within the contemplation of the parties and were the probable result of the acts of defendant. Said item of damage is separate and distinct from and in addition to the damages found in paragraph XIV.

The court also found, in paragraph XIV, as follows: By reason of the acts of defendant, as stated in the findings, and by reason of the repudiation of said contract, and by reason of the refusal of defendant to pay to plaintiff the \$125,000 as provided in the contract, plaintiff has been damaged in the further sum of \$125,000, with interest thereon from September 1, 1950, to the date of judgment in the sum of \$22,486.55, which item of damage is separate and distinct from and in addition to the damage found in paragraph XIII. Plain-

tiff has been damaged in the total sum of \$397,486.55.

The court also found: By reason of the acts of defendant, as stated in the findings, plaintiff lost and was deprived of 20 per cent of the net profits of said picture. There was no evidence from which it could be found that there was a reasonable certainty that there would be net profits, and there being insufficient evidence thereon the court makes no finding of the amount of net profits. Defendant is estopped to deny that plaintiff and defendant had a valid oral contract. Prior to May 16, 1950, plaintiff caused to be prepared a script based upon said novel, and on or prior to said date, plaintiff delivered a copy of the script to defendant. It is not true that the first draft of the proposed memorial of the oral contract was submitted by defendant to plaintiff as a basis for further negotiation with respect to the terms of a contract between them. The first draft was prepared by an attorney for defendant who had no authority to fix the terms of the contract, and the draft was prepared by him upon the assumption that the provisions thereof would be subject to further discussion. It is true that on submission of the first draft an officer of defendant advised plaintiff that no enforceable contract between the parties would exist until the agreement had been reduced to writing and executed by the parties. Said officer was not authorized to impose such condition, and such condition was contrary to the oral agreement entered into on said May 16. A second draft was prepared by defendant incorporating changes requested by plaintiff in order to memorialize the oral contract entered into between the parties. The officer of defendant participating in said discussions (regarding the changes) had authority to make such changes and bind defendant thereto. It is not true that the oral contract is invalid or unenforceable under the provisions of section 1624, subd. 1, or 1624a(1) of the Civil Code or section 1973, subd. 1, or 1973a, subd. 1, of the Code of Civil Procedure (statute of frauds). Defendant is estopped to rely upon said sections or any of them.

The parties entered into a contract on May 16, 1950, with the mutual intention that such contract should thereupon become binding. At the time the parties entered into the oral contract on May 16, 1950, it was contemplated by them that a written memorial thereof would be prepared and executed by them.

Appellant contends, as above stated, that the evidence was insufficient to support the finding that the parties entered into a contract. It concedes that the basic terms of such a contract, namely the story, leading actor and money consideration, were agreed upon. It argues, however, that the alleged agreement of May 16 left various terms of the final contract open for future agreement; and the parties did not intend to be bound until a written contract was signed. Some of the terms which, appellant asserts, were left open were: the starting date; budget; director and principal cast; minor revisions of the script; assignment of television, radio, and stage-play rights to the novel; approval by Mrs. O'Hara of assignment of rights to RKO; which party had the responsibility of computing and pay (delivering) the 5 per cent of profits to Mrs. O'Hara; schedule of "submissions and approvals" of personnel. With reference to those terms, which allegedly were left open, appellant refers to the Gwenaud contract (the pattern of which allegedly was to be followed herein) and states in effect that provisions therein, regarding terms allegedly left open herein, manifestly were not applicable to the present case by reason of different dates, names, amounts, etc., and therefore that the parties in the present case must have contemplated further agreement as to those matters.

With reference to the parties not intending to be bound until a contract was signed, appellant argues that the words "we have a deal" were ambiguous and did not import a present agreement; that the unexpressed subjective intent of the parties was immaterial; and that the surrounding circumstances showed that the parties did not intend to be bound immediately. As to the words "we have a deal," appellant asserts

that they meant that the parties had agreed upon the basic points (story, star and money) and that the other points were details as to which, it was anticipated, the parties could agree without difficulty; but that a formal agreement would be prepared. It asserts further that the words were ambiguous in that it could not be determined therefrom whether the parties were not to be bound until the formal agreement was signed, or whether they were to be bound immediately and that the formal agreement to be prepared would be a memorial of their present agreement. As to the unexpressed subjective intent of the parties, appellant is referring to testimony of Skirball and Rogell to the effect that they "felt" or "understood" the parties were "bound" or "committed" when they said they had a deal and then shook hands; and appellant is also referring to the testimony of Rogell to the effect that the handshaking was "in a manner in which you shake hands when you have concluded a deal." As to surrounding circumstances which, according to appellant, showed that the parties did not intend to be bound immediately, appellant refers to: legends on letterheads of RKO (in prior dealings) to the effect that RKO was not to be bound before signing; statements in two prior negotiations that RKO would not be bound before signing; statute requiring a writing; large amount of money involved; provisions that the time for doing various acts was measured from date of executing or signing; provisions in the written agreement indicating a concern against being bound by agreements or approvals resting in parol; negotiations continuing after May 16; prompt delivery of draft of agreement (on May 20); statement of Skirball, in applying for permit to issue securities, that Gold Seal was about to enter into an agreement with RKO; Youngman's memorandum, directing preparation of contract, which used the word "negotiated" (in the expression "A new deal has been negotiated") which allegedly meant that RKO was about to enter into a contract; a letter to Mrs. O'Hara from RKO stating, "Providing our agreement with Gold Seal is executed," which letter

was approved in writing by Skirball; Hastings's letter advising Cohen that the agreement was not binding until signed. Appellant asserts further that the parties must have intended to secure the consent of Mrs. O'Hara to assignment of rights to RKO; and they intended to secure a permit to issue securities.

As above stated, the court found that on May 16 the parties entered into an oral contract, with the mutual intention that it should thereupon become binding, and at that time the parties contemplated that a memorial thereof would be prepared and executed; on May 24 a memorial, setting forth all the terms of the oral contract, was orally approved by the parties; the second draft of the agreement (May 24), incorporating changes in the first draft (May 20), was prepared in order to memorialize the oral contract entered into between the parties. The parties had entered into prior contracts, including the Gwenaud contract. Appellant concedes that on May 16 the parties agreed orally upon the basic points of the contract (story, star and money) and that the other points were details which the parties anticipated could be agreed upon without difficulty. The other points or "details" were to follow the pattern of the Gwenaud contract. (Youngman's letter to the resident attorney of RKO, directing him to draw the agreement herein, stated that "All of the other terms and provisions are the same as those in the last contract [Gwenaud contract].") The first draft of the contract (May 20) was prepared by an attorney for RKO, who had not obtained any information from a representative of Gold Seal. The legal department of RKO had mimeographed forms for such proposed written agreement, and such forms had been used in the prior contracts with Gold Seal. Those forms, which were used in preparing the contract herein, contained terms that were variable with respect to certain points, such as the starting date and budget. Some examples as to such variable terms are: the provision as to starting date, in the Gwenaud contract, is that the principal photography will commence between December 15, 1949, and

January 15, 1950; the provision therein as to budget is that RKO may not disapprove a proper budget which does not exceed \$1,200,000 "as such sum may be adjusted as herein provided." There was evidence that Cohen, the attorney for Gold Seal, and Hastings, assistant secretary of RKO who submitted the contract to Gold Seal, said on May 24 that the second draft of the contract was satisfactory.

During a few weeks preceding May 16, Skirball, president of Gold Seal, and Rogell, the top man on the RKO lot, negotiated regarding the production of the picture. During that time there were proposals and counterproposals pertaining to the amount to be paid by RKO, and who should be selected to play the leading role. About two days before May 16, O'Shea, who was president of Vanguard, told Rogell that, as to the matter of getting Peck, there was a deadline until May 16 at noon. Rogell gave that information to Hughes and Skirball. On May 15, Rogell advised Hughes as to an offer Skirball had made. Hughes told Rogell "You can close the deal with Skirball with Peck at \$125,000 plus 20" per cent of the profits. On the morning of May 16, at a conference of RKO executives in Rogell's office, Rogell telephoned Skirball and advised him as to Hughes' offer, and invited Skirball to come to the office. When Skirball arrived there, Rogell gave him a message from Hughes to the effect that Skirball had had a lush deal at RKO, he had a future there, he would make more with Peck than with Ryan, and Skirball's profit with Peck should be half a million. Rogell also repeated the need for quick action if they were interested in Peck. In response to a question by Skirball, Rogell said that the deal, except the \$125,000 and 20 per cent, was to be the same as the last contract (Gwenaud picture). Then they shook hands and each one said, "We have a deal." According to Rogell, they shook hands "in a manner in which you shake hands that you have concluded a deal." Then Rogell telephoned O'Shea and they made an oral agreement whereby Vanguard would lend Peck to RKO for \$250,000 for 12 weeks, starting June 8. Thereupon Rogell advised Hughes that he had closed the deal with Skirball for \$125,-

000 plus 20 per cent, and he had closed the deal on Peck for \$250,000. Hughes replied "O.K.," and told him to publicize the deal. Thereafter RKO placed paid advertisements in magazines of national circulation, wherein it was stated in substance that RKO would produce the picture, starring Peck.

It is to be noted that Rogell made notes, during or immediately after his conversations with Hughes, Skirball, and O'Shea; the notes pertained to the conversations, were used by Rogell while he was a witness, and were received in evidence. Some of his notes were as follows: "H. says close at 125 plus 20." "J. S. accepted 5/16." "5/16 called H. during meet'g—Noon deadline—from O'Shea on G. Peck. Told H. J. Skirball agreed to 140 plus 20%. H. said try for 125 plus 20. Called J S to meeting. He agreed on 'phone. Then came up in person. All OK." "Called O'Shea—closed on Peck at \$250 5 6/8—12 wks.—subseq. wks. at \$15,000—Dan will prepare & send his contract." "5/16/50 H. OK'd 125 plus 20 J. S. accepted." (In those notes the H. refers to Hughes; J. S. to Skirball; and Dan to O'Shea.)

[1-4] In *Mancuso v. Krackov*, 110 Cal. App.2d 113, 115, 241 P.2d 1052, 1053, it was said: "[I]t is not necessary that each term [of an oral contract] be spelled out in minute detail." In *Thompson v. Schurman*, 65 Cal.App.2d 432, at page 440, 150 P.2d 509, at page 513, it was said: "The rule is well established and uniformly followed that when the respective parties orally agree upon all the terms and conditions of a contract with the mutual intention that it shall thereupon become binding, the mere fact that a formal written agreement to the same effect is to be thereafter prepared and signed does not alter the binding validity of the original contract. * * * The question as to whether an oral agreement, including all the essential terms and conditions thereof, which according to the mutual understanding of the parties is to be subsequently reduced to writing, shall take effect forthwith as a completed contract *depends on the intention of the parties*, to be determined by the surrounding facts and circumstances of a particular case." *Columbia Pictures Corp. v. DeToth*, 87 Cal.App.2d 620, 197 P.2d 580, was an ac-

tion for declaratory relief—the plaintiff Columbia contending that it and defendant DeToth had entered into an oral contract whereby DeToth agreed to render services as a director. Prior to making the contract there involved, the parties had entered into a written contract regarding another matter. Columbia had a standard form of contract which it used for directors, and at the time the parties were discussing the contract involved in that case DeToth understood that they were discussing the standard form of contract. After DeToth and a representative of Columbia had had some discussion regarding the new contract involved therein, wherein the essentials of a contract were stated, a representative of Columbia asked DeToth if he agreed, and he replied "Yes." Then said person shook hands and one of them said "This is a deal." DeToth also said that he would sign a contract when he was "free of" another agent. The court said in 87 Cal.App.2d at page 629, 197 P.2d at page 585: "[W]hen the respective parties orally agree upon all of the terms and conditions of an agreement with the mutual intention that it shall thereupon become binding, the mere fact that a formal written agreement to the same effect is to be prepared and signed does not alter the binding validity of the oral agreement. * * * Whether it was the mutual intention of the parties that the oral agreement should be binding *eo instante* is to be determined by the surrounding facts and circumstances of a particular case and is a question of fact for the trial court." In the present case the findings with respect to the making of the oral contract are supported by the evidence.

[5] Appellant also contends that Rogell did not have authority to bind RKO. It states in its brief that Rogell was not one of the persons authorized by the directors of RKO to execute contracts, but the persons holding that authority were Youngman and Hastings. Rogell was the "top man" on the RKO lot. Skirball testified that Rogell "was the boss of the studio" and "seemed to have complete authority"; and that it was with Rogell alone that he made prior deals for two pictures. In the present case, it appears that Hughes gave Rogell authority to make

the offer to Skirball, and to close the deal with him. It also appears that Hughes approved the deal which Rogell had made. Hughes told Rogell to close with Skirball with Peck for \$125,000 plus 20 per cent. When Rogell told Hughes that he had closed the deals with Skirball and O'Shea, Hughes replied "O.K." There was sufficient proof that Rogell had authority to bind RKO.

[6-9] Appellant contends that the action was barred by the statute of frauds. It argues that the alleged contract could not be performed within a year. Section 1624 of the Civil Code (Statute of Frauds) provides: "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent: 1. An agreement that by its terms is not to be performed within a year from the making thereof; 2. * * *." Respondent argues that said section does not apply to the contract herein. It argues that the contract could have been performed within a year; that the transaction was a joint venture which was partly performed (by paid advertisements and acquiring the services of Peck), and therefore the statute of frauds was not applicable. Irrespective of whether the contract herein is a kind of contract referred to in the statute of frauds, it appears that there was a sufficient memorandum of the contract within the provisions of the statute. The memorandum above referred to, written by Youngman on May 16 directing the resident attorney to prepare a written contract, was a sufficient memorandum. Youngman was vice-president in charge of commitments and of the legal department, and was authorized by the directors to execute contracts on behalf of RKO. The memorandum (except the date and heading) was as follows:

"A new deal has been negotiated with a corporation of Jack Skirball, Gold Seal Productions, for the production of a motion picture based upon the John O'Hara novel Appointment in Samarra.

"A screenplay has been submitted to the studio and approved. Gregory Peck is to portray the leading male role.

"Gold Seal Productions is to receive the sum of \$125,000.00 plus 20% of the profits. The sum of \$125,000.00 covers the basic story, screenplay, and individual producer's services. It is payable as follows: * * * [Here is statement of instalments.]

"All of the other terms and provisions are the same as those in the last contract * * * [Gwenaud contract].

"Mr. Skirball is very anxious to have the contract executed by the end of this week if possible. For this reason, will you please expedite the drawing of the agreement.

"Gordon E. Youngman

"CC — Messrs. Rogell, Lockhart,
Hastings, Harbin, Bender."

As above stated, Youngman initialed the memorandum and adopted his typewritten name thereon as his signature. A typewritten name may be adopted as a signature. Kadota Fig Ass'n of Producers v. Case-Swayne Co., 73 Cal.App.2d 815, 819, 167 P.2d 523; see Marks v. Walter G. McCarty Corp., 33 Cal.2d 814, 820, 205 P.2d 1025. It thus appears that the memorandum contained the basic terms of the contract (names of parties, name of picture, screenplay had been approved, name of leading actor, amounts to be paid, all other terms same as a prior contract [Gwenaud]). The Gwenaud contract, referred to therein, contained 84 mimeographed pages; and it may be stated generally that it contained the usual provisions regarding the details of an agreement for the production and distribution of a motion picture. It appears that the memorandum, which included the basic terms of the contract and stated that the other terms were the same as the Gwenaud contract, was in practical effect a complete statement of the terms of the contract. It should be noted that the attorney for RKO prepared the first draft or memorial without securing any information from a representative of Gold Seal. "It is well established that a note or memorandum under the statute of frauds need not contain all of the details of an agreement between the parties." Gibson v. De La Salle Institute, 66 Cal.App. 2d 609, 627, 152 P.2d 774, 784. Furthermore,

in the present case the court found, upon sufficient evidence, that defendant was estopped to rely upon the statute of frauds.

[10] Appellant asserts that the court erred in permitting Skirball to answer a question as to whether it was his intention to enter into a binding contract at the time he and Rogell shook hands and said they had a deal. He answered that he felt that they definitely had a deal. Under the circumstances here, the ruling was not error. On the morning of May 16 the parties were confronted with a "noon deadline," set by O'Shea, with respect to getting Peck. As stated by Rogell, he repeated to Skirball, on that morning, "the need for quick action." It was important, of course, that Rogell know whether RKO and Gold Seal were in agreement regarding the picture before he closed with O'Shea for Peck to be an actor in the picture. The significance of shaking hands, under such circumstances and following the conversation hereinbefore mentioned, and at the same time saying "We have a deal," was material. The intention of the persons who shook hands and used those words, under such circumstances, was material. The testimony of both persons, with respect to intention, was to the same effect—that they intended to close the deal.

[11] Appellant asserts further that the court erred in excluding evidence as to the time required by RKO for proper distribution of a picture such as the one contemplated here. It argues that the evidence would have established that the picture could not have been distributed within a year; and that therefore the alleged contract would come within the statute of frauds. Even if it be assumed that the ruling was error, it was not prejudicial since there was a sufficient memorandum to satisfy the statute of frauds.

[12] Appellant asserts further that the court erred in rejecting evidence as to the parties' understanding of the word "negotiated," as used in a memorandum of Youngman in a prior transaction between the parties. The memorandum in the prior transaction stated: "Mr. Rogell has negotiated a new deal * * *." It does not appear that the circumstances in the prior transaction,

with reference to the use of the word "negotiated," were similar to the circumstances here. The ruling was not error.

[13] Appellant asserts further that the court erred in not permitting defendant to inquire as to oral contracts Rogell claimed to have made on its behalf. Even if it be assumed that the ruling was error, it was not prejudicial in view of evidence herein that Hughes gave Rogell instructions as to this transaction and also approved the acts of Rogell.

Appellant also contends that the award of damages was improper. It argues that the evidence does not support the following findings: (1) that the picture rights and screenplay had a reasonable market value of \$250,000 at the time the oral contract was made; (2) that the picture rights and screenplay were rendered valueless by acts of the defendant; and (3) that such damages (resulting from destruction of value of the rights and screenplay) were within the contemplation of the parties. Appellant also argues that the court applied an erroneous measure of damages, in that, it allowed \$250,000 as damages for the loss of the total value of the rights and screenplay and it also allowed \$125,000 as the purchase price of the rights and screenplay, thereby allowing double damages; also that \$25,000, which was to be the salary of Skirball, should not have been allowed.

[14] With reference to the finding that the reasonable market value of the picture rights and screenplay was \$250,000, there was evidence that the book "Appointment in Samarra" was a best seller and was written by one of the great American novelists. Also Mr. Work, who had been in the motion picture business 37 years and had been in charge of production at Universal Pictures for 8 years and had approved every story that was used there during that time, testified that the reasonable value of the picture rights and screenplay was \$300,000 plus a participation of 5 or 10 per cent of the gross profits or a larger percentage of the net profits. Also Skirball, who had been a motion picture producer for 15 years and had produced over 250 pictures, testified that the rights were worth \$250,000, and that

the script was worth \$150,000, making a total value of \$400,000. Also, the value of the rights and script was indicated by the testimony of Mr. Rogell to the effect that Mr. Hughes said that Skirball's 20 per cent of the net profits should be half a million. The evidence was sufficient to support said finding as to reasonable value.

[15] With reference to the finding that the picture rights and screenplay were rendered valueless by acts of the defendant, the defendant, which was one of the major picture companies, advertised extensively that it would produce the picture, and thereafter did not produce it. Mr. Work, who as above stated had extensive experience in the production of motion pictures, testified that no company wants to take another company's rejects; that no important artist or director, as a general rule, wants to become identified with a questionable production; that after defendant had so advertised the picture, and had cancelled the production of it, the rights and screenplay would have very little value and it would be very difficult to negotiate an outright sale—there might be a deal on a deferred payment basis, but he thought that the property (rights and script) "had lost all of its value." Skirball testified that he and a motion picture agent made efforts to resell the rights and script but they were unable to get any offers; that in his opinion said advertising of the picture and the subsequent refusal of defendant to produce the picture made the picture rights and script worthless. The trial judge stated, in his oral opinion at the close of the trial, that Skirball and his agent "took the proper steps in their attempt to sell what they had." The evidence was sufficient to support the finding that the rights and screenplay were rendered valueless by acts of the defendant.

[16] With reference to the finding that such damages were within the contemplation of the parties, there was the testimony, above mentioned, of two experts in producing motion pictures to the effect that as a result of such advertising and the refusal to produce the picture the rights and script were of no value. The trial court could have inferred from the evidence herein that defendant knew or should have known, by

reason of its major position in the motion picture industry, that such result might follow its refusal to produce the picture. Also, defendant knew that Gold Seal, in order to retain the picture rights, was required to pay to Mrs. O'Hara \$10,000 each year until the principal photography was commenced. The court also found, upon sufficient evidence, that defendant wilfully and intentionally breached the contract. The finding that such damages, regarding the loss of the rights and script, were within the contemplation of the parties is supported by the evidence.

With reference to the alleged erroneous measure of damages, appellant argues: (1) That the \$125,000 item of damage, which was the agreed payment to be made by RKO, should have been reduced by \$25,000, the amount which was to be paid to Skirball for his services as producer of the picture, which services he did not perform. (The memorial of May 24 [second draft of the contract] provided that \$25,000 of the \$125,000 was for services of Skirball as producer.) (2) That even if it be assumed that the \$250,000, which the court allowed for the loss of the total value of the rights and script, could be recovered, it was error to allow both the purchase price of \$125,000 and the full value of the rights and script. (3) That plaintiff sold an 80 per cent interest in the rights and script to RKO and retained a 20 per cent interest therein, and since plaintiff elected to recover the purchase price, plaintiff was not entitled to recover for any loss in the value of the 80 per cent which it had sold and no longer owned; and accordingly plaintiff's recovery, at the maximum, could be no more than \$100,000 (the remainder of the \$125,000 after deducting Skirball's salary of \$25,000) plus 20 per cent of the alleged loss in value (that is, 20 per cent of the \$250,000 total value, as found by the court, or \$50,000); making a recovery of \$150,000. Appellant also argues that even if the \$125,000 were only partial consideration for the rights and script, there is still a duplication of award of damages since the \$250,000 is the award of damages for the total value of the rights and script, and to allow any part of the purchase price in addition to the total value is allowing a

double recovery to the extent that a part of the purchase price is allowed as damages.

Respondent argues that the \$125,000 was not the purchase price of the rights and script or the full consideration which defendant was to pay to Gold Seal; that as additional compensation defendant agreed to pay to Gold Seal 20 per cent of the profits; that as further consideration defendant was to make available to Gold Seal its (defendant's) technical experts, equipment, financial means to the extent of \$1,250,000, and to be the distributor of the picture. Respondent also argues that as a result of defendant's wilful breach of the contract defendant suffered two separate losses, as follows: (1) loss of the production-distribution agreement; and (2) loss of the rights and script. Respondent refers to the fact that Skirball refused a larger flat or lump sum in lieu of a percentage of the profits, and then asserts that since the contract payment of \$125,000 was not the full consideration to Gold Seal, and since Gold Seal suffered extensive additional damage in the loss of the rights and script, the damages awarded should include not only the contract payment but the value of the rights and script which were destroyed. Respondent also asserts that awarding the contract price of \$125,000, in addition to awarding \$250,000 for loss of total value of the rights and script, was proper because such loss of value was in effect expense incurred in preparation for performance of the contract. (In connection with such assertion, respondent refers to *Walpole v. Prefab Mfg. Co.*, 103 Cal.App.2d 472, at page 482, 230 P.2d 36, at page 41, wherein it is said: "Expenses incurred in anticipation of, or preparation for, performance, ordinarily are a recoverable element of damage for breach of contract.")

[17-19] The court found, as above stated, that the memorial of May 24 (second draft of the contract), a copy of which is attached as an exhibit to the complaint, sets forth all the terms of the oral contract of May 16. The memorial states, with reference to the \$125,000, as follows: "* * * Distributor will pay the Producer the sum of * * * (\$125,000.00) as consideration for the story, the screenplay referred

to in Article 6 of this Section I, any additional writing in connection with the completion and revision of said screenplay by the Producer, the compensation of the Individual Producer, and as partial consideration for the execution of this agreement." That provision, standing alone, bears the interpretation that the \$125,000 was to be full payment for the rights and the script, and also the full payment for any rewriting of the script, and for salary of producer (Skirball); and that it was also part payment for executing the agreement. In other words, with respect to the rights and the script, that provision could be interpreted as meaning that the purchase price of the rights and script was included in the \$125,000. It is to be noted, however, that the \$125,000 is also in part payment for executing the agreement. At another place in the agreement it is stated that RKO will also pay Gold Seal 20 per cent of the profits. In determining the consideration for the contract reference may be made to the oral evidence. The negotiations between the parties related principally to the amount to be paid for the rights and script, and there was evidence that Skirball would not accept an offer of a lump sum but he did accept an offer of \$125,000 plus 20 per cent of the net profits. Although the said provision of the agreement, above quoted, recites in part that RKO will pay \$125,000 "as consideration" for the rights and script (and other things), when all the provisions of the memorial are considered in connection with the prior negotiations it appears that the 20 per cent of the net profits was a part of the consideration for the rights and script. In any event, under either of the interpretations as to consideration, a part of the consideration for the rights and script was included in the \$125,000. It therefore appears that since \$250,000 was awarded as damages for the reasonable market value of the rights and script, and since \$125,000, the amount to be paid under the contract, was awarded as additional damages, there was an award of double damages with respect to the rights and script to the extent that a part of the consideration for the rights and script was included in the \$125,000. Under the evi-

dence herein it cannot be determined what portion of the \$125,000 was consideration for the rights and script. As above shown, the memorial provided that \$25,000 of the \$125,000 was compensation for Skirball. It is true that he did not render the services which it was contemplated he would render. It appears, however, from the memorial that Gold Seal had entered into an agreement with Skirball whereby he agreed to render his services as producer of the picture. In view of such obligation to Skirball, a proper element of Gold Seal's damage was the \$25,000 which, under defendant's contract with Gold Seal, was to be Skirball's compensation.

Appellant and respondent rely upon *Overstreet v. Merritt*, 186 Cal. 494, 200 P. 11, in which the plaintiff sought damages for breach of an oral contract for (1) loss of his business, and (2) for loss of prospective profits. The agreement was that if plaintiff would dispose of his business in Illinois and engage in a cattle raising business with defendant in California, defendant would provide land and money for the new business and they would share the profits. Defendant represented that there would be large profits. Plaintiff abandoned his business and rendered services in connection with the proposed new business for 22 months, but defendant failed to establish the new business and to perform the contract. During that time defendant paid a salary of \$500 a month to plaintiff and advanced \$5,387.46 to him, making a total of \$16,387.46. It was held therein that no damages for loss of profits should be allowed because such prospective profits were too speculative. The court said therein 186 Cal. at page 505, 200 P. at page 16, that the trial court adopted the proper measure of damages "in the absence of any means of determining the value of prospective profits of the contemplated business; this was the loss sustained by the plaintiff in preparing to carry out his part of the contract, less the advances of money shown to have been made to him by the defendant." The court found that plaintiff had been damaged in the sum of \$50,000 over and above the amounts received by plaintiff. Appellant RKO herein cites that case in support of

its argument that respondent may not recover both the amount to be paid under the contract and the total value of the rights and script. Respondent Gold Seal refers to a statement by the court therein, 186 Cal. at page 502, 200 P. at page 15, that: "The defendant in any event should be estopped from disputing that the profits of the new business would have at least recouped the loss of the old." Respondent herein also says that the case does not hold that plaintiff could not have recovered a contract payment in addition to damages for the loss of plaintiff's business if such a payment had been provided for in the agreement. In the present case the court applied the rule, stated in the *Overstreet* case, that speculative profits cannot be allowed. Also, in the present case the court allowed damages for loss of the total value of the rights and script; in the cited case the court allowed damages for total loss of business. It is to be noted that there was no award of double damages in the cited case.

[20] With reference to appellant's claim that it acquired an 80 per cent interest in the rights and script and that respondent had only a 20 per cent interest therein (and consequently respondent should not have an award for the entire value of the rights and script [\$250,000] but only 20 per cent thereof [\$50,000]), it is to be noted that, according to the memorial, appellant was not to have an interest in the rights and script until principal photography was commenced. Since there was no photography, appellant had no interest in the rights or script.

Plaintiff is entitled to recover the reasonable market value of the rights and script, as found by the court, in the amount of \$250,000; and to recover the \$25,000 which was provided as compensation for Skirball, with interest on the \$25,000 from September 1, 1950, to date of judgment in the amount of \$4,497.31 (this amount being $\frac{1}{5}$ of the interest of \$22,486.55 stated in the judgment to be the interest on \$125,000). The award of \$125,000 should be reduced to \$25,000. The judgment should be modified accordingly.

The judgment is modified by reducing the award of \$375,000 therein stated to

\$275,000, and by reducing the amount of interest therein stated (\$22,486.55) to \$4,497.31, and by reducing the total amount of the judgment therein stated (\$397,486.55) to \$279,497.31. The judgment, as so modified, is affirmed. Each party to pay its costs on appeal.

SHINN, P. J., and VALLÉE, J., concur.



135 Cal.App.2d 161

Sandra BRADBURN, by and through her guardian ad litem Deillard Clay Bradburn, and Deillard Clay Bradburn, Individually, Plaintiffs and Appellants,

v.

Jess C. PEACOCK, First Doe, Second Doe, Third Doe and Fourth Doe, Defendants and Respondents.

Civ. 16331.

District Court of Appeal, First District,
Division 2, California.

Aug. 22, 1955.

Rehearing Denied Sept. 21, 1955.

Hearing Denied Oct. 19, 1955.

Personal injury action. The Superior Court of Santa Clara County, Byrl R. Salsman, J., rendered judgment for defendant and plaintiffs appealed. The District Court of Appeal, Dooling, J., held that ruling by trial judge without holding a preliminary examination that five year old boy was incompetent to testify that he saw truck run over his sister and that he knew the man in the truck in personal injury action brought by his sister who was allegedly struck by truck, was an abuse of discretion to test his competency even though the boy was only three years and three months old at time of casualty.

Reversed.

1. Witnesses ⇨40(1)

In order to be a competent witness a child under ten years of age must be capable

of receiving just impressions of the facts and relating them truly and competency is to be determined, not by age, but by the degree of understanding and knowledge. West's Ann.Code Civ.Proc. § 1880, subd. 2.

2. Witnesses ⇨40(1)

There is no arbitrary age limit under which the testimony of a child is automatically rejected and a child's extreme youthfulness is not, per se, sufficient to exclude him from the witness stand.

3. Appeal and Error ⇨1056(1), 1057(1)

Witnesses ⇨79(2)

Ruling by trial judge that five year old boy was incompetent to testify, without holding a preliminary examination, that he saw truck run over his sister and that he knew the man in truck in personal injury action brought by his sister who was allegedly struck by truck, was an abuse of discretion, even though boy was only three years and three months old at time of casualty, and error in excluding such evidence was prejudicial where jury question was raised as to actionable negligence of truck driver and excluded evidence was not merely cumulative.

4. Witnesses ⇨40(1)

Requirement that child, to be competent to testify, be capable of receiving just impressions of the facts concerns his capacity at the time the facts occurred and requirement that he be capable of relating them truly concerns his capacity at the time of trial. West's Ann.Code Civ.Proc. § 1880, subd. 2.

5. Witnesses ⇨40(1)

Competency of child to testify relates to time when he is produced as a witness and so a child may be competent to testify to occurrences which he remembers, although they happened at a time when he was too immature to testify.

Johnson, Thorne, Speed & Bamford, San Jose, for appellants.

Campbell, Custer, Warburton & Britton, Frank L. Custer, San Jose, W. R. Dunn, Burlingame, for respondent.

DOOLING, Justice.

Plaintiffs appeal from a judgment for defendant following a jury's verdict. The action was grounded on the claimed negligent injury of the minor, Sandra Bradburn. The appeal is presented on an agreed statement. From this it appears that defendant had been engaged in doing the grading and lawn work around the Bradburns' house located in a new housing tract. On the day in question he had parked his truck across the street. Mrs. Bradburn testified that she had gone into her garage to do some washing and that shortly before 5 p.m. her son Danny came running toward the garage calling: "Truck, Mommie, truck." As Mrs. Bradburn went toward the street she saw the defendant in his truck driving south. The child was lying in the street seriously injured. The injured child was at that date about 4 years and 4 months of age.

Defendant testified that he started to go home about 3:45 p.m. He talked to Mrs. Bradburn "for a minute" and then walked to his truck. He found two of the three Bradburn children near the truck and took them by the hand and led them across the street to their home. He then went back to his truck, got in it and drove away. He admitted making a written statement in which he said: "I didn't see the other little girl, nor did I look for her. I got in my truck and drove off * * *." Defendant produced several witnesses whose testimony was designed to prove that he had arrived at his home before the time when the little girl was injured.

The only error urged is that the trial judge abused his discretion in ruling that the little boy, Danny Bradburn, was incompetent to testify without holding a *voir dire* examination to test his competency. Danny's age was 3 years and 3 months at the time of his sister's injury and slightly over 5 years at the time of trial. Counsel for plaintiffs offered to prove by him that he saw the defendant's truck run over his sister Sandra and that he knew defendant and his truck because defendant had previously been working about their home. In making his ruling the judge stated: "The youngster was three years and three months of age at the time he observed the facts. No doubt

he has talked with his mother and father for the last year and a half or two years concerning the facts of this accident, and I think it would be extremely dangerous to receive his testimony * * *."

[1,2] We have no doubt that it was error for the court to rule that this child was not competent to testify without examining him on *voir dire* to determine whether in fact he was competent. In order to be a competent witness a child under 10 years of age must be capable of receiving just impressions of the facts and relating them truly. Code Civ.Proc. Sec. 1880(2). "Their competency is to be determined, not by their age, but by the degree of their understanding and knowledge." *People v. Bernal*, 10 Cal. 66; *People v. Swist*, 136 Cal. 520, 522, 69 P. 223. It follows that the "child's extreme youthfulness was not, *per se*, sufficient to exclude him from the witness stand. There is no arbitrary age limit under which the testimony of a child is automatically rejected." *People v. Delaney*, 52 Cal.App. 765, 768, 199 P. 896, 898.

[3-5] We may concede that a child of such extreme youth might be produced as a witness that the trial judge could say as a matter of common knowledge that no child so young could be competent, but in view of the many cases in this state which have upheld the trial judge's discretion in allowing 5 year old children to testify we must hold that in arbitrarily refusing to permit this 5 year old to testify without a *voir dire* examination the trial judge abused his discretion. (In all of the following cases 5 year olds after *voir dire* examination were held competent witnesses: *People v. Trippell*, 7 Cal.2d 612, 61 P.2d 929; *People v. Allen*, 131 Cal.App.2d 72, 279 P.2d 996; *People v. Root*, 112 Cal.App.2d 122, 245 P.2d 679; *People v. Norred*, 110 Cal.App.2d 492, 243 P.2d 126; *People v. Goff*, 100 Cal.App. 2d 166, 223 P.2d 27; *People v. Terry*, 99 Cal.App.2d 579, 222 P.2d 95; *People v. Manuel*, 94 Cal.App.2d 20, 209 P.2d 981; *People v. Gibbons*, 83 Cal.App.2d 504, 189 P.2d 37; *People v. Ash*, 70 Cal.App.2d 583, 161 P.2d 415; *People v. Walker*, 112 Cal. App. 146, 296 P. 692; *People v. Jori*, 99 Cal.App. 280, 278 P. 250.)

Some point is made of the fact that the child was only 3 years and 3 months of age at the time of the casualty. The courts have pointed out that of the two requirements of Code Civil Procedure, Section 1880(2) the requirement that the child be capable of "receiving just impressions of the facts" concerns his capacity at the time the facts occurred and the requirement that he be capable of "relating them truly" concerns his capacity at the time of trial. *People v. Lamb*, 121 Cal.App.2d 838, 844, 264 P.2d 126; *People v. Watrous*, 7 Cal.App.2d 7, 10, 45 P.2d 380; *People v. Delaney*, supra, 52 Cal.App. 765, 777, 199 P. 896. We cannot say that *no* child of 3 years and 3 months is capable of receiving just impressions of the facts that a man whom he knows in a truck which he knows ran over his little sister. Nor can we say that *no* child of 3 years and 3 months would remember such facts and be able to relate them truly at the age of 5.

Courts of other jurisdictions have recognized that the competency of the child to testify relates to the time when he is produced as a witness and so a "child may be competent to testify to occurrences which she remembers, although they happened at a time when she was too immature to testify * * *." 70 C.J. 93-94; *Maynard v. Keough*, 145 Minn. 26, 175 N.W. 891; *Kelly v. State*, 75 Ala. 21; *Cross v. Commonwealth*, 195 Va. 62, 77 S.E.2d 447, 448; *Davenport v. Commonwealth*, 285 Ky. 628, 148 S.W.2d 1054, 1063; *Burnam v. Chicago Great Western R. Co.*, 340 Mo. 25, 100 S.W.2d 858, 863; *Whitehead v. Stith*, 279 Ky. 556, 131 S.W.2d 455; *State v. Belknap*, Mo., 221 S.W. 39, 45.

Respondent further argues that the error in excluding this witness was not prejudicial because no actionable negligence was proved. The case was circumstantial but the defendant's own admission would support a finding of negligence. Knowing that three very young children were playing in the area and having led two of them away from the vicinity of his truck, he got into his truck and drove away without seeing the little girl and without looking for her. This certainly left a jury question as to whether such conduct amounted to negligence.

The argument that the excluded evidence was only cumulative because the mother had testified that she saw the defendant driving away in his truck is not persuasive. The mother's testimony at best was only circumstantial evidence that the truck ran over the child while the proffered evidence was direct to that effect. Furthermore defendant produced four witnesses, besides himself, to testify that he was at home before the time when the child was injured. This stood against Mrs. Bradburn's uncorroborated testimony that he was at the scene of the injury when it occurred. Under these circumstances the direct testimony of the child might well prove the deciding factor in resolving this conflict.

Judgment reversed.

NOURSE, P. J., and KAUFMAN, J.,
concur.



135 Cal.App.2d 176

William ODENTHAL, Plaintiff and
Respondent,
v.

Harry W. LEE et al., Defendants and
Appellants.
Civ. 20914.

District Court of Appeal, Second District,
Division 1, California.
Aug. 22, 1955.

Hearing Denied Oct. 19, 1955.

Action by purchaser at sheriff's sale to quiet title to realty. The Superior Court of Los Angeles County, C. C. McDonald, J., rendered judgment for purchaser. Former owners appealed. The District Court of Appeal, Doran, J., held that where former owners had refused to recognize and abide by previous judgments in favor of purchaser which decided that realty was liable to payment of husband's debts although in name of wife and that purchaser had title under sheriff's deed, purchaser's

action against them was merely an attempt to enforce and protect property rights previously adjudicated and doctrine of res judicata was not available to former owners.

Affirmed.

1. Judgment ⇐668(1)

Doctrine of res judicata bars any relitigation of the issues involved in former actions between same parties.

2. Judgment ⇐609

Where purchaser of realty at sheriff's sale brought action against former owners to quiet title and former owners had refused to recognize and abide by previous judgments in favor of purchaser which decided that realty was liable for the payment of husband's debts although in name of wife and that purchaser had title under sheriff's deed, purchaser's action against them was merely an attempt to enforce and protect property rights previously adjudicated and doctrine of res judicata was not available to former owners.

3. Execution ⇐312

Where sheriff's deed to purchaser at sale specifically referred to correct tract conveyed and map of tract appeared in pages included in description, description in sheriff's deed was not uncertain, although there was a map of another tract in the description.

Ralph R. Sleeper, Los Angeles, for appellants.

Roy B. Woolsey, Los Angeles, for respondent.

DORAN, Justice.

This is the third action involving the same general subject matter. The first was an action instituted by the plaintiff Odenthal against Harry W. Lee, in Superior Court, No. 568,622, in which, on December 17, 1951, Odenthal had judgment against Lee in the amount of \$4,152.42. Nora Lee, wife of Harry W. Lee, was not a party to this action.

Thereafter, according to respondent's brief, "On February 4, 1952, the first writ of execution was returned partially satisfied after a bid by plaintiff of \$1,000.00 on an undivided one-half interest in property owned by Harry W. Lee. The net satisfaction was \$943.75. On April 28, 1952, after the examination of Harry W. Lee on supplementary proceedings, the property with which this litigation is concerned was sold (to plaintiff Odenthal, the only bidder, for \$750.00) and on June 9, 1953, the second writ was returned. On January 23, 1953, and on February 20, 1953, writs were returned wholly unsatisfied. On April 20, 1953, a writ was returned partially satisfied; on October 20, 1953, a writ was returned wholly unsatisfied, and, finally on November 17, 1953, an acknowledgment of satisfaction was filed. While Harry W. Lee redeemed the parcel of property first sold, no attempt was made to redeem the second parcel the one in dispute, until after the redemption period expired."

After sale by the sheriff of "Lot 15, Tract No. 6084, as per map recorded in Book 101, Pages 52 to 57", the property involved herein, and on October 30, 1952, Nora Lee filed an action to quiet title to said property, and for damages for slander of title, Superior Court No. 605,689, claiming ownership and alleging that Harry W. Lee "at no time whatsoever held any right, title, interest or estate in and to said real property and appurtenances, or any part thereof". Harry W. Lee was not a party to this action. At the trial of this cause, judgment was again in favor of Odenthal, and the trial court found that although standing in the name of Nora Lee, "said property was purchased by the plaintiff and her husband with community funds * * * and liable to the payment of the debts of said Harry W. Lee". On November 13, 1953, Harry W. Lee filed a motion in the first action, No. 568,622, to set aside the sale and for redemption, which motion was denied, time for redemption having already expired.

The present action is brought by Odenthal against both Mr. and Mrs. Lee, to quiet title to the property and for declara-

tory relief, and pleads the two former actions and the judgments and findings therein. The complaint likewise seeks restitution of the property, and damages for the wrongful withholding thereof. The appeal is from the judgment therein in favor of Odenthal.

It is appellants' contention that "The respondent Odenthal is barred from procuring any quiet title decree or other judgment herein against Nora Lee because a judgment in a former case (No. 605,689) between these parties renders the matter *res adjudicata*". The judgment in that case, instituted by Nora Lee against William Odenthal, adjudged and decreed "That defendant William Odenthal has obtained and now holds whatever title was acquired by him under execution and subsequent Sheriff's deed obtained by him in Action No. 568622 * * * entitled William Odenthal, Plaintiff, v. Harry W. Lee * * * et al., Defendants, in and to * * * Lot 15 of Tract 6084, as shown on map recorded in Book 10, pp. 52-57 of maps in the Office of the County Recorder of the County of Los Angeles, State of California. It is further Ordered, Adjudged and Decreed that plaintiff take nothing by her complaint".

[1] In reference to this claim of *res adjudicata* on the part of appellants, some inconsistency is apparent, since in a so-called "Memorandum Brief" filed, appellants seek to prevent the respondent from enjoying the benefits of this same doctrine. Moreover, it appears from the answer filed in the present action that the appellants are desirous of re-litigating the issues of the two previous actions. Separate ownership of the property in Nora Lee is asserted; the sheriff's sale and deed are alleged to be void, and the right of redemption is again claimed. Either the doctrine of *res adjudicata* applies or it does not apply, and if it does apply, then it similarly affects all parties and bars any re-litigation of the issues involved.

[2] The doctrine of *res adjudicata* and the underlying principles thereof are well

settled. In the present case, however, this doctrine can be of no avail to the appellants. The complaint herein seeks to quiet title to the real estate in question, to eject the appellants therefrom, and to obtain declaratory relief which will set the entire matter at rest once and for all. This procedure has been rendered necessary by reason of appellants' continued refusal to recognize and abide by the previous judgments, all of which were in favor of Odenthal. Re-litigation of the issues in these prior actions is neither sought nor desired; the respondent is, in effect, merely seeking to enforce and protect property rights previously adjudicated. That the doctrine of *res adjudicata* was never intended to apply in such a situation requires no citation of authority, and appellants have cited no decision either holding or intimating that such an interpretation of the rule should be adopted.

[3] Appellants' contention that the description in the sheriff's deed was uncertain, and that the deed was void, is untenable. As stated in respondent's brief, "The deed specifically refers to the correct tract, 6084 (Ex. 3). A map of the tract does appear in the pages included in the description, to-wit: pages 53 to 57 (Ex. 13 by ref.). It is true that on page 52 there is a map of Tract 8156. However, obviously, the lot sold as Lot 15, Tract 6084, cannot under any guise of the imagination be considered to be a lot in said Tract 8156. The complaints and the judgment in this action and in Action 605689 all refer to the property described in the sheriff's deed, that is, to Lot 15 of said Tract 6084".

There is likewise no substantial merit in the other contentions made by appellants. The trial court in the instant action, having all the interested parties before it, accorded the appellants a full and fair trial of all pertinent issues; the record discloses substantial evidence in support of the findings and judgment, and no reversible error has been pointed out.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

135 Cal.App.2d 157

Cite as 286 P.2d 977

E. A. TALIAFERRO, Plaintiff and
Appellant,
v.

Julia PRETTNER et al., Defendants,

Wm. T. Marcollo and Louis Cannelora, nam-
ed and sued as Marcollo, Cannelora & Mar-
collo, Defendants and Respondents.

No. 16397.

District Court of Appeal, First District,
Division 1, California.

Aug. 22, 1955.

Rehearing Denied Sept. 21, 1955.

Hearing Denied Oct. 19, 1955.

Action for damages arising out of al-
leged fraudulent misrepresentations. The
Superior Court, Contra Costa County, Hugh
H. Donovan, J., rendered judgment of dis-
missal. Plaintiff appealed. The District
Court of Appeal, Bray, J., held that where
allegations of amended complaint were
identical as to first count and in other re-
spects made no effort to meet objections
sustained in the first complaint, there was
no abuse of trial court's discretion in strik-
ing amended complaint from files.

Judgment affirmed.

1. Pleading ⚡356(2)

Where allegations of amended com-
plaint were identical as to first count and
in other respects made no effort to meet
objections sustained in the first complaint,
there was no abuse of trial court's discre-
tion in striking amended complaint from
files.

2. Pleading ⚡225(1)

Plaintiff has no right to file amended
complaint which merely repeats allegations
of original complaint to which demurrer
has been sustained, and if court errs in
sustaining demurrer plaintiff's remedy is to
permit judgment to be entered and then ap-
peal.

3. Pleading ⚡229, 251

Courts are liberal in allowing amended
pleadings; nevertheless, they are not re-
quired to grant further permission to amend

when amended complaint is a sham even
though plaintiff is a layman and appears "in
propria persona".

4. Courts ⚡26

Pleading ⚡251

Courts have inherent power, by sum-
mary means, to prevent frustration, abuse,
or disregard of their processes and are not
required to tolerate a purported amended
complaint which fails to amend the previous
pleading.

E. A. Taliaferro, San Pablo, in pro. per.

Marcollo & Cannelora, Richmond, for
respondents.

BRAY, Justice.

Plaintiff appeals from a judgment dis-
missing the case as to defendants Wm. T.
Marcollo and Louis Cannelora, entered on
an order striking the amended complaint
from the files.

Question Presented.

Did the court abuse its discretion in
striking from the files an amended com-
plaint which made no appreciable effort to
meet the objections which the court had
sustained to the original complaint?

Record.

Plaintiff filed a complaint. Defendants
Marcollo and Cannelora demurred.¹ Their
demurrer was sustained with leave to
amend. Thereafter plaintiff filed an
amended complaint. Said defendants moved
for an order striking it from the files and
dismissing the action as to them. The court
granted the motion. Thereupon judgment
dismissing the cause as to said defend-
ants was entered.

Amended Complaint—First Count.

It alleges that prior to July 26, 1950,
plaintiff purchased from Thomas Atalic cer-
tain described real property; that during
1945 said Atalic informed plaintiff that de-
linquent taxes thereon were unpaid, the
amount of which was unknown to plaintiff,
and that the title would have to be quieted
and that he proposed to have defendant

4. Although Julia Prettnner is charged in
both complaints as a defendant and ficti-
tious named defendants are included, ap-

parently the only defendants appearing in
the case are Marcollo and Cannelora.

Cannelora, who is an attorney at law, quiet the title; that the cost of quieting title and paying the delinquent taxes would be approximately \$1,700, which sum Atalic proposed to advance "for the account of said plaintiff," and which plaintiff could repay at his convenience. Said sum of \$1,700 was charged by Atalic against plaintiff on Atalic's books. Atalic made no demand upon plaintiff for payment of said sum. He died a short time prior to July 26, 1950. About that date Carl Atalic and Martin Atalic told plaintiff they were the executors of Thomas Atalic's estate and had discovered among his accounts sums of money owing from plaintiff; that taxes upon the properties occupied by plaintiff at the Davis Auto Exchange in the city of San Pablo (it is not clear as to whether this is the same property above mentioned) had accumulated and that it would be necessary for plaintiff to execute to the Atalic estate a note and a deed of trust in order to clear the title and all charges against the property purchased from Thomas and occupied by plaintiff at the Davis Auto Exchange and to enable them to properly probate Thomas' estate.

On July 26, 1950, plaintiff signed a note (whether to Thomas' estate or to Carl and Martin does not appear) in the amount of \$3,025.56 relying upon said statements of Carl and Martin and in full belief that they would pay all charges of quieting title to the described lots and the taxes current or delinquent. He gave as security therefor a deed of trust on the Davis Auto Exchange property. Julia Prettner, an heir of Thomas, succeeded to the title of said note and deed of trust. About December 23, 1952, said Julia served notice on plaintiff that she would sell all properties covered by said deed of trust at trustee's sale unless plaintiff paid her \$4,828.07, being the principal of said note, accumulated interest and taxes, "including the sum of \$350.00 as and for attorneys fees for the firm of Marcollo, Cannelora and Marcollo." (Whether this was fees for the quiet title action or in connection with the note or deed of trust does not appear.) Plaintiff paid said sum under duress, compulsion and threat of sale of said properties owned by

him at the site of Davis Auto Exchange in order to save title to his said properties and to prevent interruption of his business and deprivation of possession of his business properties. Plaintiff is informed that said quiet title proceeding was never completed, the taxes on plaintiff's properties were never paid, and that said note was entirely devoid of consideration. Plaintiff signed said note on the basis of misrepresentation and fraud and paid "to the firm of Marcollo, Cannelora and Marcollo, said sum of \$4,828.07 as a direct and proximate result thereof." The sum of \$350 paid to said firm (by whom does not appear) as and for attorney's fees was illegal, unlawful and excessive (in what respect does not appear), and the acts of all defendants were willful and malicious. Plaintiff then asks judgment for \$4,828.07 as compensatory damages and \$20,000 punitive damages.

[1,2] This count is identical with the allegations of the original complaint as to which a demurrer, both general and special, was sustained. As to this count the court was justified in ordering it stricken as a cause of action, as plaintiff had no right, after the sustaining of a demurrer to the original complaint, to file an amended complaint merely repeating the allegations of the original complaint without change or amendment. If the court erred in sustaining the demurrer to the original complaint plaintiff's remedy was to stand on it, permit a judgment to be entered, and then appeal, and not by again filing the same complaint.

Second Count.

Plaintiff incorporates by reference all the allegations of the first count and then alleges that at the time of the collection of said \$4,828.07 defendants were acting as the agents of Julia Prettner and the other defendants (fictitious named defendants). It is not alleged that said defendants have not paid said sum to their principals. Plaintiff is informed that at all times said defendants acted with full knowledge of all matters alleged. Again the prayer is for \$4,828.07 as compensatory damages and \$20,000 punitive damages.

None of the ambiguities and uncertainties specified in the demurrer to the original

complaint is cleared up. Nor was any attempt made to join Carl and Martin Atalic, the only persons alleged to have made the misrepresentations or promises. This defect in parties defendant was one of the grounds of the demurrer.

It is very difficult to spell out even the nucleus of a cause of action against defendants. Even though such a possibility exists, it does not affect the real question here, which is whether the trial court abused its discretion in striking the amended complaint when no serious effort was made to meet the objections sustained to the first complaint. The only change made was to increase the ambiguities and uncertainties, still without pleading a cause of action against defendants.

[3,4] The courts are, and should be, liberal in allowing pleadings to be amended, but when, as here, the court reasonably concludes that the plaintiff has made no real effort to comply with the permission once given him to amend his complaint, the amended complaint becomes nothing but a sham. The court is not required to give him another opportunity. The situation here is quite similar to that in *Neal v. Bank of America, etc.*, 93 Cal.App.2d 678, 209 P.2d 825, where the court held the amended complaint to be a sham justifying the trial court in striking it from the files and dismissing the action. As there said, "No attempt is made to state new facts, or to state the facts more fully, or to bring in any new parties. * * * [I]n determining defendant's motion, the court was fully justified in examining and considering the original complaint. [Citations.] So considered, the 'amended' complaint was no better than the original complaint. * * * [T]he courts have inherent power, by summary means, to prevent frustration, abuse, or disregard of their processes. * * * The fundamental principle running through the cases is that a court is not required to tolerate a purported amended complaint which fails to amend the previous pleading, is not filed in good faith, is filed in disregard of established procedural requirements, or is otherwise violative of orderly judicial administration."

93 Cal.App.2d at pages 682, 683, 209 P.2d at page 827.

Just as in *Wilson v. Shea*, 194 Cal. 653, 659, 229 P. 945, 947, where the trial court's order striking an amended complaint from the files was affirmed, the amended complaint here "utterly fails, and in fact does not attempt to remedy the defects" in the plaintiff's previous pleading and "is in all its essential averments but a repetition" thereof.

Under the circumstances of this case, the fact that plaintiff is a layman and appeared in propria persona, would not compel the trial court to give him another chance to amend.

The court had jurisdiction to strike plaintiff's amended complaint on the ground that it was frivolous and a sham. The order was clearly not an abuse of discretion. The complaint having been stricken, the judgment of dismissal was, of course, proper.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



135 Cal.App.2d 201

**The PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Manuel PEREZ and Loran Rocheford,
Defendants,**

**Manuel Perez, Defendant and Appellant.
Cr. 5409.**

**District Court of Appeal, Second District,
Division 3, California.**

Aug. 24, 1955.

Defendant was convicted of assault by means of force likely to produce great bodily injury. The Superior Court of Los Angeles County, Charles W. Fricke, J., entered judg-

ment and an order denying motion for new trial, and defendant appealed. The District Court of Appeal, Vallée, J., held, *inter alia*, that denial of motion for a new trial on ground of newly discovered evidence was not abuse of discretion in absence of showing that defendant by exercise of reasonable diligence could not have produced such evidence at trial.

Judgment and order affirmed.

1. Criminal Law Ⓒ448(11)

Testimony that defendant held beer bottle up as if he were going to throw it towards automobile was admissible as a statement of what witness saw and was not a conclusion.

2. Criminal Law Ⓒ693, 1044

Objection to testimony made after such testimony had been given came too late, and error could not be predicated on admission of such testimony in absence of motion to strike.

3. Criminal Law Ⓒ448(2)

Question as to whether witness heard any other bottle hit the ground or anything like that called for matters which witness could perceive with his senses, and was not objectionable as calling for a conclusion.

4. Criminal Law Ⓒ1120(1)

Error could not be predicated on failure of trial court to strike specified testimony at defendant's request, where district attorney agreed to such request and the record did not indicate that trial court had been apprised of the facts that a motion had been made.

5. Criminal Law Ⓒ863(2)

Instructing jury, after case had been submitted to it, in response to request through foreman for instruction as to difference between a felony and a misdemeanor, that simple assault was a misdemeanor and assault by means of force likely to produce great bodily injury was a felony was not error.

6. Criminal Law Ⓒ829(20)

Refusal to give requested instruction that one who does not actively commit offense but aids, promotes or encourages its

commission should not be found guilty of offense unless he acted knowingly and with criminal intent was not error, in view of another paragraph of requested instruction which was given and which adequately covered subject matter of refused instruction. Pen.Code, § 971.

7. Criminal Law Ⓒ814(19)

Where the evidence was that defendant had hit prosecuting witness with a beer bottle, requested instruction that one who aids, promotes or encourages commission of offense should not be found guilty thereof unless he acted knowingly and with criminal intent, had no application to facts of case and was properly refused.

8. Criminal Law Ⓒ814(8)

In prosecution for assault by means of force likely to produce great bodily injury, requested instruction as to right of self-defense was properly refused, in absence of evidence that defendant was being assaulted or believed that bodily injury was about to be inflicted upon him.

9. Criminal Law Ⓒ938(1)

To justify granting a new trial on ground of newly discovered evidence, such evidence and not merely its materiality must be newly discovered, it must not be merely cumulative, a different result must be probable upon retrial of cause, reasonable diligence must have been exercised to discover and produce such evidence at trial, and such facts must be shown by the best evidence which the case admits.

10. Criminal Law Ⓒ938(1), 1156(3)

A motion for new trial on ground of newly discovered evidence is looked upon with disfavor and ruling of trial court in such regard will not be disturbed except upon a clear showing of abuse of discretion.

11. Criminal Law Ⓒ939(1)

Denial of motion for new trial on ground of newly discovered evidence after conviction for assault by means of force likely to produce great bodily injury was not abuse of discretion in absence of showing that defendant by exercise of reasonable diligence could not have produced such evidence at trial.

Jesse Bach Porter, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and James C. Maupin, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant Perez was convicted by a jury of assault by means of force likely to produce great bodily injury. He appeals from the judgment and the order denying his motion for a new trial. He urges that the court "erred in decisions on questions of law," misdirected the jury, and erred in denying a new trial.

Viewed in the light most favorable to respondent, the evidence was as follows: About 5:00 p. m. on October 10, 1954, Carl Webb, his wife, his sister-in-law, and his 3 children left Norwalk Park in an automobile. As they left Webb noticed a group of young men on the sidewalk and in the parkway. Perez was in the group. Two of the group were wrestling or tussling with each other. Webb stopped his car to watch what the group was doing. He saw Perez run over to a tree which was about 12 feet from his car and jerk a bottle of beer out of a small 6-pack. Perez held the bottle by the neck as if he were going to throw it at the car.

Webb immediately got out of the car and walked around in front of it to about 3 feet from where Perez was standing. He asked Perez to put the bottle down and Perez lowered his arm to his side. Another of the group asked Webb to take a swing on him if he wanted to fight. Webb told him he did not want to fight. Defendant Rocheford then approached and told Webb to mind his own business, that they were just having a drunken party and he had no business butting in. Webb's wife had left the car and was standing directly behind him. She asked him to "come on" and he started to turn to his right. As he did so, defendant Rocheford said to Mrs. Webb, "You two-bit whore, get back in the car." Webb turned to his left and at that moment was struck on the right temple and knocked to the pavement. He did not see who struck him or with what he was struck. At that time Perez was standing to Webb's right and Roche-

ford was in front of him. Webb was lying face-up on the ground and a foot struck him in the face, knocking him unconscious. A nerve in Webb's right temple was crushed, 3 teeth were loosened, his mouth was lacerated, his eyes were blackened, and an artery "broken" in his left cheek.

Webb's sister-in-law testified that Perez hit Webb with the beer bottle and Rocheford "stomped him in the face."

[1-4] In response to a question by the district attorney, Webb testified Perez held the beer bottle "up as if he was going to throw it towards the car." Defendant then objected on the ground the answer was a conclusion. The objection was overruled. Defendant asserts error. There was no error. The objection came too late. There was no motion to strike. The answer was merely a statement of what the witness saw. It was descriptive of the manner in which Perez held the bottle. A witness who saw the fracas was asked, "Did you hear any other bottles hit the ground, or any thing like that or—". Defendant objected on the ground the question called for a conclusion. The objection was overruled. Defendant claims error. There was no error. The question called for matters which the witness could perceive with his senses. Referring to Perez, a witness said "It looked like he aimed—intended to throw it [the bottle] through the window of the car." Defendant asked "that the intended go out." The district attorney said, "All right." No action by the court appears. Defendant says the court erred. The record does not indicate the court was apprised of the fact that a motion had been made. It was the duty of counsel to press the matter and obtain a ruling. Not having done so, error cannot be claimed.

[5] After the jury had been out about half an hour, they returned to the courtroom and stated through the foreman they wanted to know the difference between a felony and a misdemeanor. The following then took place:

"The Court: * * * All crimes are either felonies or misdemeanors. The difference being that, in the case of a misdemeanor there is no possibility of any State Prison sentence. In other

words, if you get the kind of crime that could not be punished by State Prison, that is a misdemeanor. The crimes where the sentence could be a State Prison sentence are felonies.

"In other words, if you want to put it in ordinary English, we use a loose expression that State Prison offense is a felony.

"The Foreman: If I may ask a question. That is really not what we are concerned with. We are trying to determine, according to the instructions—not the instructions, but the papers that we have to sign, according to those, the word misdemeanor is mentioned and that's the first time it has been mentioned and we are trying to determine what a misdemeanor is and what a felony is in reference to what was done, not the sentence that might be passed.

"The Court: I do not know whether I get your idea. See whether this answers your question.

"The offense of simple assault is a misdemeanor. Assault by means of force likely to produce great bodily injury is a felony.

"Does that answer your question?

"The Foreman: That will help, I'm sure."

Defendant says the court erred in its statement to the jury, but he does not indicate how or in what respect. We see no error.

[6,7] The People requested this instruction: "All persons concerned in the commission of a crime who either directly and actively commit the act constituting the offense or who knowingly and with criminal intent aid and abet in its commission or, whether present or not, who advise and encourage its commission, are regarded by the law as principals in the crime thus committed and are equally guilty thereof.

"[*One who does not actively commit the offense, but who aids, promotes, or encourages its commission either by act or counsel or both, is not deemed by law to be guilty and shall not be found guilty of the crime unless he did what he did knowingly and with criminal intent. To abet another in the*

commission of a crime implies a consciousness of guilt in instigating, encouraging, promoting, or aiding the commission of such criminal offense.]" The court gave the first paragraph. It did not give the second, italicized paragraph. Defendant asserts it was error not to give the second paragraph. The argument is that "Perez is accused by two prosecution witnesses [sic] of nothing more serious than standing with a bottle." There was no error. The evidence was that Perez actively committed the offense. He hit Webb with the beer bottle. The subject matter of the second paragraph was adequately covered by the first paragraph. See Pen.Code, § 971. The fact that some of the witnesses did not see Perez hit Webb did not call for instructing the jury in greater elaboration. The second paragraph had no application to the facts of the case.

[8] The court declined to give the following instruction, requested by defendant:

"It is lawful for a person who is being assaulted, and who has reasonable ground for believing that bodily injury is about to be inflicted upon him, to stand his ground and defend himself from such attack, and in doing so he may use all force and means which he believes to be reasonably necessary and which would appear to a reasonable person in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent."

Defendant claims error. The argument is: "There was no instruction as to whether the act of holding the bottle was to be considered as a threat, or whether standing near when Loran Rocheford assaulted Mr. Webb, or just what constituted the assault. If Manuel Perez was apprehensive of an assault by the openly belligerent Mr. Webb, he certainly had a right to hang on to it." There was no error. There was no evidence that Perez was being assaulted, nor was there any evidence or inference that he believed bodily injury was about to be inflicted upon him. As written by the trial judge on the instruction, the defense witnesses denied "any attack or assault by Webbs."

The motion for a new trial was predicated on newly discovered evidence. An affidavit

of Diana Stevenson was filed in support of the motion. She stated she saw a man she believed to be Webb get out of a car carrying a small beer bottle; he went up to a group of boys; his wife or another woman followed him and he handed the beer bottle to her and she put it back in the car; the man started talking to the boys and Perez moved away and went back of a hedge; the man raised his hand as if to hit Rocheford; Rocheford appeared to block the punch but actually hit the man with his fist and the man went down; at no time after Perez backed up to the hedge was he anywhere near the man.

[9-11] These requirements must be fulfilled for the granting of a new trial on the ground of newly discovered evidence: (1) the evidence and not merely its materiality must be newly discovered; (2) the evidence must not be merely cumulative; (3) a different result must be probable on a retrial of the cause; (4) the party could not with reasonable diligence have discovered and produced it at the trial; (5) these facts must be shown by the best evidence which the case admits. *People v. Sutton*, 73 Cal. 243, 247, 15 P. 86. A motion for a new trial on the ground of newly discovered evidence is looked upon with disfavor, and the trial court's ruling in that regard will not be disturbed except upon a clear showing of an abuse of discretion. *People v. Miller*, 37 Cal.2d 801, 807, 236 P.2d 137. There was no showing of diligence. An affidavit of defendant's counsel stated that subsequent to the trial he discovered evidence "which will establish the fact that the complaining witnesses were under the influence of liquor." What that evidence was does not appear. There is no showing that the evidence could not with reasonable diligence have been produced at the trial. The court did not abuse its discretion in denying a new trial.

The judgment and the order denying a new trial are affirmed.

PARKER WOOD, Acting P. J., and
ASHBURN, J. pro tem., concur.

Norma Jeanne ASHWELL, Plaintiff and
Appellant,

v.

Curtis Lee ASHWELL, Defendant and
Respondent.

Civ. 8694.

District Court of Appeal, Third District,
California.

Aug. 24, 1955.

The mother of four children, the oldest of whom was six and the youngest less than two years of age, obtained an interlocutory decree of divorce awarding custody of children to her, and the father of children thereafter filed notice of motion to modify decree as to custody of children. The Superior Court, Sacramento County, James H. Oakley, J., entered an order modifying decree so as to give custody of children to father, and the mother appealed. The District Court of Appeal, Van Dyke, P. J., held that changing custody of children from mother to father constituted abuse of discretion in view of the evidence.

Order reversed.

1. Divorce ⇨303(3)

Interlocutory decree of divorce, awarding custody of minor children to mother, adjudged that she was a fit and proper person to have such custody and modification of decree so as to award custody of children to father was abuse of discretion, unless there was sufficient evidence that a change had taken place after granting of interlocutory decree and that thereby the welfare of children was endangered. West's Ann.Civ.Code, § 138.

2. Divorce ⇨303(3)

In proceeding to modify provision of divorce decree as to custody of a minor child, moving party has the burden of satisfying the court that conditions have so changed as to justify the modification. West's Ann.Civ.Code, § 138.

3. Parent and Child ⇨2(4)

The fundamental issue in a child custody proceeding is whether, as of the time

a modification of custody order is sought, such modification is reasonably necessary to the welfare of child, and on such issue, court is guided by what appears to be for the best interests of the child, bearing in mind that as between parents adversely claiming custody, neither parent is entitled to such custody as of right, but that other things being equal, mother should be given custody of a child of tender years. West's Ann.Civ.Code, § 138.

4. Parent and Child ☞2(4)

In determining which of two parents shall have custody of minor child, much is committed to the sound legal discretion of trial court, and its decision will not be reversed on appeal except for a clear abuse of discretion.

5. Divorce ☞303(3)

Modification of interlocutory decree of divorce seven months after entry thereof by changing from mother to father custody of four children, the oldest of whom was six and the youngest less than two years of age, constituted abuse of discretion, notwithstanding meretricious relations between mother and another man resulting in birth of a fifth child, in view of evidence of their intention to marry as soon as divorce decree became final, intention of father to remove children to Virginia to be reared by their paternal grandmother, and evidence that children were properly cared for by mother. West's Ann.Civ.Code, § 138.

6. Parent and Child ☞2(4)

In determining custody of minor children as between parents adversely claiming such custody, courts are not engaged in a disciplinary action to punish parents for their shortcomings as individuals or to reward the unoffending parent for any wrong suffered by reason of sins of the other. West's Ann.Civ.Code, § 138.

7. Divorce ☞303(3)

In proceeding for modification of interlocutory decree of divorce so as to change custody of minor children from mother to father, the prime question was what was the effect of mother's custody upon lives of children and what would be the effect of a modified decree that would disturb

their settled life and compel them to make adjustments to a life with strangers. West's Ann.Civ.Code, § 138.

Malone, Dennis & Schottky, Sacramento, for appellant.

Johnson & Lemmon, Sacramento, for respondent.

VAN DYKE, Presiding Justice.

[1-4] On August 17, 1953, an interlocutory decree of divorce was entered in an action brought by Norma Jeanne Ashwell, appellant herein, against Curtis Lee Ashwell, respondent herein. The decree was granted to Norma upon the ground of extreme cruelty and upon default of Curtis. Custody of the four children of the marriage was given to Norma. The oldest of the children was six and the youngest less than two. During the interlocutory period and on January 19, 1954 Curtis filed a notice of motion to modify the interlocutory decree by taking the custody of the children from Norma and awarding that custody to Curtis. The notice of motion stated that the modification sought would be to the effect that Norma was not a fit and proper person to have custody. After a hearing the existing decree was modified to give legal custody of the children to Curtis. There was no express finding that Norma was not a fit and proper person to have custody nor that she was not properly caring for them nor that she maintained them in an improper home. If the order is to be supported upon the ground alleged in the notice of motion it can only be because, if such findings had been made, they would have been sustained by the evidence, for, unless that be so, then it seems clear to us that the change in custody constituted an abuse of discretion in view of the previous and recent adjudication that Norma was a fit and proper custodian and that the welfare of the children required that she have their custody and control; that is, there must be sufficient evidence that a change had taken place after the granting of the interlocutory decree and that thereby the welfare of the children was endangered. *Munson v. Munson*, 27 Cal.2d 659, 166 P.2d

268; *Prouty v. Prouty*, 16 Cal.2d 190, 193, 105 P.2d 295, 297—there the court said: "It must be borne in mind that in every proceeding to modify a provision for the custody of a minor child the burden is on the moving party to satisfy the court that conditions have so changed as to justify the modification." *Washburn v. Washburn*, 49 Cal.App.2d 581, 122 P.2d 96; *In re Inman*, 32 Cal.App.2d 130, 134, 89 P.2d 421; *Foster v. Foster*, 8 Cal.2d 719, 726-728, 68 P.2d 719, 722—"until some change of circumstance arises which makes a modification of the former order of custody advisable from the point of view of the welfare of the child, the court will give effect to the former order and will refuse to make any modification of such order". The fundamental issue in a child custody proceeding is whether, as of the time a modification is sought, such an order is reasonably necessary to the welfare of the children. In examining into that issue the court is to be guided "By what appears to be for the best interests of the child * * *", bearing in mind that "As between parents adversely claiming the custody, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, custody should be given to the mother; * * *." Civ.Code, sec. 138. In the resolution of the issue as to which of two parents shall have custody much is committed to the sound legal discretion of the trial court and the decision will not be reversed on appeal unless there is a clear abuse of discretion.

[5] Norma has appealed from the order changing custody of the children and here urges that in this case the trial court did abuse judicial discretion and that the application of the foregoing rules demand a reversal of the order. Giving full scope to the showing made before the trial court, we are constrained to hold that appellant's contentions are sound and that the decree must be reversed.

A sufficiently full summary of the evidence follows: Norma gave birth to a fifth child on February 14, 1954 (conceived prior to the interlocutory decree). The father of the child was one Barney Cassella. Norma, the five children and Cassella were living

in the same house when the motion to modify the decree was heard. Curtis was a master sergeant in the United States Army, stationed in Sacramento. That county had also been the situs of the domicile of the parties when the decree of divorce was granted. Curtis testified he had visited the children about once a week and a number of times had found them in charge of a 12-year old girl. He said they were generally raggedly dressed in dirty clothes and appeared to need a bath; that whenever he visited Barney Cassella was always present; that Norma and the children had, after the decree, moved from a residence in Sacramento and were living in West Sacramento, across the river in Yolo County; that on December 23, 1953, at about 10 P.M. he visited there and Cassella answered the door and was improperly dressed (he did not specify in what the impropriety consisted); that Norma then told him she was pregnant, but denied that Cassella was responsible. Curtis stated to the court that if he obtained custody of the children he intended to get a discharge from the Army and take the children back to Virginia to live with his parents who were living on a farm three miles out of Huddleston; that the home was an average home, with access to schools and churches; that his parents were Mormons; that his mother was 45 years of age and his father 54 years old; that he, Curtis, is a mechanic by trade and had been offered a job in Huddleston and expected to support his children from his earnings. He said he had never seen any improprieties between Norma and Cassella.

Barney Cassella testified he was a taxi driver employed in Sacramento and since November, 1953 had been living in the same house with Norma and the children; that he rented the house; that before that time he rented an apartment from Mrs. Ashwell in Sacramento; that he had had sexual intercourse with her several times, but not since June of 1953; that he was the father of the child she bore February 14, 1954; that when he moved to West Sacramento it was to a house which he rented which had three bedrooms, one of which was occupied by him and his adult nephew, one by Norma with the new baby and the youngest Ash-

well child, and the other by the three older children; that he loved Norma and intended to marry her as soon as her divorce became final. Norma testified that Cassella was the father of her last born child; that she and Cassella had had no sexual relations since she became pregnant in June of 1953; that she had not told Curtis at any time that Cassella was not the father of her last born child. In explanation of her conduct she testified that she had been compelled, while living in Sacramento and after her separation from Curtis, to rent an apartment to Cassella, and that the compulsion was from economic necessity; that she was compelled to leave her Sacramento home because Curtis came there at unreasonable hours and abused and insulted her beyond endurance; that she had moved into a house which Cassella rented because she could not afford a place of her own; that she loved Cassella and intended to marry him as soon as her divorce became final; that she had always properly cared for the children; that she loved them and devoted her full time to their care; that they were healthy and happy. She said: "I am living with Mr. Cassella now because of economic necessity. I receive \$100 a month from him to apply toward the support of myself and my children. I cannot afford to live separate and apart from him at the present time. If my children were taken back to Virginia, I could not afford to go there to visit, and I would probably never see them again." Two women, neighbors to Norma, testified that Norma was a good mother, cared for her children well and that they appeared to be healthy, happy, normal children; that she was conscientious and never neglected or abused her children in any way.

The order appealed from was made on the 25th of March, 1954; the interlocutory decree had been entered August 17, 1953; and the final could not be entered until about five months after the entry of the order modifying the interlocutory.

[6, 7] It is clear that this decree must rest upon an assumption that the trial court concluded Norma was not a fit and proper

person to have the custody of her children despite their tender ages, even though the court did not see fit to so declare. This is so because there is nothing else upon which the order could be based. The meager showing, disputed by the neighboring women, that there was anything amiss in Norma's care of her children can be dismissed as of no moment. Any normal, healthy, playing child of the ages of these children will at some time during almost every day be found to need a bath and there was no attempt here to show that in proper time these children did not get the needed ablution. Curtis said, additionally, that he found the children raggedly dressed, but he did not otherwise describe their clothes, and these children, described by the neighbors as healthy, happy, active children, probably were at times dressed in clothes that had been torn and needed mending. These things really do not measure up even to makeweights as against the imperative need of very young children for the constant care and love of the only person who can fill these needs in full measure—the mother who bore them. There is no worthwhile dispute here but that Norma took good care of her children, and if she did that then anyone who has observed the tasks that must be performed by a mother in caring for four tiny children will know that she is the hardworking, and, toward her children, the conscientious woman that her neighbors testified she was. If support is to be found for the order, therefore it must be found in her meretricious relations with Cassella resulting in the birth of a fifth child. Upon examination, and in view of the applicable case law and the statutory command, these derelictions do not measure up in quantity and quality to justification for depriving these children of their mother. Except for her relations with Cassella, there is nothing in this record to indicate that Norma is a loose woman. There is here no proof that she is amoral. There is proof of error, but along with it goes proof of her acceptance of the consequences and her expressed desire to regularize, within the possible limits, her habitation with Cassella, the father of her youngest

child. These people could not marry until the final decree of divorce was entered, but they testified they intended to do so as soon as that could be done, and as we read this record there is no good reason to doubt that their testimony expressed their true intent. After all, they were bound by mutual obligations to their illegitimate child. Norma testified that she was compelled by economic necessity to depend upon Cassella for aid and that he was furnishing aid to her. This testimony could be construed as an indictment of her moral character, but we think it could not be fairly so construed. Five children below seven years of age effectively prevents a mother charged with their care from gainful occupation. The divorce decree awarded her \$176 per month and she told the truth when she said that she was under economic pressure. Cassella was a taxi driver and there is nothing to show he was not a man with a moderate income derived from that occupation. These two people, regardless of their sin, were in all things else responding commendably to the demands of a burdensome situation. It is proper to bear in mind, as these things are being considered, that in determining where custody of children shall lie the courts are not engaged in a disciplinary action to punish parents for their shortcomings as individuals nor to reward the unoffending parent for any wrong suffered by the sins of the other. *Washburn v. Washburn*, supra, 49 Cal.App.2d at page 587, 122 P.2d 96. The prime question is, What is the effect upon the lives of the children and what will be the effect of a modified decree that disturbs their settled life and compels them to make adjustments to a life with strangers. In view of the tender ages of these children we think that the conduct of the mother as described in the testimony was at the time this change was ordered having no possible bad effect upon them. They were too young.

We turn now to the effect of the order granting the custody of these children to the father. In view of his expressed intention to remove the children to the distant state of Virginia for rearing by their grandmother, it is at once apparent that this

decree in all practical effect gives the legal custody to the father and the physical care and custody to the grandmother whom the children have never seen; and by doing this prevents them from having any further contact with their mother whom they have always known and from whom they had received the motherly love, affection and constant care which good mothers give. Norma testified that she would not be able to visit her children and it is easily seen that unless her financial condition betters considerably in the future her testimony is true. The granting to her of visitatorial rights under these conditions is an idle gesture. Curtis makes no claim that he could properly care for these children himself while he is in the Army and subject to be sent on the Army's missions at any time. His testimony was that if he received the children he would get a discharge from the Army and that he was in a position to do so upon request. Norma and Cassella testified they intended to marry as soon as they could. At the time this hearing was held both these promises could only be performed in the future. When the order was made Curtis had no assured home for these children and the home they were in was not presently damaging to them. We think the situation was one that required denial of the motion if insisted upon at that time. It is apparent that, so far as shown here, if Cassella and Norma marry and keep for these children the home that they were then furnishing, a decree taking the custody of these infants from their mother could not be supported upon this record of her past delinquencies. If she does not marry, and continues in her relations with Cassella, then, obviously, the time is fast approaching when that condition will endanger the welfare of the children, but that is not the situation that confronted the trial court when it made its decree. On the other hand, if Curtis, given the children, should remain in the Army and leave the children with their grandparents they would be deprived of the needed constant parental care of both their parents. From the whole record we think the order constituted an abuse of discretion.

For the reasons given the order appealed from is reversed.

PEEK, J., and FINLEY, J. pro tem., concur.

SCHOTTKY, J., disqualified.



135 Cal.App.2d 237

Leonard A. ENGELMAN, Jr., by Vina Engelman, his guardian ad litem, and Vina Engelman, Plaintiffs and Appellants,

v.

CONSOLIDATED HOUSE MOVERS, Inc., a corporation, A. Marcus Jensen and Michael Jensen, co-partners, doing business as Consolidated House Movers, Harvey B. Forsyth, and Phillip Tourigny, Defendants and Respondents.

Vina ENGELMAN, Administratrix of the Estate of Leonard A. Engelman, Deceased, Plaintiff and Appellant,

v.

CONSOLIDATED HOUSE MOVERS, Inc., a corporation, A. Marcus Jensen and Michael Jensen, co-partners, doing business as Consolidated House Movers, Harvey B. Forsyth, and Phillip Tourigny, Defendants and Respondents.

Civ. 20657-20658.

District Court of Appeal, Second District,
Division 3, California.

Aug. 25, 1955.

Rehearing Denied Sept. 14, 1955.

Hearing Denied Oct. 19, 1955.

Actions were brought for death of driver of automobile and for medical expenses, loss of wages, and damage to automobile as result of collision between automobile and house, which was being towed down street by defendants truck, and which extended over center line of street. The Superior Court of Los Angeles County, Robert H. Scott, J., entered orders of nonsuit on the opening statement of the plaintiffs, and the plaintiffs appealed. The Dis-

trict Court of Appeal, Parker Wood, Acting P. J., held that Superior Court erred in entering orders of nonsuit on opening statement, which charged that the house and truck were on the wrong side of the street, and which was silent on question whether defendants had a permit to move the house along the wrong side of the street.

Orders reversed.

1. Automobiles ⇨244(10)

Driving a vehicle on wrong side of highway is prima facie evidence of negligence and calls for explanation by driver. Vehicle Code, § 525.

2. Trial ⇨109

In actions for death of driver of automobile and for medical expenses, loss of wages, and damage to automobile as result of collision between automobile and house, which was being towed down street by defendants by truck, and which extended over center line of street, presumption that defendants obeyed the law and therefore had a permit should not be considered as a part of plaintiff's opening statement on motion for nonsuit. Vehicle Code, § 525; West's Ann.Code Civ.Proc. §§ 581c, 581d, 1963, subds. 4, 33.

3. Trial ⇨165

On motion for nonsuit, disputable presumptions in favor of defendant are not to be considered.

4. Automobiles ⇨244(10)

Where house and truck, which was towing the house, were on the wrong side of the street when oncoming automobile collided with the house, position of house and truck was prima facie evidence of negligence. Vehicle Code, § 525.

5. Automobiles ⇨242(3)

In actions for death of driver of automobile and for medical expenses, loss of wages, and damage to automobile as result of collision between automobile and house, which was being towed down street by defendants by truck, and which extended over center line of street, defendants had burden of proving a lawful excuse or justification for position of house and truck on wrong side of street. Vehicle Code, § 525.

6. Trial ⇐109

In actions for death of driver of automobile and for medical expenses, loss of wages, and damage to automobile as result of collision between automobile and house, which was being towed down street by defendants by truck, court erred in entering orders of nonsuit on plaintiffs' opening statement, which charged that house and truck were on wrong side of street, and which was silent on question whether defendants had a permit to move the house along the wrong side of the street. Vehicle Code, § 525; West's Ann.Code Civ.Proc. §§ 581c, 581d, 1963, subs. 4, 33.

Vaughan, Brandlin & Wehrle, and Warren J. Lane, Los Angeles, for appellants.

Kenneth J. Murphy and Henry E. Kappler, Los Angeles, for respondents.

PARKER WOOD, Acting Presiding Justice.

These two actions were consolidated for trial. One action is for damages for wrongful death. The other action is for medical expenses, loss of wages of decedent, and damage to his automobile. Orders of nonsuit were made, based upon the opening statement of counsel for plaintiffs. Plaintiffs appeal from the orders.

The allegations of the complaints in the two actions were substantially the same, except as to damages. Those allegations (except as to damages) were, in part: Sunset Boulevard was a public street in the city of Los Angeles. On August 6, 1952, about 2:15 a. m., deceased Leonard A. Engelman was operating a Hillman-Minx "sedan" in a westerly direction on Sunset Boulevard. At said time defendants so negligently and unlawfully operated a

truck "together with the frame house being towed by said truck" in an easterly direction on Sunset Boulevard, and they so negligently and unlawfully placed the house upon said boulevard, that "the same" collided with the sedan being operated by deceased. As a proximate result of defendants' negligence as aforesaid, and by reason of the collision, deceased was injured, and he died on November 6, 1952.

The actions, at plaintiffs' request, were set for a trial by jury. When the case was called for trial, the attorneys for the parties and the judge had a discussion regarding the issues, the evidence, and questions on voir dire examination of jurors. Then the attorney for plaintiffs said that he had no witnesses except as to the position of the house and that it was moved east along the middle of the street and occupied the lane which, under section 525¹ of the Vehicle Code, was reserved for west-bound traffic. Then after some discussion as to whether that section 525 was applicable herein, the judge said: "If you do not have any evidence I am willing to assist you in conserving your clients' money by allowing you to make an opening statement embracing everything that you could prove and rule upon a motion for a nonsuit, if you would want to stipulate that that could be done before the jury is empaneled, with the same force and effect as though the jury had been empaneled." Thereupon the parties so stipulated.

The opening statement was as follows:

"Plaintiff Vina Engelman is the surviving widow, and plaintiff Leonard A. Engelman, Jr. is the surviving minor child of Leonard A. Engelman, Deceased.

"On August 6, 1952, at or about 2:15 A.M., the defendants Consolidated House Movers, Inc. and its employees Harvey B.

1. Section 525 of the Vehicle Code provides, in part, that: "(a) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows: (1) When overtaking and passing another vehicle proceeding in the same direction * * *. (2) When placing a vehicle in a lawful position for, and when such vehicle is lawfully making a left turn. (3) When the right half of a roadway is closed to

traffic while under construction or repair.

(4) Upon a roadway designated and signposted for one-way traffic. (b) The State Department of Public Works shall by regulation determine a distinctive roadway marking which shall indicate no driving over such marking * * *. When such markings or signs * * * are in place, the driver of a vehicle shall not drive along the highway to the left thereof * * *."

Forsyth and Phillip Tourigney were moving a house along and upon Sunset Boulevard in an easterly direction near the intersection of Sunset Boulevard and St. Andrews Place in the City of Los Angeles, County of Los Angeles, State of California. The house was being towed by a truck owned by the defendant Consolidated House Movers, Inc. and being driven by the defendant Harvey B. Forsyth.

"That at said time and place the deceased Leonard A. Engelman was driving a Hillman-Minx automobile in a westerly direction along and upon said Sunset Boulevard. At the point of the accident involved herein, Sunset Boulevard was 72 feet wide. The house being moved by the defendants was approximately 30 feet wide. The house being towed rested upon a device commonly known as dollies having wheels. Such dollies were a device for moving the house and extended approximately the width of the house. At the time and place of the accident the truck towing the house and the dollies was moving down the center of Sunset Boulevard and the house being towed extended across the center line to the north approximately the full width of the lane for westbound traffic nearest the center line. At the point of the accident Sunset Boulevard is divided down the center of the street by two white lines, conforming to the provisions of Section 1411 of Title 21 of the California Administrative Code, the same being the regulation promulgated by the State Department of Public Works in accordance with the provisions of Section 525, subdivision (b), of the Vehicle Code of the State of California. At this point on either side of the double white line is a single white line dividing the westbound traffic into two lanes and likewise dividing eastbound traffic into two lanes. The house thus occupied the traffic lane on either side of the double white center line. The automobile being driven by the deceased, Leonard A. Engelman, was at the time of the accident and prior to the accident, wholly to his right of the double white center line and was in the traffic lane for westbound traffic nearest the double center line. The point of impact was approximately 19 feet west of the west

curb line of St. Andrews Place, north portion, and 30 feet south of the north curb of Sunset Boulevard. The northeast portion of the house being towed by the defendants collided with the left front portion of the automobile being driven by the deceased.

"As a result of this collision the deceased sustained injuries which caused him to be confined to the Los Angeles General Hospital for three months. On November 6, 1952, the deceased, Leonard A. Engelman, died as a proximate result of the injuries sustained in this accident. The medical and hospital expenses incurred for the treatment of the deceased from the time of the accident to the time of his death amounted to approximately \$1,500. The automobile being driven by the deceased was totally demolished and its reasonable value is approximately \$1,875.

"The deceased was 36 years of age at the time of his death and left surviving him as his only heirs the plaintiffs. The plaintiff Vina Engelman was approximately 38 years of age, and plaintiff Leonard A. Engelman, Jr. was approximately 12 years of age.

"Plaintiff and deceased were married in 1940 and had lived together continuously from the date of marriage and were living together at the time of the accident.

"At the time of his death and for several years prior thereof, the deceased was employed by Columbia Studios as a makeup artist and earned approximately \$7,500 a year."

[1-5] Defendants' motion for nonsuits was granted. The judge stated: "The opening statement does not disclose any facts which the plaintiffs would expect to prove that would constitute an act or omission on the part of the defendants upon which liability could be predicated. The motion for a nonsuit is granted, and this order granting the motion for a judgment of nonsuit is, pursuant to Section 581c [Code Civ.Proc.], an adjudication upon the merits, and, under Section 581d, this order shall constitute the judgment." According to the opening statement Sunset Boulevard "is divided down the center" by two white lines; and the truck which was

towing the 30-foot-wide house was moving easterly down the center of Sunset Boulevard and the house extended across the center line to the north (on the wrong side of the boulevard) approximately the width of the westbound traffic lane which was next to the center line. In other words, a part of the truck was on the wrong side of the boulevard, and a part of the house—covering approximately the westbound traffic lane next to the double line—was on the wrong side of the boulevard; and the northeast portion of the house collided with the left front portion of the automobile that was being driven by deceased (on the right side of the boulevard) in said westbound traffic lane. As above shown, section 525 of the Vehicle Code provides, in part, that a vehicle shall be driven upon the right half of the roadway, except under certain conditions (such as passing a vehicle going in same direction, turning left, right half under construction, one-way traffic) which have no application here. The truck and house being upon the left or wrong side of the boulevard constituted a prima facie violation of said section. "Driving on the wrong side of the highway is prima facie evidence of negligence and calls for an explanation on the driver's part. * * *" *Musgrove v. Zobrist*, 83 Cal.App.2d 101, 103, 187 P.2d 782, 784. Therefore, the opening statement disclosed facts that would constitute a prima facie showing of negligence on the part of defendants. The opening statement did not include a statement that defendants or any of them had a permit to move the house upon or along the left or wrong side of the boulevard or to move the house upon or along the boulevard at all; nor did it include a statement showing an exception under section 525 which would justify moving the truck and house upon the wrong side of the boulevard. Appellants' counsel, in his argument in the trial court, did not argue that defendants did not have a permit; nor does he argue on appeal that defendants did not have a permit. His argument at the trial and here is to the effect that the movement of vehicles across the double white line in the center of the boulevard is prohibited under said section

525 of the Vehicle Code and under the regulation of the State Department of Public Works (Cal.Admin. Code, Title 21, § 1411) determining that double white lines are a distinctive roadway marking indicating there shall be no crossing over or driving to the left thereof. He also argues that the device used to transport the house (namely, the truck and dollies under the house) was a vehicle. Counsel for defendants argues that the house-moving equipment was not a vehicle; that even if it were such a vehicle, the legislature intended that local authorities could make exceptions in certain cases to the general rules of conduct set forth in the Vehicle Code; that regulating the moving of buildings through streets is such an exception; and that said section 525 is not controlling because cities and counties have authority to use their streets in a manner other than is provided in the Vehicle Code. At the trial, during the discussions which preceded the making of the opening statement and during the argument of defendants' counsel in support of his motion for nonsuits, defendants' counsel said that defendants had a permit to move the house. Counsel for appellants did not say that defendants had a permit. Just preceding the oral decision of the judge, counsel for defendants said: "I don't believe the state occupies the entire field of the city streets, and I don't believe Section 525 prohibits a city or any municipality from making exceptions to the use of their streets, regardless of 525. *And the presumption is that the law has been obeyed.* I believe counsel will agree with me *we had a proper permit.*" Counsel for appellants made no reply thereto. Then the trial judge said (preceding the part of his oral decision above quoted): "As a part of the plaintiffs' case I would assume that any presumptions established by law would, of necessity, have to be included and considered by the court. Section 1963 [Code Civ.Proc.] sets out the disputable presumptions. Sub-section 33 is one presumption; 'That the law has been obeyed.' That presumption, therefore, would have to be considered by the court as having been included by reference in the plaintiffs' opening statement. Similarly, the presumption in 1963, subdivision

4, that a person takes ordinary care of his own concerns." It is to be noted that, just preceding the oral decision by the judge, counsel for defendants referred to the presumption that the law has been obeyed, and then said that he believed that counsel for appellants would agree that defendants had a permit. Immediately after such a reference the trial judge, in commencing his oral decision, referred to that presumption and said that it would have to be considered by the court as having been included in the opening statement. A question arises as to whether the trial judge meant that by reason of the presumption he would have to consider that defendants obeyed the law in the matter of obtaining a permit, and therefore that they had a permit. Since the judge's reference to the presumption followed immediately the reference of defendants' counsel to such presumption and to a permit, it would seem that the judge meant that by reason of such presumption he would consider that defendants had a permit. Unless such a presumption was a part of the opening statement, there was nothing in the opening statement indicating that defendants had a permit. Such a presumption (that defendants obeyed the law and therefore had a permit) should not be considered as a part of the opening statement. Upon a motion for a nonsuit, disputable presumptions in favor of a defendant are not to be considered. In *Copeland v. Rabing*, 110 Cal.App.2d 631, 243 P.2d 119, a motion for nonsuit was granted as to the second cause of action which was based upon fraud. It was said therein 110 Cal. App.2d at page 635, 243 P.2d at page 121: "We find respondents in their brief urging the following: That there is a presumption that one is innocent of fraud which approximates in strength the presumption of

innocence of crime; that it is the duty of the court or jury to draw from proved facts the inference favorable to fair dealing rather than the inference of corrupt practice; * * *." Immediately following said quotation it was also said therein: "These rules of law find their application in the trial court when a decision is made on the merits. *They have no application to a motion for nonsuit* and they have no application here. 'That fraud is never presumed * * *, of course, is the law. However, the rule has no pertinency when a motion for a nonsuit in an action based on a claim of fraud is the question involved. If defendants would make use of the rule they should have waited until the cause was submitted to the jury and then have argued for and against presumptions.'" (Italics added.) As above shown the truck and house were on the wrong side of the boulevard, and such position was prima facie evidence of negligence. If defendants had lawful excuse or justification for being in such position, the burden was upon them to prove such excuse or justification. *Musgrove v. Zobrist*, supra, 83 Cal.App.2d 101, 104, 187 P.2d 782.

[6] There being no evidence herein that defendants had a permit to move the house along the wrong side of the boulevard, it is not necessary to decide whether the city or county would have authority to issue such a permit. The orders of nonsuit herein were based upon plaintiffs' opening statement, and the question before this court is whether the statement was legally sufficient.

The orders of nonsuit are reversed.

VALLÉE, J., and ASHBURN, J. pro tem., concur.

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Leonard LYONS, Defendant and Appellant.*
Cr. 5368.

District Court of Appeal, Second District,
Division 1, California.

Aug. 15, 1955.

Hearing Granted Sept. 14, 1955.

Defendant was convicted of violating Section 288 of the Penal Code on the person of nine year old girl and on person of eleven year old girl. The Superior Court of Los Angeles County, Charles W. Fricke, J., entered judgment and an order denying defendant's motion for new trial, and defendant appealed. The District Court of Appeal, White, P. J., held that where evidence was in sharp conflict, and no complaint had been made by the girls for several weeks after occurrence of alleged offenses, and general reputation of one of the girls for truth and veracity was shown to be bad, and the other girl was impeached, and there was uncontradicted testimony that defendant's reputation was good, improper reference by Deputy District Attorney to prior conviction of defendant, before defendant testified, and improper addition in court's handwriting to cautionary instruction that fact that charge was one difficult to disprove should not deter jury from rendering a verdict of guilty, if jury was convinced beyond a reasonable doubt that defendant was guilty constituted reversible error.

Judgment reversed and cause remanded for new trial.

1. Criminal Law ⇨706

Where defendant had not yet testified as a witness, it was improper for Deputy District Attorney on cross-examination of defendant's wife to refer to an alleged prior conviction of defendant.

2. Criminal Law ⇨145½

Courts look with disfavor on a complaint made long after the event in question.

3. Criminal Law ⇨728(5)

Generally, if harmful effect of improper statements of prosecuting attorney could probably have been removed by admonition to jury, failure of defendant to request such admonition is a waiver of right of defendant to rely on the statements as misconduct.

4. Criminal Law ⇨730(1), 1037(1, 2)

Where misconduct of prosecuting attorney is of such a character that it cannot be purged of its harmful effect by an admonition, it will be considered as a possible ground for reversal in cases where jury has been admonished, as well as in cases where no objection was made or admonition requested on behalf of defendant.

5. Criminal Law ⇨1171(1)

Where case is closely balanced, and guilt has not been so clearly established as to render it improbable that harmful effect of misconduct of prosecuting attorney may have turned scales against defendant, such misconduct is ground for reversal.

6. Constitutional Law ⇨257

When an accused is denied a fair and impartial trial as guaranteed by law, procedure amounts to a denial of due process of law.

7. Criminal Law ⇨1186(4)

Criminal cases should not be conducted with an eye to the saving grace of section of the Constitution permitting reversal only for error resulting in miscarriage of justice, since, except on motion for new trial, the section is of no concern to the trial court, and, so far as its application goes, is only of interest to courts of review. West's Ann.Const. art. 6, § 4½.

8. Infants ⇨20

In prosecution for violation of Section 288 of the Penal Code on the persons of nine year old girl and eleven year old girl, testimony of the girls was not inherently improbable. Pen.Code, § 288.

9. Criminal Law ⇨1159(2)

Though a reviewing court will not uphold a judgment or verdict based on evi-

dence inherently improbable, testimony, which merely disclosed unusual circumstances, does not come within that category.

10. Criminal Law ☞260(11)

To warrant rejection of statements given by a witness, who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.

11. Criminal Law ☞260(11), 1159(3)

Conflicts in evidence and even testimony, which is subject to justifiable suspicion, do not justify reversal of a judgment, since it is the exclusive province of the trial judge or the jury to determine the credibility of a witness and the truth or falsity of the facts on which a determination depends.

12. Criminal Law ☞811(1)

In prosecution for violation of Section 288 of the Penal Code on the persons of nine year old girl and eleven year old girl, it was improper for the trial judge to add in his own handwriting after cautionary instruction that fact that charge made is one difficult to disprove should not deter jury from rendering a verdict of guilty, if jury is convinced beyond a reasonable doubt that defendant is guilty. Pen.Code, § 288.

13. Criminal Law ☞824(4)

Trial court was not guilty of prejudicial error in failing to instruct, on its own motion, as to defense of alibi.

14. Criminal Law ☞1186(4)

Where evidence was in sharp conflict in prosecution under Section 288 of the Penal Code, and no complaint had been made by prosecution witnesses for several weeks after occurrence of alleged offenses, and general reputation of one prosecuting witness for truth and veracity was shown to be bad, and the other prosecuting witness was impeached, and there was uncontradicted testimony that defendant's reputation was good, improper reference by Deputy District Attorney to prior conviction of defendant before defendant testified and improper addition in court's handwriting to cautionary instruction that fact that

charge was one difficult to disprove should not deter jury from rendering a verdict of guilty, if jury was convinced beyond a reasonable doubt that defendant was guilty, constituted reversible error. Pen.Code, § 288, West's Ann.Code Civ.Proc. § 2051; West's Ann.Const. art. 6, § 4½.

Matthews and Hill, John J. Hamilton, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Marvin Gross, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County containing two counts, defendant was charged in Count I with a violation of Section 288 of the Penal Code on the person of Linda —, age 9 years, and in Count II with a violation of the same statute on the person of Cheryl —, 11 years of age.

In an amended information setting forth the foregoing offenses, it was also charged that defendant in 1931, under the name of Leonard Leibowitz, had been convicted of the crime of robbery in the State of New York, and that he served a term of imprisonment in the State Prison therefor. At the outset of the trial defendant admitted the prior convictions charged against him. He was found guilty by a jury of both offenses contained in the information. Following a subsequent hearing the court found that the defendant was not a sexual psychopath, denied probation, and sentenced him to State Prison after denial of his motion for a new trial. From the judgment of conviction and the order denying his motion for a new trial defendant prosecutes this appeal.

We regard the following as a fair epitome of the evidence surrounding this prosecution as reflected by the record herein. Defendant and the two complaining witnesses lived in the same general neighborhood. Linda, 9 years old, testified that on one occasion toward the end of July, 1954, about one o'clock in the afternoon, she went to defendant's home to call on his daughter Gail. Opening the door, defendant told Linda that his daughter was in the kitchen; after Linda

had entered, defendant locked the doors. Upon finding that Gail was not in the kitchen, Linda was invited by defendant into the den, where she sat down on the couch to watch television. At that time defendant "started to tickle me", "from the top of me and went down". Then "he pushed me down and he made me lay down and he got on top of me", "and he took my shorts and panties down". Linda then testified that defendant then "opened a part of his pants and then he lay on top of me", "and stuck his thing into mine" "and he moved up and down". Linda testified that during this time she made no outcry nor did she say anything to defendant.

Afterwards defendant told Linda that she had better not tell anyone about this. Linda did not tell her parents about the incident for five or six weeks, because, "I was afraid he was going to do something to me".

About a week after the incident defendant called Linda on the telephone several days in succession telling her, "I have got some candy for you, come over". Linda refused the invitation.

William Rosenthal, the father of Linda, corroborated the fact that Linda had informed him of the incident on the Friday after Labor Day of that year.

Cheryl, 11 years old, testified to substantially the same personal experiences as did Linda; that she went to defendant's home to visit Gail; that defendant told her that Gail was in the kitchen; that after Cheryl entered, defendant locked all the doors; that Gail was not in the house and that defendant invited Cheryl to enter the den and sit on the couch; that he tickled her from the head down, then asked her to lie down and pull her panties down; and that defendant then fondled her private parts; also, that he opened his trousers and Cheryl "saw his thing". Then defendant lay on top of Cheryl "and he put his thing between my legs" "he moved around", and "he laid on me for a long time and then he got off" and said, "I will be right back"; and that she then unlocked a door and left. Due to her fear of defendant, Cheryl postponed telling her parents until the same day on which Linda told her's.

This complaint was corroborated by Cheryl's mother, Shirley Funk.

Dr. Light, a qualified pediatrician, testified that he examined Linda on October 4, 1954 and found that her hymen was ruptured; his notations from a previous examination of April 29, 1953 disclosed that there was no ruptured hymen at that time.

In his own behalf defendant took the witness stand and denied putting his private parts next to those of either of the complaining witnesses; and he further denied that Cheryl ever came to his home during June, when his daughter was not at home. Lillian Lyons, the wife of defendant, testified that her husband was never home alone on any Saturday from June until September of 1954 because it was their habit to go shopping together every Saturday.

Esther Appleton testified that she is the principal of the school attended by Linda; that she had talked with other teachers and pupils at the school and had written reports from teachers concerning Linda. Based on the foregoing the witness testified that Linda's reputation for truth and veracity was bad. On cross-examination of Mrs. Appleton she was questioned as follows:

"Q. (By Deputy District Attorney) Let me ask it this way: In your discussions with Mrs. Kirkham, did she tell you that this little girl was a liar? A. Yes.

"Q. More than one occasion? A. Yes, sir.

"Q. All right. How about Mr. Prenn? A. The name is Prenn.

"Q. Mr. Prenn. Mr. or Mrs.? A. Mr. Prenn.

"Q. And did he tell you that this little girl tells stories? A. Yes, sir; because we never use the word lie."

Six witnesses testified that defendant's general reputation for chastity was "good", "very good", and "above reproach". Other witnesses were present and ready to testify but the court restricted the number to 6 on the ground that there being no rebuttal testimony on the issue of reputation, further evidence "becomes cumulative definitely".

In view of subsequent discussion it might here be noted that during the cross-examination of the complaining witness Cheryl, the following transpired:

"Q. And every time he put it between your legs; is that right? A. Yes, sir.

"Q. Well, he put it inside of you too, didn't he? A. No.

"Q. Never? A. No.

* * * * *

"Q. Cheryl, when you were in the other court (Preliminary Examination), didn't you say, 'He put his in mine'? 'His private parts in mine and he left it there for about three minutes'? A. But mother had an examination at the doctor's office and the doctor said it didn't happen.

"Q. The doctor said it didn't happen? A. Yes.

"Q. That is all."

As his first ground for a reversal appellant urges that the district attorney was guilty of prejudicial misconduct in alluding to appellant's prior conviction during the cross-examination of the latter's wife. She had testified that she never left home on Saturdays (the day of the week on which both offenses allegedly occurred) without her husband because that was the day on which they did their shopping. Then the following ensued:

"Q. (By Deputy District Attorney) And there is some reason, then, for your not leaving Mr. Leibowitz at your home on Saturday by himself? A. My husband's name is not Mr. Leibowitz, sir.

"Q. Oh, it is not Leibowitz? A. Not now.

"Q. You knew him back in 1931, didn't you? A. Yes.

"Q. You know of his conviction back in New York under that name? A. Yes, sir.

"Q. His real name now is Lyons? A. His real name is Lyons now.

"Q. Was it something else before that? A. Pardon?

"Q. Was it something else before that? A. Leibowitz.

"Q. Before that, it was Leibowitz? A. Yes.

"Q. I thought you just told us his name is not Leibowitz. A. Now, I said.

"Q. Oh, I see. However, in 1931 it was? A. Yes, sir; it was."

With commendable fairness, the attorney general does not contend that the foregoing cross-examination was proper but asserts there was no actual prejudice or resultant miscarriage of justice. Const. of California, Art. VI, Sec. 4½. Respondent urges that while, at the time of the foregoing interrogations, appellant had not yet taken the witness stand, he ultimately became a witness in his own behalf, at which time the prior conviction was properly alluded to for the purpose of impeachment, Code Civ. Proc. § 2051.

[1] It would be an impeachment of the legal learning of counsel for the People to intimate that he did not know the aforesaid questions to be improper, wholly unjustifiable and peculiarly calculated to prejudice the appellant before the jury. One has but to read the foregoing questions to observe in them the subtle insinuations that appellant had used names other than Leibowitz or his present name of Lyons. The prosecuting attorney may well be assumed to be a man of fair standing before the jury, and the members thereof may well have thought that he could prove the innuendo contained in the improper questions.

[2] In the instant case, the evidence is in sharp conflict. All the material facts testified to by the witnesses for the prosecution were denied and controverted. There was creditable evidence to support appellant's alibi. No complaint was made by either of the victims for several weeks after the occurrence of the acts charged. Courts look with disfavor upon a complaint made long after the event in question. *People v. Musumeci*, 133 Cal.App.2d 354, 284 P.2d 168. The general reputation of one of the complainants for truth and veracity was characterized as bad by her teachers at school, while the other complainant was impeached by showing that she changed her testimony given at the preliminary examination because thereafter her "mother had

an examination at the doctor's and the doctor said it didn't happen".

Several witnesses testified that appellant's general reputation in the community where he lived was good. When consideration is given to the evidence in this case in its entirety it seems manifest that if the jury attached the slightest weight to the insinuating questions of the prosecution, and the innuendo therein contained, it would be sufficient to turn the scales.

[3-5] It is true, as urged by respondent, that no objection to the foregoing questions was made at the trial, and the court was not requested to admonish the jury to disregard them. And it is contended that the issue cannot be raised for the first time on appeal. However, as was said in *People v. Ford*, 89 Cal.App.2d 467, 470, 471, 200 P.2d 867, 869: "As a general rule, if the harmful effect of improper statements could probably have been removed by an admonition to the jury, failure to request such admonition is regarded as a waiver of the right to rely upon the statements as misconduct. *People v. Simon*, 80 Cal.App. 675, 678, 679, 252 P. 758, and many cases cited. Upon the other hand, where the misconduct is of such a character that it cannot be purged of its harmful effect by an admonition, it will be considered as a possible ground for reversal in cases where the jury has been admonished (citing cases), as well as in cases where no objection was made or admonition requested on behalf of the accused (citing cases). *In either situation, where the case is closely balanced and guilt has not been so clearly established as to render it improbable that the harmful effect of the misconduct may have turned the scales against the accused, such misconduct has consistently been deemed ground for reversal.* (Citing cases.)" (Emphasis added.)

What was said by the Chief Justice of the United States in the case of *Viereck v. United States*, 318 U. S. 236, 63 S. Ct. 561, 566, 87 L.Ed. 734 (quoting from *Berger v. United States*, 295 U. S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314, 1321), reflects our views as to the duties and obligations of a prosecuting officer. We quote: "The United States Attorney is the representative not of

an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

In the recent case of *People v. Wilkes*, 44 Cal.2d 679, 284 P.2d 481, 486, our Supreme Court in dealing with the propensity of some prosecutors to transcend the bounds of legitimate methods to secure a conviction, had this to say: "It was error for the prosecution to comment on the failure of Mrs. Wilkes to testify. (Citing cases.) Such error has repeatedly been denounced but held not to have been prejudicial in the circumstances of the particular cases in which it has occurred. Because of such repeated holdings, it appears from the brief of the People, prosecuting officials have come to the belief that erroneous conduct in this regard is, as a matter of law, not cause for reversal. The conduct here, as in previous cases where it has been rebuked but held not prejudicial, was manifestly deliberate. Regrettably, the circumstances make it apparent that we must recognize and deal with the fact that such conduct will not be discontinued as long as it is merely rebuked. (See *People v. Ford*, 1948, 89 Cal.App.2d 467, 472, 200 P.2d 867 [we have extended our remarks respecting misconduct in the hope that they will be taken as a serious effort to inspire a greater degree of responsibility, duty and caution on the part of those prosecutors who are either careless in the observance of the rights of the accused or wholly indifferent to the consequences of their misconduct. It is regrettable that so much is left for reviewing courts in the way of discouraging misconduct. Fewer judg-

ments would have to be reversed if the trial courts were more firm in controlling the comparatively few prosecutors who need restraint'].)"

[6,7] It is axiomatic that when an accused is denied that fair and impartial trial guaranteed by law, such procedure amounts to a denial of due process of law. *Powell v. State of Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527. Criminal cases should not be conducted with an eye to the saving grace of Section 41½, Article VI of our State Constitution. Excepting motions for a new trial, the constitutional section is of no concern to the trial courts, and so far as its application goes, it is of interest only to the courts of review. *People v. Black*, 73 Cal.App. 13, 43, 238 P. 374.

[8-11] Appellant next assails the testimony of the prosecuting witnesses as inherently improbable. This contention cannot be sustained. The rule is thus stated in *People v. Huston*, 21 Cal.2d 690, 693, 134 P.2d 758, 759:

"Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. *Kidroski v. Anderson*, 39 Cal.App.2d 602, 605, 103 P.2d 1000. To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. (Citing cases.) Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. *Hicks v. Ocean Shore Railroad, Inc.*, 18 Cal.2d 773, 781, 117 P.2d 850."

It is next urged that the trial court was guilty of prejudicial error in modifying the cautionary instruction given the jury. In that regard the record shows that the

trial judge read to the jury the following instruction, which was in printed form:

"It is not essential to a conviction in this case that the testimony of the prosecuting witness be corroborated by other evidence, provided that from all the evidence you are convinced beyond a reasonable doubt and to a moral certainty of the defendant's guilt. However, a charge such as that made against the defendant in this case is one which, generally speaking, is easily made, and, once made, difficult to disprove even if the defendant is innocent. From the nature of a case such as this, the complaining witness and the defendant usually are the only witnesses. Therefore I charge you that the law requires that you examine the testimony of the prosecuting witness with caution.

"(In giving this instruction I do not mean to imply an opinion of my own as to the credibility of any witness.)"

To the foregoing the judge added in his own handwriting the following: "and the fact that the charge here made is one difficult to disprove should not deter you from rendering a verdict of guilty, if you are convinced beyond a reasonable doubt that the defendant is guilty."

In an affidavit by the bailiff of the trial court, received by augmentation of the record, he avers that he recalls the instant case, "that in all cases of jury trials he always takes the jury instructions in to the jury room * * * that he recalls no case in which a jury trial was had that he did not take the jury instructions in to the jury room".

Appellant argues that "It is within reason to anticipate that most, if not all, jurors entertain a belief that the judge or the Court is a person of great importance and hence such jurors undoubtedly would pay great attention to any expression either oral or in writing of any judge and upon viewing the said instruction in connection with the personal writing of the trial judge must have realized that the over-emphasis caused solely by the said additional writing by the judge re-emphasized the judge's belief that he leaned definitely toward guilt

rather than a neutral position in the matter and in this regard it must be noted that no saving phraseology is included in the instruction or no effort to neutralize the possible danger of the jury viewing such handwritten handwriting by the judge."

The reason for giving cautionary instructions in cases of the kind now before us was thus stated by the Supreme Court in *People v. Adams*, 14 Cal.2d 154, 167, 93 P.2d 146, 152, wherein it is stated: "As frequently has been said regarding cases of the instant character, 'No charge can be more easily made, and none more difficult to disprove.' As a matter of practical observation to many judges who have presided over trials of this nature, it is plainly recognized that, notwithstanding the salutary rule that an accused is presumed to be innocent until his guilt has been established beyond a reasonable doubt, nevertheless, to the mind of the average citizen or juror, the mere fact that a person has been accused of the commission of such an offense seems to constitute sufficient evidence to warrant a verdict of 'guilty'; and that—instead of its being necessary for the prosecution to prove his guilt beyond a reasonable doubt—in order to secure an acquittal of the charge, it becomes incumbent upon the accused to completely establish his innocence, and to accomplish that result not only by a preponderance of the evidence but beyond a reasonable doubt. In such a situation, the only defense available, ordinarily, to the accused is his own denial of any asserted misconduct, together with evidence of a former good reputation; otherwise, he is utterly defenseless and at the mercy of a jury which probably is very much prejudiced."

In the case just cited it is further stated, 14 Cal.2d at page 168, 93 P.2d at page 153: "It is because of the recognized existence of the ease with which convictions of men, even those of unblemished reputation, may be secured in cases of the instant kind that courts are at pains to insist upon fair trials in all respects being accorded to the accused. Errors committed either by the prosecution or by the court in the course of the trial, which ordinarily might be considered trivial and as of no material conse-

quence from a standpoint of adverse effect upon the rights of a defendant, may become of great importance when committed in a case of the character of that here involved."

By other instructions the jury had been fully admonished that, "if, after weighing all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty of (a) crime charged against him in the information, your duty will be to find him guilty * * *" The jury was also advised that, "You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the defendant have a right to demand, and they do demand and expect, that you will conscientiously and dispassionately consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict, regardless of what the consequences of such verdict may be."

[12] Since in no other instruction did the trial judge add anything in his own handwriting, it may well be that if the jury read the instructions they might have been influenced to the belief that notwithstanding the cautionary admonition as to the testimony of the complaining witnesses, the court was inclined to the belief of the guilt of the accused. To us it appears that in the case at bar there was no reason to add to the cautionary instruction the admonition that notwithstanding the caution with which they should view the testimony of the complainants that, "should not deter you from rendering a verdict of guilty, if you are convinced beyond a reasonable doubt that the defendant is guilty". They had already been fully advised in that regard, and to emphasize it as was done in this case might well have turned the scales to the prejudice of appellant. In other words, that the court leaned toward the view that notwithstanding the "recognized existence of the ease with which convictions of men, even those of unblemished reputation, may be secured in cases of the instant kind", *People v. Adams*, supra, 14 Cal.2d at page

168, 93 P.2d 153, such was not the case in the instant prosecution. The over-emphasis contained in the language appended to the cautionary instruction in the handwriting of the trial judge might well have militated against a fair or dispassionate consideration by the jury of the cautionary elements of the instruction which is the outgrowth of human experience. The portion of the instruction added in the handwriting of the trial judge would seem to be an admonition to exercise caution in the application of the cautionary instruction. To us this seems contrary to the philosophy and reasons which gave rise to the necessity for giving the cautionary instruction in cases such as the one now engaging our attention.

[13] Appellant's contention that the court was guilty of prejudicial error in not instructing on its own motion as to the defense of alibi is without merit. Appellant's claim in this regard is answered by the following language in *People v. Williams* 128 Cal.App.2d 458, 464, 275 P.2d 513, 517: "The rule in California is well established that, although substantial alibi evidence may be given by the defense, in the absence of any request for an instruction in respect thereof, it is not the duty of the trial court to give a specific charge upon that subject." (Citing cases)."

[14] The ultimate question presented to us in the case at bar is, *Has the accused been accorded a fair trial?* In reviewing, as we have herein, the overall picture framed by the evidentiary features of this case and the errors to which we have referred, we are persuaded that the question must be answered in the negative. As was said by our Supreme Court in the recent case of *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, 912, "Thus no matter how guilty a defendant might be or how outrageous his crime, he must not be deprived of a fair trial, and any action, official or otherwise, that would have that effect would not be tolerated".

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each is reversed, and the cause remanded for a new trial.

DORAN and DRAPEAU, JJ., concur.

John C. RITCHIE, an Individual; John C. Ritchie and John Burroughs, individually and as co-partners doing business under the fictitious firm name and style of All American Nut Co., a co-partnership, Plaintiffs and Appellants,

v.

ANCHOR CASUALTY COMPANY, a corporation, Defendant and Respondent.

Civ. 20695.

District Court of Appeal, Second District,
Division 3, California.

Aug. 25, 1955.

Action by insured against insurer to recover under products property damage endorsement which extended coverage to insured for damage to property caused by accident and arising out of the handling, use or any condition existing in insured's products sold if accident occurred after insured had relinquished possession of the products. The Superior Court, Los Angeles County, Newcomb Condee, J., entered judgment for insurer and insured appealed. The District Court of Appeal, Ashburn, J. pro tem., held that where insured sued customer for purchase price of oil but compromised action after buyer presented a cross-complaint for damages arising from the use of rancid oil sold to it by insured, claim contained within cross-action was within coverage of policy even though cross-complaint alleged action against insured for breach of implied warranty.

Reversed.

1. Insurance ☞514½

Where insurance policy provides that insurer will defend in insured's name and behalf any suit against insured alleging injury or damage arising out of an alleged liability covered by policy, insurer's obligation to defend is measured by terms of the insurance policy and the pleading of the claimant who sues the insured.

2. Insurance ☞646(6, 8)

Where policy contains obligation of insurer to defend actions and claim against insured is compromised without judgment having been rendered against insured, ques-

tion of insurer's liability to defend remains open for adjudication in a later proceeding, but the settlement or stipulated judgment entered thereon becomes presumptive evidence of the liability of the insured and the amount thereof.

3. Insurance ⇨514½

Where an action is brought against insured and question subsequently arises whether allegations of complaint reveal a liability covered under policy, complaint must be taken by its four corners and facts arrayed in a complete pattern without regard to niceties of pleading or differentiation between different counts of a single complaint and the ultimate question is whether the facts alleged fairly apprise insurer that plaintiff is suing insured upon an occurrence which, if his allegations are true, gives rise to liability of insurer to insured under terms of policy.

4. Insurance ⇨514½

In case of doubt as to whether or not allegations of complaint against insured give rise to liability of insurer under terms of policy, such doubt should be resolved in the insured's favor.

5. Insurance ⇨434

Where buyer sued insured for property damage caused by use of rancid oil sold to it by insured the occurrence was an accident within the terms of insured's product property damage endorsement covering damages to property caused by accident and arising out of the handling, use or condition existing in insured's products sold if accident happened after insured had relinquished possession of products.

6. Insurance ⇨434

A policy covering liability for damage caused by "accident" covers the unexpected and unforeseeable result of a voluntary act.

See publication Words and Phrases, for other judicial constructions and definitions of "Accident".

7. Insurance ⇨434

Where policy contained under one coverage an agreement to pay on behalf of insured all sums which it shall become obligated to pay "by reason of the liability imposed on him by law or by written contract for damages" and other coverage in main

body of policy and rider attached thereto merely used term "by reason of the liability imposed on him by law for damages", phrase "liability imposed by law" was construed to relate to the nature of liability to be defended rather than the result of lawsuit against insured and included claim based on breach of implied warranty.

See publication Words and Phrases, for other judicial constructions and definitions of "Liability Imposed by Law".

8. Insurance ⇨514½

If complaint filed against insured alleges several causes of action some of which are not covered by the policy and one or more are within its terms, the insurer is bound to defend the action.

9. Sales ⇨255

Privity of contract is not necessary for claim based on damages arising from breach of an implied warranty that food-stuffs were unfit for the use intended.

10. Action ⇨27(2)

Action for breach of implied warranty that food is fit for human consumption sounds in tort.

11. Insurance ⇨434, 514½

Where products property damage endorsement covered insured for liability imposed on it by law for damage to property caused by accident arising out of the handling, use or any condition existing in insured's products sold to others if the accident happened after insured had relinquished possession of products, and insured was sued by buyer of its products for property damage resulting from use of rancid oil sold to it by insured and one of the causes of action in complaint alleged breach of an implied warranty that oil was fit for use for which it was intended, claim was covered under the terms of the policy and insurer was obligated to defend such action.

12. Insurance ⇨146(3)

The insurance policy is to be construed most favorably to the insured and in such a manner as to provide full coverage of the indicated risk rather than to narrow the protection.

13. Evidence ⇨66

Where insurer issued property products damage policy to food processor, cov-

ering damages caused by accident, it was presumed to have been known the nature of insured's business and that it was one in which accidents might occur not through explosion or violence of any kind but through an unwholesome condition in a food product such as peanut oil.

14. Insurance ⇨146(3)

An exception to the general import of the principal coverage clauses in policy must be couched in terms which are clear to the ordinary mind and any doubts as to its meaning will be resolved against the insurer.

15. Insurance ⇨514, 514½

Where insured was sued for liability covered under policy but insurer refused to defend, the insured had the right to make any reasonable and bona fide compromise of the action against them and was entitled to recover from insurer, in addition to amount paid for reasonable compromise, reasonable attorney's fees incurred in defense of action.

16. Insurance ⇨602.2

Where insured successfully brought action against insurer to recover expense of defending claim against it which should have been defended by insurer under terms of its policy, insured was not entitled to recover attorney's fees for the prosecution of action against insurer.

Abraham Gottfried, Beverly Hills, for appellants.

Moss, Lyon & Dunn, Gerold C. Dunn, and Henry F. Walker, Los Angeles, for respondent.

ASHBURN, Justice pro tem.

Plaintiffs appeal from an adverse judgment rendered after a nonjury trial in an action upon an insurance policy issued to them by defendant Anchor Casualty Company. Plaintiffs John C. Ritchie and John Burroughs do business under the name of All American Nut Co., a business of processing and selling food products, including refined peanut oil. In August 1950 they bought from defendant a "comprehensive liability" policy, covering primarily liability

from operation of automobiles; but it also contained certain riders, one of which is entitled "Products Property Damage Endorsement for Attachment to Comprehensive Liability Policy." So far as pertinent it provides:

"In consideration of the premium at which this endorsement is issued, it is understood and agreed that the Policy to which it is attached is extended to cover the *liability imposed upon the assured by law* for damages because of injury to or destruction of property, including the loss of use thereof, *caused by accident* and arising out of

"(1) the handling or use of or the *existence of any condition in goods or products* manufactured, sold, handled or distributed by the insured if the accident occurs after the insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the insured." (Emphasis added.)

In April 1951, while the policy was in force, plaintiffs sold to Post Trading Company, a partnership consisting of Max Sorrell and Irving Horowitz, 10 drums of refined peanut oil at a price of \$1,324.80. The buyers refused to pay for same, claiming that the oil was rancid and they had been damaged through its use. Plaintiffs herein, through an assignee, A. F. Stark, sued to recover the purchase price and the buyer, Post Trading Company, not only resisted that claim but also filed a cross-complaint seeking recovery of damages from plaintiffs herein (as cross-defendants) in the sum of \$12,140.80, alleged to have been proximately caused by use of the rancid oil in manufacture of certain food products (corn chips) for which use the oil had been purchased. Plaintiffs furnished the cross-complaint to defendant insurance company, called upon it to defend pursuant to that provision of the policy which provides: "It is further agreed that as respects insurance afforded by this policy the company shall (a) defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; * * *." Defendant insurer refused to defend upon the ground

that the causes of action alleged in the said cross-complaint were not within the coverage of the policy. After the Stark case had been partially tried (defendant refusing to have anything to do with it) plaintiffs made a compromise by which they dismissed the Stark complaint and Post Trading Company dismissed its cross-complaint, both dismissals being made expressly with prejudice. This action was brought to recover from the insurance company the sum of \$2,574 alleged to be the cost of the settlement to plaintiffs, i. e. surrender of their claim of \$1,324.80 plus reasonable attorney fees incurred in the Stark case in the sum of \$1,250; they also seek recovery of an attorney fee of \$750 in the instant action brought upon the policy. The heart of the trial judge's ruling is found in paragraph VII of the findings, reading as follows: "None of the allegations of said cross-complaint pleaded or alleged an 'accident', or made claim for damages 'caused by accident' as those terms were used, and intended to be used, by the parties to the insurance policy. None of the allegations of said cross-complaint pleaded or alleged a 'liability imposed upon the assured by law', as such term was used, and intended to be used, by the parties to the insurance policy. None of the allegations of said cross-complaint pleaded or alleged the 'injury to or destruction of property' caused by any 'accident' occurring after the insured 'relinquished possession' of 'products sold', as those terms were used, and intended to be used, by the parties to the insurance policy." This sustains defendant's arguments (1) that the cross-complaint alleges no accident, (2) that it alleges a liability created by contract and not one "imposed upon the assured by law" and (3) that the accident, if any, did not occur after the insured had relinquished possession of the oil and away from the premises of insured. Appellant assails each of these phases of the ruling as legally unsound. Defendant introduced no evidence and the ruling is based upon the terms of the policy and the cross-complaint, supplemented by certain undisputed oral evidence, thus presenting questions of law upon this appeal.

[1, 2] The first question is whether the cross-complaint in the Stark case avers an accident. Respondent contends, and we agree, that the insurer's obligation to defend is measured by the terms of the insurance policy and the pleading of the claimant who sues the insured. It is so held in *Lamb v. Belt Casualty Co.*, 3 Cal. App.2d 624, 630, 40 P.2d 311 and *Greer-Robbins Co. v. Pacific Surety Co.*, 37 Cal. App. 540, 543-544, 174 P. 110. It is also established that in cases where no judgment has been rendered against the insured, the claim having been compromised, the question of the insurer's liability to defend remains open for adjudication in a later proceeding. *Lamb v. Belt Casualty Co.*, supra, 3 Cal.App.2d 624, 631, 40 P.2d 311; *Chrysler Motors v. Royal Indemnity Co.*, 76 Cal.App.2d 785, 788, 174 P.2d 318; see also 45 C.J.S., Insurance, § 937, p. 1073. But the settlement, or stipulated judgment entered thereon, becomes presumptive evidence of the liability of the insured and the amount thereof. *Belt*, 3 Cal.App.2d at page 631, 40 P.2d 311; *Chrysler Motors*, 76 Cal.App.2d at page 788, 174 P.2d 318.

The cross-complaint in question alleges five causes of action, two of which sound in express warranty and three in implied warranty of fitness of the oil for the use for which intended. Counsel for respondent say this is an action in contract and hence is not one to recover for an accident or upon a liability imposed by law.

[3] Examination of the pleading reveals that it does factually allege an accident though it does not use that word. The draftsman of a complaint against the insured is not interested in the question of coverage which later arises between insurer and insured. He chooses such theory as best serves his purpose; if it be breach of contract rather than negligent performance of contract, he chooses the former; if it be negligence rather than warranty he alleges negligence; if he happens to choose warranty it may be an express one or one implied. And when the question later arises under an insurance policy as to what the facts alleged in the complaint do spell,—for instance, whether they aver an accident,—

the complaint must be taken by its four corners and the facts arrayed in a complete pattern without regard to niceties of pleading or differentiation between different counts of a single complaint. And the ultimate question is whether the facts alleged do fairly apprise the insurer that plaintiff is suing the insured upon an occurrence which, if his allegations are true, gives rise to liability of insurer to insured under the terms of the policy.

[4] It is settled that "in case of doubt such doubt ought to be resolved in the insured's favor," *Boyle v. National Cas. Co.*, D.C.Mun.App., 84 A.2d 614, 616; see, to same effect, *Lee v. Aetna Casualty & Surety Co.*, 2 Cir., 178 F.2d 750, 752-753; *Pow-Well Plumbing & Heating v. Merchants Mut. Cas. Co.*, 195 Misc. 251, 89 N.Y.S.2d 469, 474; 8 *Appleman on Insurance Law and Practice*, § 4683, at page 5 of 1955 Pocket Part. In the *Pow-Well* case, which depended upon a showing of an accident arising out of a plumber's operations, the court said with reference to a complaint leaving the matter in doubt: "In such a situation, it would seem to be the duty of the insurer to defend, if there is, potentially, a case under the negligence complaint, within the coverage of the policy. If, under the negligence complaint, a claim could be proved, which the insurer must pay, the duty to defend arises." 89 N.Y.S.2d at page 474.

[5] The instant cross-complaint alleges purchase by Post Trading Company of the oil from the Nut Company for use in preparation of food products in the course of the buyer's business; that the seller knew the intended use; that previous purchases of such oil had been made from the Nut Company by Post Trading and the oil was then satisfactory; that the particular batch of oil was used in preparation of food products; that it was not reasonably fit for the intended use; that it was so used without knowledge that it was rancid; that its condition was not discovered until after use or until after damage proximately caused thereby; that it did cause damage consisting of refunds to Post customers who had purchased unmerchantable food products from Post, cost

of detergent and labor used in removing the effects of the rancid oil from machinery, cost of laboratory tests to determine cause of Post's bad products, damage to its trade name and good will, in the total sum of \$12,140.80. In short it alleges use of rancid oil in the belief that it was sweet, with the unexpected result that the oil ruined all food products in which it was used, and damaged the machinery employed in the manufacture of same. This occurrence was an accident within the law applying to insurance policies worded like the one under discussion. "Caused by accident" is the phrase to be interpreted here; not "accidental means" or "external, violent, and accidental means."

Richards v. Travelers Ins. Co., 89 Cal. 170, at page 175, 26 P. 762, at page 763, discusses the meaning of "accident" as follows: "It is impossible to give a precise definition of the word 'accidental.' As every effect has a cause, there is one sense in which nothing is accidental. * * * but the authorities to be found on the subject seem to be to the point that 'accident' must be given its popular meaning,—that is, a casualty, something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured." Then, quoting Judge Withey in *Ripley v. Railway Company*, 2 Bigelow's Life & Acc. Ins. Cas. 738: "'Perhaps, in a strict sense, any event which is brought about by design of any person is not an accident, because that which has accomplished the intention and design, and is expected, is a foreseen and foreknown result, and therefore not strictly accident. Yet I am persuaded this contract should not be interpreted so as thus to limit its meaning, for the event took place unexpectedly, and without design on Ripley's part. It was to him a casualty, and in the more popular and common acceptation, 'accident,' if not in its precise meaning, includes any event which takes place without the foresight or expectation of the person acted upon or affected by the event. * * * I think in construing a policy of insurance against accident, issued to all sorts of people, a majority of whom do

not, as the company well knew, nicely weigh the meaning of words and terms used in it, courts are called upon to interpret the contract as a large class, not versed in lexicology, are sure to regard its terms and scope. That which occurs to them unexpectedly is by them called "accident." The company fix the terms of the contract, and are to be held, in the absence of plain, unequivocal exceptions and provisions, to intend what, in popular acceptation, the insured party is likely to understand by its terms.' * * * the language of Judge Withey seems to us to express correct views of the question." 89 Cal. at pages 175, 176, 26 P. at pages 763, 764. The definition of accident given in the foregoing quotation has been accepted and applied uniformly in this jurisdiction and quite generally in others where the word accident is found without qualifying phrases such as "accidental means." This is true of *Rock v. Travelers' Insurance Co.*, 172 Cal. 462, 465, 156 P. 1029, L.R.A.1916E, 1196; *Price v. Occidental Life Ins. Co.*, 169 Cal. 800, 802, 147 P. 1175; *Olinsky v. Railway Mail Ass'n*, 182 Cal. 669, 671, 189 P. 835, 14 A.L.R. 784; *Ogilvie v. Aetna Life Insurance Co.*, 189 Cal. 406, 411-412, 209 P. 26, 26 A.L.R. 116. See also 14 Cal.Jur. § 101, p. 552; 7 Ten Year Supp.Cal.Jur. § 101, p. 138; 45 C.J.S., Insurance, § 827, p. 880; 29 Am.Jur. § 931, p. 706. We quote *Zuckerman v. Underwriters at Lloyd's*, 42 Cal.2d 460, 473, 267 P.2d 777, 784: "'Accident' has been defined as 'a casualty—something out of the usual course of events, and which happens suddenly and unexpectedly and without any design of the person injured.' *Rock v. Travelers' Ins. Co.*, 172 Cal. 462, 465, 156 P. 1029, 1030, L.R.A.1916E, 1196; *Richards v. Travelers Ins. Co.*, 89 Cal. 170, 175, 26 P. 762 [23 Am.St.Rep. 455]."

[6] There is a clear distinction between injury caused by "accident" and one caused by "accidental means." This is pointed out in most of the cases just cited and in *Horton v. Travelers Ins. Co.*, 45 Cal.App. 462, 466, 187 P. 1070; *Losleben v. California State L. Ins. Co.*, 133 Cal.App. 550, 555, 24 P.2d 825; *Davilla v. Liberty Life Ins. Co.*, 114 Cal.App. 308, 313, 299 P. 831;

Zuckerman v. Underwriters at Lloyd's, supra, 42 Cal.2d 460, 476, 267 P.2d 777; *Rooney v. Mutual Benefit H. & A. Ass'n*, 74 Cal.App.2d 885, 888, 170 P.2d 72, 74. It is stated in the last cited case: "Where, as here, the policy does not insure against accidental death or accidental injuries, but against death or injuries caused by accidental means, it is not sufficient that the death or injury should be unexpected, but in the means through which the injury was sustained or the death produced there must be something of an unexpected or unforeseen character." See also annotations in 111 A.L.R. 628 and 166 A.L.R. 469. As we deal only with an "accident" policy, the unexpected and unforeseeable result of a voluntary act fulfills the term of the policy as to the event covered thereby.

[7] As above indicated the Post cross-complaint sounds in warranty, express as to two counts and implied in the other three counts. Respondent argues that this cannot be a "liability imposed upon the assured by law" because it is a liability arising from contract. *Girard v. Commercial Standard Ins. Co.*, 66 Cal.App.2d 483, 490, 152 P.2d 509, 513, says that "the term 'liability imposed by law,' when used in connection with liability insurance, as ordinarily construed as meaning liability imposed in a definite sum by a final judgment against the assured." The word "ordinarily" is significant; it does not preclude a different connotation when the policy under consideration so indicates. And that is the case here. Coverage A of the insurance agreements obligates defendant "To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law or by written contract for damages, including damages for care and loss of services, because of bodily injury, disease or illness, including death at any time resulting therefrom, sustained by any person or persons." Coverage B: "To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, * * *." The use of the phrase "or by written contract" in

A and its omission from B is persuasive that the phrase "imposed upon him by law" as used in this policy and in the subject rider relates to the nature of the liability to be defended rather than the result of the lawsuit against the assured. Like meaning was attributed to the phrase "liability imposed by law" in *Bahlman v. Hudson Motor Car Co.*, 290 Mich. 683, 288 N.W. 309, 313; *Ohio Casualty Ins. Co. v. Welfare Finance Co.*, 8 Cir., 75 F.2d 58, 59; *Dryden v. Ocean Accident & Guarantee Corp. Ltd.*, 7 Cir., 138 F.2d 291, 292-293. And that is undoubtedly the correct connotation of the phrase in the policy at bar.

[8] If the complaint filed against the insured alleges several causes of action some of which are not covered by the policy but one or more being within its terms, the insurer is bound to defend the action. 8 *Appleman Insurance Law and Practice*, § 4683, p. 10; *Pow-Well Plumbing & Heat. v. Merchants Mut. Cas. Co.*, 195 Misc. 251, 89 N.Y.S.2d 469, 475; *Christian v. Royal Ins. Co.*, 185 Minn. 180, 240 N.W. 365, 366; *American Indemnity Co. v. Sears, Roebuck & Co.*, 6 Cir., 195 F.2d 353, 356.

[9-11] It may be conceded that an action upon express warranty rests upon contract, but privity of contract is not necessary to an implied warranty when foodstuffs are involved, as here. *Vaccarezza v. Sanguinetti*, 71 Cal.App.2d 687, 689, 163 P.2d 470; *Klein v. Duchess Sandwich Co., Ltd.*, 14 Cal.2d 272, 93 P.2d 799. Appellant cites *Rubino v. Utah Canning Co.*, 123 Cal.App. 2d 18, 24-26, 266 P.2d 163, which involved the question of the applicable statute of limitations in an action on implied warranty. It held the one year statute, C.C.P. § 340, subd. 3, relating to injury "caused by the wrongful act or neglect of another" to be applicable rather than the contract section, C.C.P. § 399, subd. 1. The opinion relies in part upon *Gosling v. Nichols*, 59 Cal.App.2d 442, 139 P.2d 86, which passed upon the question of abatement through defendant's death. Dismissal on that ground was there affirmed. The complaint alleged negligence and breach of implied warranty that food sold to plaintiff was wholesome. At page 444 of 59 Cal.App.2d,

at page 87 of 139 P.2d the court said: "The gravamen of a cause of action for breach of an implied warranty that food is fit for human consumption is the personal injury which results, and the action 'sounds in tort'. The cause of action is not *ex contractu*. *Singley v. Bigelow*, 108 Cal.App. 436, 445, 291 P. 899; *Speer v. Brown*, 26 Cal.App.2d 283, 294, 79 P.2d 179; *Harkins v. Provenzo*, 116 Misc. 61, 189 N.Y.S. 258, 259, et seq.; *Bernstein v. Queens County Jockey Club*, 222 App.Div. 191, 225 N.Y.S. 449 et seq." See also *Automobile Ins. Co. v. Union Oil Co.*, 85 Cal.App.2d 302, 306, 193 P.2d 48; *De Mirjian v. Ideal Heating Corp.*, 91 Cal.App.2d 905, 909, 206 P.2d 20; *Zellmer v. Acme Brewing Co.*, 9 Cir., 184 F.2d 940, 945; *Harkins v. Provenzo*, 116 Misc. 61, 189 N.Y.S. 258, 260-61; *Bekkevold v. Potts*, 173 Minn. 87, 216 N.W. 790, 791, 59 A.L.R. 1164; 55 C.J. § 701, p. 715; 77 C.J.S., Sales, § 314, p. 1155. We quote 46 Am.Jur. § 332, pp. 513, 514: "An implied warranty arises under certain circumstances by operation of law irrespective of any intention of the seller to create it. It is a conclusion or inference of law. Similarly, implied warranties provided for by the Uniform Sales Act are imposed by operation of law and, unless specifically negated or waived become a part of the contract of sale by virtue of the statute. It has been said that an implied warranty arises from the presumed intention of the parties. Its origin and use are to promote high standards in business and to discourage sharp dealings." *Hertzler v. Manshum*, 228 Mich. 416, 200 N.W. 155, 157: "The implied warranty, so called, reaching from the manufacturer of foodstuffs to the ultimate purchaser for immediate consumption is in the nature of a representation that the highest degree of care has been exercised, and a breach of such duty inflicting personal injury is a wrong in the nature of a tort, and not a mere breach of contract to be counted on in *assumpsit*. Except in name and to establish privity between the manufacturer and the ultimate consumer, it is the same thing as negligence. Plaintiff's case, in its last analysis, is bottomed on negligence." It is apparent that an im-

plied warranty creates a liability imposed by law and the insurer was obligated to defend such an action.

The cited case of *The Canadian Indemnity Co. v. Andrews & George Co. Ltd.* (1953), 1 S.C.R. 19 (Canada Supreme Court Law Reports 1953) lends considerable support to respondent's argument that breach of an implied warranty gives rise to a liability imposed by contract rather than one imposed by law. But its reasoning is opposed to the above cited cases of *Gosling v. Nichols*, *Rubino v. Utah Canning Co.* and other authorities stating the law as it has developed in the United States. And it is opposed to the doctrine of *Eads v. Marks*, 39 Cal.2d 807, 249 P.2d 257, which involved the question of whether and when a right of action for tort grows out of a breach of contract. The holding is expressed in this quotation from 39 Cal.2d at page 811, 249 P.2d at page 260: "Here, the duty of care arose by reason of the contract, and plaintiff has sued in tort for the breach of that duty. The contract is of significance only in creating the legal duty, and the negligence of the defendant should not be considered as a breach of contract, but as a tort governed by tort rules. *Rushing v. Pickwick Stages System*, 113 Cal.App. 240, 298 P. 150; *Basler v. Sacramento, etc., Ry. Co.*, 166 Cal. 33, 134 P. 993. As was said in *Peterson v. Sherman*, 68 Cal.App.2d 706, 711, 157 P.2d 863, 866: 'It has been well established in this state that if the cause of action arises from a breach of a promise set forth in the contract, the action is *ex contractu*, but if it arises from a breach of duty growing out of the contract it is *ex delicto*. * * *' See, also, *Jones v. Kelly*, supra, 208 Cal. 251, 254-255, 280 P. 942. Where the cause of action arises from the breach of a contractual duty, the action is delictual notwithstanding that it also involves a breach of contract. *Jones v. Kelly*, supra; *Peterson v. Sherman*, supra." We are persuaded that the Canadian Indemnity Company case does not represent the law of this state.

[12-14] There is more than legalism in the application of the foregoing cases to the facts at bar. An insurance policy is to

be construed most favorably to the insured, in such manner as to provide full coverage of the indicated risk rather than to narrow the protection. *Olson v. Standard Marine Ins. Co.*, 109 Cal.App.2d 130, 135, 240 P.2d 379; *Miller v. United Ins. Co.*, 113 Cal. App.2d 493, 497, 248 P.2d 113; *Pendell v. Westland Life Ins. Co.*, 95 Cal.App.2d 766, 769, 214 P.2d 392; *Fageol Truck & Coach Co. v. Pacific Indemnity Co.*, 18 Cal.2d 748, 751, 117 P.2d 669. The courts will not sanction a construction of the insurer's language that will defeat the very purpose or object of the insurance. *Miller v. United Ins. Co.*, supra, 113 Cal.App.2d at page 497, 248 P.2d 113; *Narver v. California State Life Ins. Co.*, 211 Cal. 176, 180, 294 P. 393, 71 A.L.R. 1374. When American Nut Company bought a property damage endorsement to protect against accidents growing out of the handling or use of its products or any condition in products manufactured, sold, handled or distributed by it, a reasonable expectation would be protection against the type of liability which would ordinarily grow out of its kind of business. The body of the policy describes it as "Nut Processing Co." The particular endorsement: "Food Sundries Mfg. N. O. C.—Code 2455—cleaning, grinding, sorting or mixing of coffee, sugars, confections, pastry flours, spices or nuts—no cereal milling." Another one describes it as "Food Products—N. O. C. in paper or cardboard containers or in bulk." The insurer is presumed to have known of the nature of applicant's business and that it was one in which accidents might occur, not through explosion or violence of any kind but through an unwholesome condition in a food product such as peanut oil. Naturally sales are not conducted wholly through written contracts. And every sale of food-stuffs carries an implied warranty of fitness for consumption. Normally a businessman who takes "comprehensive" insurance with express coverage of "products property damage" would expect his ordinary transactions to be covered. If the insurer would create an exception to the general import of the principal coverage clauses, the burden rests upon it to phrase that exception in clear and unmistakable language. *Pendell*

v. Westland Life Ins. Co., *supra*, 95 Cal. App.2d at page 770, 214 P.2d 392. If this is not done any ambiguity or uncertainty is resolved in favor of the policyholder. Indeed an exception must be couched in terms which are clear to the ordinary mind, *Pendell v. Westland Life Ins. Co.*, *supra*, 95 Cal.App.2d at page 770, 214 P.2d 392, or any doubts as to meaning will be resolved against the insurer.

That the accident arose out of "the existence of any condition in goods or products manufactured, sold, handled or distributed by the insured" is equally clear. And, as the accident occurred at the time of use of the rancid oil in the belief that it was good, it cannot be gainsaid that it occurred "after the insured has relinquished possession thereof (the rancid oil) to others and away from the premises owned, rented or controlled by the insured."

All of the conditions of the Products Property Damage Endorsement were fulfilled and defendant improperly refused to defend.

[15] This gave plaintiffs the right to make any reasonable and bona fide compromise of the action against them. *Lamb v. Belt Casualty Co.*, 3 Cal.App.2d 624, 630, 40 P.2d 311; *St. Louis Dressed Beef & P. Co. v. Maryland Casualty Co.*, 201 U.S. 173, 26 S.Ct. 400, 50 L.Ed. 712; 45 C.J.S., Insurance, § 937b, p. 1072; 142 A.L.R. 812, annotation. This they did. Their complaint for recovery of the purchase price was dismissed with prejudice and the Post Trading cross-complaint was dismissed, also with prejudice. Plaintiffs had incurred in that action an attorney fee of \$1,250, and no claim is made that the amount is not reasonable. That item is recoverable here. *O'Morrow v. Borad*, 27 Cal.2d 794, 801, 167 P.2d 483, 163 A.L.R. 894; 45 C.J.S., Insurance, § 926, p. 1043. No money passed in the compromise but plaintiffs gave up their claim to the purchase price of the oil, \$1,324.80. They argue that that amount is part of their recovery herein as it measures the value of what they gave in order to obtain dismissal of a claim against them in the sum of \$12,140.80. That was

an agreed purchase price, there is no claim to the contrary, or that it was not the reasonable value of the oil if sweet and wholesome. Had plaintiffs been required to pay \$1,324.80 in cash to effect a settlement there would be little question of their right to recover it in this action. The insurance company answer at bar says that plaintiffs had a good defense to the cross-complaint. Appellants at the trial of this case introduced evidence that there was nothing wrong with the oil. If that is so, they gave up a good claim for \$1,324.80 as consideration for a compromise. But if the oil was rancid when sold that was the cause of the accident, not the result of it, and hence the value of that oil would not equal the sale price. The court made no finding on the subject and the question of the value of that claim is open for determination as one of fact under the *Lamb* and *Chrysler* cases, *supra*, and cannot be determined as one of law upon this appeal.

[16] Appellant complains of dismissal of the second count of his complaint wherein he seeks recovery of a \$750 attorney fee for prosecution of the instant action. There was no error in this. It is so ruled in *O'Morrow v. Borad*, *supra*, 27 Cal.2d 794, 801, 167 P.2d 483. To the same effect are *Macco Construction Co. v. Fickert*, 76 Cal. App.2d 295, 305, 172 P.2d 951; *Anger v. Borden*, 38 Cal.2d 136, 145, 238 P.2d 976; *Viner v. Utrecht*, 26 Cal.2d 261, 272, 158 P.2d 3, and many other cases.

Appellants also complain of other alleged errors, such as refusal to receive evidence of expenses not alleged in their complaint and refusal to permit amendment to cover same. But this matter of permitting amendment during the trial is a discretionary one. And we do not apprehend that appellants will not have full opportunity upon retrial to fully prove their damages or be refused leave to amend to that end. No other points require discussion.

The judgment is reversed.

PARKER WOOD, Acting P. J., and VALLÉE, J., concur.

135 Cal.App.2d 100

Barbara R. SMITH, Plaintiff and Appellant,
v.

Walter G. SMITH, Defendant and
Respondent.
No. 15881.

District Court of Appeal, First District,
Division 1, California.
Aug. 16, 1955.

Application was made by father for modification of divorce decree in order to give him custody of minor children. The Superior Court, County of Contra Costa, Wakefield Taylor, J., entered an order modifying the decree in order to give father custody of the children, and the mother appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence sustained finding that the placing of the children in the custody of their father was for their best interests.

Order affirmed.

See also 120 Cal.App.2d 474, 261 P.2d 561.

1. Divorce ⇐296

A wide measure of discretion is vested in trial court in determining custody of children of divorced parents. West's Ann. Civ.Code, § 138.

2. Divorce ⇐312.6(5)

Abuse of discretion on part of trial court in awarding custody of children of divorced parents, must be clearly established before reviewing court will interfere. West's Ann.Civ.Code, § 138.

3. Divorce ⇐296

Trial court, in determining custody of children of divorced parents, is given a wide latitude of discretion in determining whether "other things are equal" within meaning of statute providing that "other things being equal," if child is of tender years, custody should be given to the mother. West's Ann.Civ.Code, § 138.

4. Divorce ⇐298(1)

Welfare of child of divorced parents, and not shortcomings of the parents, is determinative of question of which of the

parents shall have custody of the child. West's Ann.Civ.Code, § 138.

5. Divorce ⇐301

Rule which obtains in cases involving custody of children of divorced parents is the same as in other judicial determinations of issues of fact, and similar presumptions and intendments must be indulged. West's Ann.Civ.Code, § 138.

6. Divorce ⇐303(3)

Evidence sustained finding of trial court that best interests of children required that divorce decree be modified to award the father custody of the children. West's Ann.Civ.Code, § 138.

7. Trial ⇐105(2)

Where hearsay testimony went in without objection, it thereby became competent evidence.

8. Divorce ⇐303(3), 312.5

Where trial judge, in hearing on application to modify divorce decree with respect to custody of children, spoke with one of the children in chambers with knowledge and consent of all counsel, but information received by him during the interview was not included in the record on appeal, the information received furnished additional support for the trial judge's order awarding custody of children to father, but was not available for review.

9. Witnesses ⇐256

Where defendant's witness reviewed report, which had been made by her, before coming to court, but she did not use the report during direct examination to refresh her recollection, and, during cross-examination of the witness by plaintiff, witness used the report, on invitation of plaintiff, to refresh her recollection as to what she included in the report and not to refresh her memory respecting a fact, court did not err in refusing to permit plaintiff to inspect the whole report under section of the Code of Civil Procedure giving adverse party right to see notes used by a witness to refresh his memory. West's Ann.Code Civ.Proc. § 2047.

10. Divorce ⇐303(3)

No findings of fact were required for custody order modifying divorce decree to award custody of minor children to father.

11. Divorce ⇨303(3)

Where divorce decree awarded mother custody of daughter but was silent as to custody of son, who was not born until after interlocutory decree, and on application for modification of custody provisions of divorce decree, no formal written application was made by either party in respect to the custody of the son, absence of formal written application with respect to custody of son was of no consequence, since jurisdiction does not depend on specific allegations as to fitness of the respective parties, or their ability or willingness to care for their offspring, or on a specific prayer for custody.

12. Evidence ⇨43(3)

The District Court of Appeal, on review of order modifying custody provisions of divorce decree in order to award father custody of children, would take judicial cognizance of fact that father was adjudged in contempt of the District Court of Appeal for removing children from the state with full knowledge of legal effects of statutory stay pending the appeal.

13. Divorce ⇨312.6(1)

On appeal from order modifying custody provisions of divorce decree in order to give father custody of children, District Court of Appeal could not use, as a basis for reversal of trial court's custody order, evidence that father was adjudged in contempt of the District Court of Appeal because he unlawfully removed the children from the state with full knowledge of the legal effect of the statutory stay pending the appeal. West's Ann.Const. art. 6, § 43 $\frac{3}{4}$, West's Ann.Code Civ.Proc. § 956a.

Edises, Treuhaft, Grossman & Grogan, Bertram Edises, Robert E. Treuhaft, Oakland, Kretzmer & Landisman, Joseph Landisman, Richmond, for appellant.

Fitzgerald, Abbott & Beardsley, Robert S. Rutledge, Oakland, Carlson, Collins, Gordon & Bold, John Ormasa, Richmond, Mabel Walker Willebrandt, Dwain L. Clark, Washington, D. C., and Los Angeles, of counsel, for respondent.

FRED B. WOOD, Justice.

The custody provisions of the decree of divorce of the parties were modified February 9, 1953, by awarding defendant the custody of their minor children, Amanda and Eric, with the right to take them to his home in Salt Lake City, plaintiff to have the right to visit them at all reasonable hours.

The interlocutory decree, filed July 8, 1949, awarded plaintiff the custody of Amanda (who was born in 1942), gave defendant the right of visitation and ordered him to pay plaintiff \$50 a month for the support of Amanda. The interlocutory decree was silent as to Eric for he was not born until October 30, 1949. Its provisions were carried into the final decree of July 14, 1950, without change.

Plaintiff resides in Berkeley, California; defendant, in Salt Lake City, Utah. Each remarried in 1951. Amanda spent the summers of 1950, 1951 and 1952 with defendant in Salt Lake City.

[1] The major question upon this appeal is whether or not the trial court committed an abuse of discretion when it gave the father custody of the children. A wide measure of discretion is vested in the trial court, in the exercise of which the "court is to be guided by the following considerations: (1) By what appears to be for the best interests of the child; and if the child is of a sufficient age to form an intelligent preference, the court may consider that preference in determining the question; (2) As between parents adversely claiming the custody, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, custody should be given to the mother; if the child is of an age to require education and preparation for labor or business, then custody should be given to the father." Civ.Code, § 138.

[2-5] "An abuse of discretion must be clearly established before the reviewing court will interfere with an award of custody. *Wolfe v. Wolfe*, 30 Cal.2d 1, 5, 180 P.2d 345; *Munson v. Munson*, 27 Cal.2d 659, 666, 166 P.2d 268; *Prouty v. Prouty*, 16 Cal.2d 190, 191, 105 P.2d 295. The trial court is given a wide latitude of discretion

in determining whether other things are equal within the meaning of the Code section. *Taber v. Taber*, 209 Cal. 755, 756, 290 P. 36. It is the welfare of the child and not the shortcomings of the respective parties which is determinative. *Washburn v. Washburn*, 49 Cal.App.2d 581, 588, 122 P.2d 96." *Clarke v. Clarke*, 35 Cal.2d 259, 261-262, 217 P.2d 401, 402. See also *Crater v. Crater*, 135 Cal. 633, 634-635, 67 P. 1049; *Fine v. Denny*, 111 Cal.App.2d 402, 403, 244 P.2d 983; *Hamilton v. Hamilton*, 104 Cal. App.2d 111, 117, 231 P.2d 69; *Morgan v. Morgan*, 103 Cal.App.2d 776, 777, 230 P.2d 130; *Ludlow v. Ludlow*, 89 Cal.App.2d 610, 612-613, 201 P.2d 579; *Di Giorgio v. Di Giorgio*, 87 Cal.App.2d 576, 580, 197 P.2d 213. "The rule which obtains in this class of cases is the same as in other judicial determinations of issues of fact, and similar presumptions and intendments must be indulged." *Lefebvre v. Lefebvre*, 48 Cal.App. 483, 485, 192 P. 76, 77.

[6] In the instant case considerable evidence was introduced relating to the capabilities of the parties to care for and educate the children and as to which should have custody for that purpose. Our review of the record¹ convinces us that there is substantial evidence to support a rational inference that placing the children in the custody of their father was for their best interests and that the trial court was properly guided by the considerations prescribed by the statute and the judicial decisions which interpret and apply the statute.

For example, there is evidence tending to show that Amanda is subject to nervous tension in her mother's home and the environment it provides, from which she is free when living with her father; that she is happier when visiting her father and has

indicated reluctance to return to California; that only through the father will either child have contact with its relatives, maternal as well as paternal, because the mother is estranged from and by her own admission does not communicate with her own relatives (the parents grew up in Salt Lake City and it would appear that many of the relatives, including the maternal and the paternal grandparents, live there); that wider and richer opportunities for their educational and social development are available to the children in their father's than in their mother's home; that living conditions are crowded and cramped in the mother's home and that conditions of sanitation and cleanliness are substandard in the home where Eric and his half-brother are placed during the hours that his mother is absent at work, during which period each working day both Eric and Amanda are without the companionship of their mother.² We observe, too, that the stepmother presented herself to the scrutiny of the court, took the witness stand, professed deep affection for Amanda with whom she had become well acquainted and expressed a warm welcome for both Amanda and Eric in her home. The stepfather, however, did not present himself to the court, did not take the witness stand, did not give the court the benefit of his thoughts on these subjects, did not express his feelings toward these children, nor voice a welcome for them in his home.

It is unnecessary and would serve no purpose to summarize the evidence in detail. It sufficiently appears that we would be acting in excess of our authority were we, upon the record before us, to disturb the determination made by the trial court.

[7] Plaintiff would discount as hearsay certain testimony to the effect that the step-

1. We use the work "record" advisedly, as including only that which appears in the clerk's transcript and the reporter's transcript upon this appeal and in the exhibits which were put in evidence at the hearing in the trial court.

2. The stepfather is employed but about one-third of the time and contributes about \$1,200 a year to the family income. The mother works from 8 to 4:30 five days a week. Her take-home pay

is \$185 per month and she pays \$110 a month to a neighbor for the day care of Eric and his half-brother, the child of her second marriage.

The father receives \$145 a month in the form of a war service disability pension and in addition earns about \$225 a month in his profession as a teacher of music, conducted principally at his home. The stepmother also teaches music.

father was arrested for gambling on several occasions. That testimony went in without objection, indeed was elicited by plaintiff's cross-examination of the defendant. It thereby became competent evidence. Moreover, plaintiff's counsel made no effort to refute it by calling the stepfather to the stand, or otherwise.

[8] In addition to considering the evidence in the record, the trial judge spoke with Amanda in chambers. He did so with the knowledge and consent of all counsel. The information received by him during that interview was evidence in the case which is not included in the record. As such, it furnishes additional support for the order but is not available for review. *Swenson v. Swenson*, 101 Cal.App. 440, 446, 281 P. 674; *Young v. Young*, 132 Cal.App. 301, 303, 22 P.2d 564; *Morris v. Morris*, 121 Cal.App.2d 707, 709, 264 P.2d 106. Such evidence is quite similar to the view which a trial judge upon occasion takes of property. When the judge takes such a view with consent of counsel, it is "evidence in the case and 'may be used alone or with other evidence to support the findings.'" *Stegner v. Bahr & Ledoyen, Inc.*, 126 Cal.App.2d 220, 225, 272 P.2d 106, 109.

[9] Plaintiff claims prejudicial error in the asserted erroneous refusal of the court to allow inspection of a report which had been prepared by one of defendant's witnesses. The witness had gone over the report prior to coming to court but had not during direct examination used it to refresh her recollection. That did not entitle the plaintiff to see the report and cross-examine the witness upon it pursuant to the provisions of section 2047 of the Code of Civil Procedure. *People v. Gallardo*, 41 Cal.2d 57, 66-68, 257 P.2d 29; *People v. Humphries*, 127 Cal.App.2d 131, 134-135, 273 P.2d 562. During cross-examination the witness was asked if what she had testified to was what she had observed while looking through a window on November 19th. She replied she did not believe she had testified it was on the 19th. Asked when she looked through the window, she replied, "Several occasions between November 5th and

November 25th * * *" Asked if she had included in the report what she saw through the window, she did not remember. The cross-examiner then invited her to look at the report, upon doing which she said, "On November 25th when I looked through the window I did include what I saw in the Taylor home in the report. It is here, part of it at least." Defendant's counsel thereupon cut from the report and delivered to plaintiff's counsel a portion thereof which he stated pertained to November 25th. Plaintiff's counsel demanded to see the entire report. The court offered to examine the report to ascertain if it contained anything further that would be material to the particular inquiry, but plaintiff's counsel rejected the offer. We find no error in this refusal to allow inspection of the report. It is not a situation to which section 2047 applies. That section says: "A witness is allowed to refresh his memory respecting a fact, by anything written by himself". This witness did not so use the report which she had written. She merely used it, upon invitation of the cross-examiner, to refresh her recollection as to what she had included in the writing, not "to refresh * * * [her] memory respecting a fact" which she had observed. That is a collateral matter to which we believe section 2047 was never intended to apply. Even if that section were deemed applicable, we can conceive of no possible prejudice to plaintiff flowing from the refusal of this demand for inspection.

[10] Plaintiff comments upon the absence of findings of fact in support of the order. The answer is that no findings are required for a custody order. *Booth v. Booth*, 69 Cal.App.2d 496, 498, 159 P.2d 93; *O'Connor v. O'Connor*, 91 Cal.App.2d 147, 151, 204 P.2d 916.

[11] There was no formal written application by either party in respect to the custody of Eric but that is of no consequence because jurisdiction does "not depend upon specific allegations as to the fitness of the respective parties, or their ability or willingness, to care for their offspring, nor upon a specific prayer for the custody." *Ex parte Gordan*, 95 Cal. 374,

377, 30 P. 561. Moreover, early during the hearing counsel agreed that the question of the custody of both children was before the court for consideration and decision.

Plaintiff further claims that the actual reason for the trial court's decision is that her present husband is a negro. We find no sound basis in the record for any such inference. Plaintiff's argument rests principally upon asserted prejudices of the defendant. We can not say from the record that defendant harbors such prejudices, but even if he did that would be no reason for ascribing them to the judge who tried and decided the factual and legal issues in a wholly impartial, objective, and judicial manner.

Plaintiff directs attention to the fact that defendant, with full knowledge of the legal effect of the statutory stay pending this appeal, improperly and unlawfully removed Amanda and Eric from the State of California, was adjudged in contempt of this court therefor, *Smith v. Smith*, 120 Cal. App.2d 474, 261 P.2d 567, and has not yet purged himself thereof. Plaintiff contends that such conduct deprives defendant of the right to be heard upon this appeal. Specifically she claims: "Equity and justice require that he be denied an audience here; that his briefs and arguments not be considered; and that the cause be decided as if respondent were in default—as in legal effect he is."

[12, 13] While we may and do take judicial cognizance of the contempt adjudication, a proceeding in this very action (see *Willson v. Security-First Nat. Bank*, 21 Cal.2d 705, 711, 134 P.2d 800; *Christiana v. Rose*, 100 Cal.App.2d 46, 52-53, 222 P.2d 891, there are reasons why we should not use it as a basis for reversal of the trial court's custody order.

This is not an ordinary adversary case. The personal rights of the parties are by no means the sole subject of judicial concern. Their children are the persons beneficially interested. The question "What is for the best interests of Amanda and Eric?" furnishes the major issue. We must not suffer the urge to punish either parent to lead to judicial action which in effect pun-

ishes these innocent children and renders for naught the inquiry so painstakingly conducted and the determination so thoughtfully made by the trial judge in exercising his function of ascertaining and declaring which of these two homes is the better equipped to foster the best interests of these children.

Also, we should be mindful of the fact that the defendant does not appear here in an active role. It is the plaintiff, not the defendant, who seeks the aid of this court in the hope of overruling the decision of the trial court. Significantly, we think, the cases which plaintiff cites in support of her position are cases in which contemptuous conduct furnished the basis for denial of relief that was being requested by the contemnor. The contemnor was seeking affirmative judicial action. He was invoking the judicial process for his own benefit; e. g., he was prosecuting an appeal for the purpose of reversing a judgment or an order, or seeking a writ of mandate to compel action in his favor, or seeking prohibition to stay proceedings against him. Among such cases, cited by plaintiff, are *MacPherson v. MacPherson*, 13 Cal.2d 271, 277, 89 P.2d 382; *Ross v. Ross*, 48 Cal.App.2d 72, 73, 77-79, 119 P.2d 444; and cases reviewed or cited in each.

Plaintiff makes the additional argument that defendant's contemptuous conduct is itself evidence to be considered in weighing the question "Which parent should be given custody of the children?" But that evidence was not before the trial court when it made the order appealed from. Indeed, it had not yet come into existence. In effect, plaintiff is asking us, as a reviewing court, to take evidence (by way of judicial notice) of facts which have occurred since the trial court acted and then on the basis of such evidence make a finding which will require a reversal of the order the trial court made. That certainly is not within the purview of section 43 $\frac{3}{4}$ of Article VI of the State Constitution or of section 956a of the Code of Civil Procedure. Prior to the adoption of those sections "it was firmly established that an appellate tribunal in this state possessed none of the functions of a jury, and that the sole province of the court on appeal

was to review the action of the trial court, correct its errors, and thus pass upon questions of law only. This was the established rule at common law." *Tupman v. Haberkern*, 208 Cal. 256, 262, 280 P. 970, 972. "Neither the constitutional amendment nor section 956a of the Code of Civil Procedure was intended to abrogate the general rule respecting the powers of the trial court in its determination of questions of fact or the rule that the reviewing court is bound by the findings of the trial court if based upon substantial evidence." At pages 265-266 of 208 Cal., at page 974 of 280 P. Accordingly, the Supreme Court concluded it was not the intention of section 43 $\frac{3}{4}$ or of 956a "that the reviewing courts should develop generally into trial courts; that it was contemplated that the courts of appellate jurisdiction would exercise the new power sparingly and, as a general rule, would exercise it only when the purpose of the new findings was to constitute a basis for an affirmance of the judgment or a basis for a reversal of the judgment with directions to the trial court to enter a judgment for the appellant." At page 269 of 208 Cal., at page 975 of 280 P. Assuming that the evidence of defendant's contumacious conduct is available for consideration it would have to be appraised as to its portent and effect and weighed in with all the other evidence in the case. That would present questions of fact for determination by the trier of the facts.

Significantly, it would appear that plaintiff has not found a case in which a reviewing court has done what she urges this court to do. The cases she cites, including *Green v. Perr*, Mo.App., 238 S.W.2d 924, were cases in which the trial court had given consideration to the contumacious conduct of a parent and the reviewing court considered such conduct relevant under the circumstances of the case. That falls far short of that which plaintiff asks this reviewing court to do.

In the instant case, on June 30, 1953, during the pendency of the contempt proceeding and at plaintiff's request we ordered a stay of proceedings upon this appeal. Later, likewise at the request of plain-

tiff and on December 29, 1954, we issued an order vacating the stay, restoring the cause to the active calendar and authorizing plaintiff to file her opening brief. Thus, it was at plaintiff's express request that this cause came on for determination upon the merits. In making this determination we do not, of course, condone defendant's contumacious conduct. The judgment of contempt still stands and will be enforced whenever possible.

The order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.



134 Cal.App.2d Supp. 902

PASADENA INVESTMENT CO., a corporation, Plaintiff, Appellant, and Respondent,

v.

PEERLESS CASUALTY COMPANY, a corporation, et al., Defendant, Respondent, and Appellant.

C. A. 8645.

Appellate Department, Superior Court,
Los Angeles County, California.

July 8, 1955.

Action upon fidelity bond brought against casualty company and against individual who had set up escrow with bank for consummation of sale of his business, wherein plaintiff filed claim as creditor of individual, and individual filed cross-complaint against bank seeking adjudication of validity of plaintiff's claim as creditor. The Municipal Court of the Los Angeles Judicial District rendered judgment from which appeals were taken. The Appellate Department of the Superior Court, Bishop, Acting P. J., held that Municipal Court lacked jurisdiction from moment that cross-complaint was filed, and jurisdiction was not obtained by proceeding as though it ex-

isted, nor was it restored by failure of individual to prove his cross-complaint.

Judgment reversed.

1. Declaratory Judgment ⇨82

Interpleader ⇨10

Interpleader action may not be brought by claimant to fund, but claimant may take initiative by bringing action for declaratory relief. West's Ann.Code Civ.Proc. §§ 386.5, 1060.

2. Declaratory Judgment ⇨273

Municipal court had no jurisdiction over cause of action for declaratory relief. West's Ann.Code Civ.Proc. § 1060.

3. Declaratory Judgment ⇨273

Where plaintiff brought action upon fidelity bond in municipal court and filed claim as creditor of one of defendants who was entitled to deposit in escrow with bank, and such defendant filed cross-complaint against bank seeking adjudication of validity of plaintiff's claim as creditor, municipal court lacked jurisdiction from moment that cross-complaint was filed, and jurisdiction was not obtained by proceeding as though it existed, nor was it restored by failure of such defendant to prove his cross-complaint. West's Ann.Code Civ.Proc. §§ 386.5, 1060.

McLaughlin & Casey, Los Angeles, for plaintiff.

Anderson, McPharlin and Connors, Los Angeles, for defendant.

BISHOP, Acting Presiding Judge.

It may well be that when this action returns to the trial court, steps will be taken to give that court jurisdiction to try it—over again. The futility of this procedure does not escape us, nor does it avoid its necessity. Trying a case before a court that lacks jurisdiction is itself a futile act, and an appeal from a judgment following such a trial can have only one outcome, a reversal.

The trial court lacked jurisdiction from the moment that a cross-complaint was filed for declaratory relief. The complaint set up several causes of action upon a fidelity

bond given by the Peerless Casualty Company. One of the defendants, Robert Sheahan, had sold his business some time before the complaint was filed, and set up an escrow with a bank for the consummation of the sale, the sum of \$3,500 being called for by the escrow instructions. The plaintiff in this case filed a claim as a creditor of Sheahan, an act which held up the closing of the sale.

[1, 2] The object of the cross-complaint, which brought the bank in as a cross-defendant, was to have an adjudication of the validity of plaintiff's claim as a creditor (cross-complainant hoping to have it declared invalid), so that the escrow holder, the bank, could act with safety. If an action in interpleader could be brought by a claimant to a fund held in escrow, the cross-complaint would closely resemble such an action. An interpleader action, however, may not be brought by a claimant to a fund, but a claimant may take the initiative by bringing an action for declaratory relief, and that is what cross-complainant Sheahan did. We see no reason to consider the pleading anything other than what it purported to be, a cross-complaint for declaratory relief, and no one contends that it was anything else. But the trial court had no jurisdiction over a cause of action for declaratory relief. Cook v. Winklepleck, 1936, 16 Cal.App.Supp.2d 759, 763-764, 59 P.2d 463, 465-466; section 1060, Code of Civil Procedure; Ralphs Grocery Co. v. Amalgamated Meat Cutters, etc., 1950, 98 Cal.App. 2d 539, 542, 220 P.2d 802, 804.

[3] The plaintiff seeks to escape the consequences of the conclusion that the trial court had no jurisdiction by persuading us that jurisdiction had been restored by action amounting to a retraxit of the cause of action pleaded in the cross-complaint. Sympathetic as we are to any reasonable interpretation that will avoid a reversal on jurisdictional grounds, we find ourselves unable to agree with the plaintiff. Supplementing the record brought to us by the appellant, we secured the entire file from the trial court. We find that the cross-defendant escrow holder made a motion purportedly under section 386.5, C.C.P. to be allowed to pay into court the sum held in

escrow. That section begins: "Where the only relief sought against one of the defendants is the payment of a stated amount of money alleged to be wrongfully withheld, * * *." That condition did not exist, and the trial court lacked jurisdiction, but the motion was granted. Then the parties stipulated that the larger part of the sum paid into court should be paid at once to the cross-complainant Sheahan. Subsequently, they entered into a stipulation dismissing the action as to the defendant Sheahan, and agreeing how the sum still remaining in the court's possession should be divided. This stipulation was brought before the trial judge at the beginning of the trial of this action, and he was given the option of making use of the stipulation in rendering judgment, or of approving it at once. He adopted the latter course.

The trial proceeded, and, as the recitals preliminary to the findings of fact note, no evidence was offered "in behalf of defendant Robert Sheahan on his cross-complaint for declaratory relief in the above entitled action. * * *." The judgment as ordered and as entered dismissed the cross-complaint.

We have, then, an action beyond the jurisdiction of the trial court because of the presence of a cross-complaint for declaratory relief: an order entered by the court that lacked jurisdiction, made on the theory that the cause of action for declaratory relief served as one in interpleader; a further order, by the court without jurisdiction, giving effect to the stipulation of the parties as to the disbursement of moneys the court held without any supporting pleadings; and a judgment, after a trial, dismissing the cross-complaint because no proof had been offered in its support. We see no escape from the conclusion that the jurisdiction that was lacking was not obtained by taking steps as though it existed. Nor did the failure of the cross-complainant to prove his cause of action, because he believed he had obtained that which he desired without proving it, operate as a *re-traxit*, under the circumstances.

The judgment is reversed, each party to bear his own costs of appeal.

PATROSSO and SWAIN, JJ., concur.

134 Cal.App.2d Supp. 912

The PEOPLE of the State of California,
Plaintiff and Respondent,

v.

Wilford Lee MITCHELL, Defendant and
Appellant.

Cr. A. 20.

Appellate Department, Superior Court,
San Bernardino County, California.

July 21, 1955.

Defendant was convicted and sentenced in Justice Court, Barstow Judicial District, County of San Bernardino, Art Manning, J., on his plea of guilty and appealed from an order denying motion to set aside the judgment and sentence and for permission to withdraw the plea of guilty and enter a plea of not guilty. The Superior Court, Appellate Department, Coughlin, P. J., held that even if the defendant had pleaded guilty to the misdemeanor because the arresting officer had told him he would otherwise be charged with a felony, such fact did not require granting of the relief asked where it appeared defendant could properly have been charged with a felony and where there was no misrepresentation of any kind.

Affirmed.

1. Criminal Law ⇨274

A plea of guilty may be withdrawn for mistake, ignorance, inadvertence or any other factor overreaching defendant's free and clear judgment.

2. Criminal Law ⇨274

Though permission to withdraw plea of guilty is within trial court's discretion, courts generally are liberal in allowing such plea to be withdrawn, especially where there is doubt of defendant's guilt.

3. Criminal Law ⇨997(1, 6)

Defendant's motion to vacate judgment and for leave to withdraw plea of guilty is in nature of writ of error coram nobis and judgment will be vacated only where some fact exists which, if before court, would have prevented rendition of judgment and which, without defendant's fault or negligence, was not presented in court.

4. Criminal Law $\S$ 998

The fact of mistake, fraud or duress as ground for vacating judgment of conviction on plea of guilty must be established by convincing evidence.

5. Criminal Law $\S$ 998

Record on appeal from order denying motion to set aside judgment and sentence upon plea of guilty and for permission to withdraw guilty plea and enter plea of not guilty sustained trial court's implied finding that defendant's entry of guilty plea did not result from fear and threats made against him.

6. Criminal Law $\S$ 998

Even if, as defendant alleged, he had pleaded guilty to misdemeanor because arresting officer told him he would otherwise be charged with a felony, such fact did not require setting aside conviction and granting of leave to withdraw guilty plea, where it appeared defendant could properly have been charged with felony and where there was no misrepresentation of any kind. Pen.Code $\S$ 266h, 647, subd. 5.

7. Criminal Law $\S$ 998

Mere fact that defendant expected a small fine and instead was sentenced to county jail on his plea of guilty to a misdemeanor did not require setting aside conviction and granting leave to withdraw guilty plea, in absence of any misrepresentation. Pen.Code, $\S$ 647, subd. 5.

T. L. DeBord, Barstow, for appellant.

Lowell E. Lathrop, Dist. Atty., San Bernardino, and Arthwell C. Hayton, Deputy Dist. Atty. San Pedro, for respondent.

Before COUGHLIN, P. J., and HILLIARD and MITCHELL, JJ.

COUGHLIN, Presiding Judge.

This is an appeal from an order denying a motion to set aside a judgment and sentence upon a plea of guilty and for permission to withdraw the plea of guilty and enter a plea of not guilty.

After the notice of appeal was filed the judge of the trial court transferred all papers and documents in his file together

with a transcript of his docket to the above-entitled court. Thereafter the appellant submitted a proposed statement on appeal. Without undertaking any certifying procedures this document also was transferred to this court. Thereupon this Court made an order directing the judge of the trial court to certify a statement on appeal in the manner prescribed by law. Subsequently there was filed in this court a document entitled "Defendants Proposed Statement on Appeal" and a document entitled "Respondent's Proposed Amendments to Statement on Appeal—Rule V". To the latter document there was attached a certificate signed by the judge, with these words: "This statement is hereby certified as a true and correct statement on appeal in the above entitled matter". No certificate was attached to defendant's proposed statement on appeal although there are additions and deletions to the document and a notation, "End of Certification, Art Manning". After the presentation of this inept record on appeal the appellant moved to strike the document entitled "Respondent's Proposed Amendments To Statement on Appeal". This motion was denied. Subsequently, the matter was heard on the merits and submitted, but upon review of the certified statement on appeal, it appeared that a letter which was considered by the trial judge and introduced as an exhibit in the proceedings, had not been forwarded to this court. Thereupon this Court ordered the submission set aside and directed the judge of the trial court to supplement the record on appeal and transmit to it the letter in question. In compliance with the latter order this letter was delivered to this Court.

The defendant, Wilford Lee Mitchell, was charged with a violation of Section 647, subd. 5 of the Penal Code, a misdemeanor. The complaint alleged that he was "wilfully and unlawfully an idle, lewd and dissolute person". Prior to arraignment before the judge in question, the defendant had been taken into custody and was told by the arresting officer "that the crime of Pandering was a felony; that while Pimping was a felony, Vagrancy was a misdemeanor". Thereafter the defendant was

taken before the Court and was duly arraigned. The judge handed a letter to the defendant asking whether or not the facts contained in the letter were true, to which the defendant replied "Yes, Judge, I guess that's true all right". The letter in question was signed by a Mary Hollenback and related that for over a week the defendant, who was a cab driver, brought men to her under an arrangement whereby the men would pay her ten dollars and she would pay the defendant one dollar. Thereupon the defendant entered a plea of guilty to the offense charged in the complaint, a misdemeanor, and the Court sentenced him to one hundred and eighty days in the county jail.

In his affidavit, filed in support of the motion to set aside the judgment and permit him to withdraw his plea of guilty, the defendant stated "that he was threatened with a felony prosecution if he did not plead Guilty to a misdemeanor", and that the arresting officer "told him it would be a misdemeanor if he pled guilty and if he pled not guilty it would be a felony charge".

At the hearing upon the motion the police officer in question testified "that at no time while the defendant was being booked or prior to the entering of his plea or any time were any threats of force or violence or promise of leniency made by him or anyone in his presence to the defendant; that the defendant made certain statements to the officer wherein he admitted knowing the woman involved and that he had hauled fares in his cab to her house and that he had received money for this, knowing her to be a prostitute". (Respondent's Proposed Amendments to Statement on Appeal, Pg. 3, ls. 12-19.) At this hearing the defendant testified "that at no time during the proceedings of March the 16th had any threats, force or of physical or violence been used against him; that at no time were there any promises of leniency or reward or immunity made to him". (Respondent's Proposed Amendments to Statement on Appeal, Pg. 4, ls. 27-30.)

[1-4] The defendant contends that he entered his plea of guilty "because of his fear and the threats made against him". The rule applicable to this case is stated

in *People v. Butler*, 70 Cal.App.2d 553, 561, 161 P.2d 401, 405, as follows:

"* * * A plea of guilty may be withdrawn for mistake, ignorance or inadvertence or any other factor overreaching defendant's free and clear judgment. Although the permission to withdraw the plea is within the trial court's discretion, courts are, in general, liberal in allowing the plea to be withdrawn, especially where there is doubt of defendant's guilt. A motion to vacate judgment and withdraw a plea of guilty is in the nature of a writ of error coram nobis. The judgment will be vacated only where some fact exists which, if before the court, would have prevented rendition of judgment, and which, without fault or negligence of the party, was not presented in court. The fact of mistake, fraud, or duress must be established by convincing evidence in order to entitle the defendant to relief from a guilty plea * * *."

[5] The record on appeal substantiates an implied finding by the trial court that the defendant did not enter a plea of guilty because of his fear and threats made against him.

[6] Moreover, even though this Court accepts as true the statements made in the defendant's affidavit that he entered his plea of guilty because the arresting officer told him it would be a misdemeanor if he pled guilty and if he pled not guilty it would be a felony charge, these statements do not prove any fraud, threat, promise of immunity or other overreaching of the defendant's free and clear judgment. The case at bar is not similar to those cases where a defendant entered a plea of guilty upon a representation of leniency and after the entry of such plea the expected leniency was not extended him. There is no evidence of any misrepresentation in this case. The defendant was advised that if he did not enter a plea of guilty to a misdemeanor he would be charged with a felony. He did enter a plea of guilty and no felony charge has been made against him. This Court does not believe that the acceptance, in good faith, of a plea of guilty to a lesser offense in lieu of prosecution on a greater

offense constitutes any overreaching of the defendant's free and clear judgment. There is no evidence in the instant case that the defendant might not have been properly charged with a felony. The statement of the defendant to the police officer, which is substantiated by the statement of the prostitute which the defendant admitted to be true, warranted the trial court in believing that the defendant properly could have been charged with the offense of pimping. Sec. 266h P.C.

[7] A consideration of the entire record on appeal establishes that the defendant complains not because judgment was pronounced on him under a plea of guilty, but rather, because he was sentenced to the county jail instead of receiving a small fine. However, the leniency which he expected to receive in pleading guilty to a misdemeanor was not the result of any misrepresentation by anyone whomsoever, and is not ground for the relief he requests. *People v. Butler*, 70 Cal.App.2d 553, 161 P.2d 401.

The order is affirmed.



134 Cal.App.2d Supp. 905

**Esther LENTFOEHR, Plaintiff and
Respondent,**

v.

**Claude W. LENTFOEHR, Defendant and
Appellant.**

No. Civ. A. 8717.

Appellate Department, Superior Court,
Los Angeles County, California.

July 12, 1955.

Action by wife against former husband for attorney's fees she incurred in obtaining divorce. The husband presented a claim for exemption for execution which had been levied on his wages. The Municipal Court of San Antonio Judicial District denied the

claim and husband appealed. The Appellate Department of the Superior Court, County of Los Angeles, Shaw, P. J., held that attorney's fees incurred by former wife were not necessities of life, and levy of execution on one half of former husband's wages was therefore unjustified.

Order reversed with directions to allow former husband's claim of exemption in full.

Swain, J., dissented.

1. Appeal and Error ⚡544(2)

Where record on appeal contained neither reporter's transcript nor agreement or settled statement to disclose what occurred at hearing of motion, and appeal was brought solely on clerk's transcript, appellant could not obtain review of exhibits or other matters on file in the trial court.

2. Exemptions ⚡127

Where judgment debtor filed affidavit for exemption of his wages from execution of levy, and creditor filed counter-affidavit contesting claim, affidavits were regarded as pleadings, and as judgment debtor had burden of proof, his allegations which were not controverted by creditor were taken as true, and debtor was not required to prove them. *West's Ann.Code Civ.Proc.* §§ 462, 690.11, 690.11(a, b), 690.26(1, 4, 6, 10).

3. Exemptions ⚡68

Attorney's fees former wife incurred in obtaining divorce were not common "necessaries" of life within exception from statutory exemption of wages from execution, and, therefore, levy of execution on one half of former husband's wages was not justified. *West's Ann.Code Civ.Proc.* §§ 690.11, 690.26(1, 4, 6).

Edgar J. Melchione, Los Angeles, for appellant.

Wendell W. Schooling, Huntington Park, for defendant.

SHAW, Presiding Judge.

A judgment having been entered against defendant in this action, an execution was issued and levied on his wages. He pre-

sented a claim for exemption of all these wages, under C.C.P., sec. 690.11. The plaintiff conceded the exemption of half thereof, and on hearing of defendant's claim it was denied as to the remaining half. He appeals from the order of denial.

Sec. 690.26, C.C.P., provides for the procedure on such a claim. The judgment debtor must file an affidavit setting forth the nature of his claim and the facts necessary to support it. Subd. (1). The creditor may then file a counter-affidavit contesting the claim, subd. (4). There may then be a hearing before the court, subd. (6). At this hearing the affidavits above mentioned "shall constitute the pleadings" and "shall be received in evidence." Subd. (10). If no other evidence is received, the court may decide the case thereon "if satisfied that sufficient facts are shown thereby"; otherwise, it may order the hearing continued for other evidence. Subd. (10).

In support of their various arguments here, the parties refer to documents sent up in the clerk's transcript which appear to be marked as exhibits (though not on the date of the hearing), to other documents filed in the trial court but not marked as exhibits, and to some other documents not in the record at all, but on file in a superior court action. Whether any of these documents was presented at the hearing does not appear.

[1] There is in the record neither a reporter's transcript nor an agreed or settled statement to disclose what occurred at the hearing of the motion, the appeal being here solely on the clerk's transcript. In such a case the appellant cannot obtain a review of exhibits and other matters on file in the trial court, the proceedings, if any, for the presentation of such matters to the trial court being a part of the oral proceedings, which can be brought up on appeal only by one of the forms of record above noted as being absent here. In *re Estate of Larson*, 1949, 92 Cal.App.2d 267, 269, 206 P.2d 852; *Hunt v. Plavsa*, 1951, 103 Cal.App.2d 222, 224, 229 P.2d 482.

[2] The case must therefore be decided on the two affidavits. Since they are to be regarded as pleadings, and the judgment debtor has the burden of proof, C.C.P., sec.

690.26, subd. (10), his affidavit may be regarded as the complaint. The rule of section 462, C.C.P., may properly be applied here, and the allegations of the debtor, not controverted by the creditor, must be taken as true, and the debtor is not required to prove them.

The affidavit of the debtor here states that all his earnings levied on are needed for the support of himself and his family, and that they were earned within a period of time which makes them exempt if so needed. These allegations are not denied in the creditor's counter-affidavit, so they must be accepted as true.

The particular part of section 690.11, C.C.P., here in question exempts all of the debtor's earnings for the prescribed time "unless the debts are: (a) Incurred * * * for the common necessities of life; or, (b) incurred for personal services rendered by any employee, or former employee, of such debtor." The debtor's affidavit negated both of these limitations. The creditor's affidavit said nothing of limitation (b), and the debtor's affidavit in regard to it must be accepted.

The debtor added to his denial of limitation (a) a statement that the debt was "for monies owed under a property settlement agreement." The creditor's affidavit said the claim was "for necessities of life, to wit, attorney's fees and court costs in a divorce action between the defendant and the plaintiff herein, his former wife." Since the creditor's affidavit coupled such denial as it attempted of the debtor's allegations regarding limitation (b) with a statement of the subject matter of the claim, we must, in the absence of any further record, assume the truth of this statement.

[3] This leaves for determination only the question whether a wife's attorney's fees and costs in a divorce case are "common necessities of life." The creditor did not, indeed, state that they were such, but only that they were "necessities of life," omitting the word "common." However, since the affidavit for the creditor clearly stated the nature of the claim, it will not be ruled out by this omission, but we will decide the case on the question just stated.

That question we think is answered by the rules declared by this court in Los Angeles Finance Co. v. Flores, 1952, 110 Cal. App.2d Supp. 850, 243 P.2d 139. There we were required to construe the same provision of C.C.P., sec. 690.11, subjecting half of the creditor's wages to levy for debts incurred for "the common necessities of life." After reviewing various decisions holding articles exempt from levy because necessary, we said at page 854 of 110 Cal. App.2d Supp., at page 142 of 243 P.2d:

"These decisions are in accordance with the general policy of the courts of this state to give a liberal construction to exemption statutes in favor of the debtor. * * *

"It follows logically that this same policy requires a *strict* construction of any provisions which tend to limit the exemptions elsewhere in the statute extended to the debtor. In 25 Cor.Jur. 10 (par. 8), the rule is thus stated: 'Conversely to the rule of liberal construction of the grant of an exemption, provisions which limit or take away the exemption are strictly construed, whether in provisos and exceptions or in amending statutes.' * * *

"* * * 'common necessities of life' as used in C.C.P., § 690.11, second paragraph, means those things which are commonly required by persons for the sustenance of life regardless of their employment or status. * * * on the other hand, the decision of whether or not a certain article previously sold to a debtor is a common necessary of life so that *one-half of the debtor's earnings* of the past 30 days, elsewhere exempted by the statute for the support of his family, shall nevertheless be taken to pay for it, involves a determination of whether or not it is such an article that *in the hands of any-one* it is to be regarded universally, or substantially so, as necessary to sustain life. Obviously the Legislature, cognizant of the fact that to the great majority of persons supporting a family the earnings of the past 30 days are required for such basic things as food, heat, shelter, etc. (*Common* to all)

desired to make sure that these earnings shall not be taken to pay for something less basic."

Accordingly, we reversed a decision of the trial court subjecting half the debtor's earnings to a levy.

Under the construction here given to the section the plaintiff's claim does not justify the levy. Possibly, each wife in such a case may regard her expense money in a divorce suit as necessary to her; but divorces are not yet so common that the cost of them "is to be regarded universally, or substantially so, as necessary to sustain life."

The order appealed from is reversed, and the trial court is directed to allow defendant's claim of exemption in full.

PATROSSO, J., concurs.

SWAIN, Judge.

I dissent. In *Bruton v. Tearle*, 1936, 7 Cal.2d 48, 57, 59 P.2d 953, 106 A.L.R. 580, the Supreme Court held that a mere money judgment rendered in California, based on a New York decree awarding alimony to plaintiff in a divorce suit, was in legal effect a judgment for alimony, 7 Cal.2d 55-56, 59 P.2d 957, and then went on to hold: "One of the characteristics of such a judgment is that as against said judgment the judgment debtor's earnings are not exempt from execution. (Citations.) Not only are the earnings of the judgment debtor under an alimony judgment liable for the payment thereof, but the means of enforcement of such a judgment are different and more effective than those applicable to the enforcement of an ordinary money judgment." The court referred to the power to punish for contempt as one of the differences between the two sorts of judgments. On pages 58 and 59 of 7 Cal.2d, on pages 957 and 958 of 59 P.2d is further discussion of the reasons for the rule announced. The court said the trial there (not the court that originally ordered the alimony) could exercise its discretion and could allow the defendant some part of his wages as exempt, if deemed necessary.

It is true, that case dealt with a judgment for alimony, and we have here a judgment for attorney's fees and costs, and defend-

ant argues that this is not alimony. But it appears to me that the reasons which led to the decision are equally applicable to both sorts of judgments. Money awarded a wife to pay her attorney fee in a divorce case is as much for her support as money for a doctor's fee or a grocery bill. This was not a division of community property. Both may be enforced by contempt proceedings, and both are originally matters in the discretion of some court. See also *Rankins v. Rankins*, 1942, 52 Cal.App.2d 231, 126 P.2d 125.

On the reasoning of the decision cited the order should be affirmed.



134 Cal.App.2d Supp. 835

**GLENDALE EMERGENCY HOSPITAL,
etc., Plaintiff and Appellant,**

v.

**Joseph REYNOLDS, Defendant and
Respondent.**

C. A. 8774.

Appellate Department, Superior Court,
Los Angeles County, California.

Aug. 15, 1955.

Action by lessor to recover \$2200 representing the unpaid installments of \$200 per month provided for in a written lease and the attorney's fees of \$500 provided for in the lease. From an adverse judgment of the Municipal Court, Glendale Judicial District, Kenneth A. White, J., and from an order denying motion for new trial the lessor appealed. The Superior Court, Los Angeles County, held that where lessee agreed by written instrument to lease certain premises at \$200 per month for a specific period but by oral agreement lease was subject to cancellation upon failure of lessor to refer patients needing dental work to lessee, the lease became presently operative as the oral agreement was a condition lease and can-

cellation of the lease for nonfulfillment of the condition subsequent was prevented by the parol evidence rule.

Judgment reversed and appeal from order denying motion for new trial dismissed.

1. Trial ⇨105(5)

Where lessee agreed by written instrument to lease certain premises at \$200 per month for a specified period, but lease by oral agreement, was subject to cancellation for failure of lessor to refer patients needing dental work to lessee, lease became presently operative as the oral agreement was a condition subsequent and as the condition was not contained in the writing itself, the parol evidence rule operated to prevent the cancellation of the lease, even though no objection was made to the introduction for testimony showing such a condition.

2. Evidence ⇨384

The parol evidence rule is a rule of substantive law.

3. Landlord and Tenant ⇨200.5

Where lessee agreed by written instrument to lease certain premises at \$200 per month, subsequent oral agreement of March 1953 that rent would be \$125 per month until business was better, served to modify terms of a written lease only as to installments already paid, and lessee was liable for \$200 rental provided for in lease from June 15, 1953, to and including April 15, 1954.

Erb, French, Picone & Griffin, Beverly Hills, for appellant.

Ernest G. Cade, Glendale, for respondent.

Before SHAW, P. J., and PATROSSO and SWAIN, JJ.

BY THE COURT.

This action was commenced to recover \$2,200 representing the unpaid installments of \$200 per month, provided for in a written lease from June 15, 1953 to April 15, 1954, and also reasonable attorney fees of \$500 under the provisions in the lease. By his answer the defendant alleged that the lease was made, executed and delivered on the oral condition that the lessor would

refer persons needing dental care to the defendant for treatment and, if this did not take place, the instrument would be cancelled, and that plaintiff failed to do this. The defendant further denied that possession was under and by virtue of the terms of the lease. The answer also alleged that the promise of referral was a fraudulent inducement to the execution of the agreement.

The trial court did not find fraud but found that the defendant had paid the rent called for until June of 1953. In March of 1953 the parties agreed that the rent would be \$125 until business was better. Thus the rent due from June 15, 1953 to March 15, 1954 was \$125 per month or \$1,000 in all, and the court awarded judgment to the plaintiff for that sum. The trial judge further found that the written lease was a nullity and not intended to be legally effective and possession was by virtue of an oral agreement. As a conclusion, the court stated that no counsel fees would be allowed since the leasing was oral.

The lessor appeals, claiming that it is entitled to the full amount of the rent and reasonable attorney fees as provided in the written lease. We have concluded that the law supports these contentions.

[1,2] That the lessor would refer patients needing dental care to the lessee or, in the event this did not take place, the lease would be cancelled, was the interpretation placed on the agreement by defendant's own answer and his testimony. This oral condition did not prevent the lease from becoming presently operative, contrary to the conclusion reached by the trial court that this was a condition precedent. Instead, it was a condition subsequent. Since this condition was not contained in the writing itself, the parol evidence rule operates to prevent the cancellation of the lease. See *Fontana v. Upp*, 1954, 128 Cal. App.2d 205, 208, 275 P.2d 164; 32 C.J.S., Evidence, § 935, p. 857. This is so although no objection was made to the introduction of testimony showing such a condition as it is almost axiomatic to say that the parol evidence rule is a rule of substantive law. *Hale v. Bohannon*, 1952, 38 Cal.2d 458, 465, 241 P.2d 4. Thus possession by the lessee was under the written lease.

[3] Nor is there any support for the finding that the parties agreed in March of 1953 that the rent would be \$125 until business would be better. It is true that an executed oral agreement will serve to modify the terms of a written lease, but only as to installments already paid. *Julian v. Gold*, 1931, 214 Cal. 74, 3 P.2d 1009. As the lessee was holding by virtue of the written lease, he is liable for the \$200 rental provided for from June 15, 1953 to and including April 15, 1954. *De Hart v. Allen*, 1945, 26 Cal.2d 829, 832, 161 P.2d 453.

The conclusion that no attorney fees should be allowed was a result of the finding that the lease was oral. Since this is contrary to what we have just said, and as the written lease does provide for attorney fees, reasonable fee should have been allowed.

The judgment is reversed. The appeal from the order denying motion for a new trial is dismissed.



134 Cal.App.2d Supp. 919

**Joseph LEVY et al., Plaintiffs and
Respondents,**

v.

**Isadore H. PRINZMETAL et al., Defendants
and Appellants.**

C. A. 8706.

Appellate Department, Superior Court,
Los Angeles County, California.

Aug. 2, 1955.

Action to recover \$200 for meat supplied by seller to buyers. The Municipal Court of Los Angeles Judicial District, Elisabeth E. Zeigler, J., rendered judgment for seller's assignee. Buyers appealed. The Appellate Department of the Superior Court of Los Angeles County, Patrosso, J., held that where seller of meat, which spoiled when freezer went out of order, believed freezer company was liable and replaced spoiled meat with \$200 worth of other meat and sent a bill to buyers showing a balance

of \$14.30 after buyers ordered additional meat and buyers sent seller a \$14.30 check which he cashed with notation that endorsement of check acknowledged receipt in full for price of meat less \$200 credit, an account was stated between the parties and payment and acceptance without objection discharged the alleged debt.

Judgment reversed.

Swain, J., dissented.

1. Account Stated ⇨1

An "account stated" is a new contract having a previous indebtedness for its consideration.

See publication Words and Phrases, for other judicial constructions and definitions of "Account Stated".

2. Account Stated ⇨6(2)

If a creditor renders to a debtor a bill or invoice reflecting a charge in a stated amount arising out of transactions previously had between them, and debtor makes no protest as to the amount shown due, his silence is equivalent to express assent to the correctness thereof, and gives rise to an account stated, implying a promise upon the part of the debtor to pay the same and a correlative promise by the creditor to accept that amount shown in discharge of the obligation.

3. Account Stated ⇨6(1)

The acceptance of payment of a balance shown to be due on an account rendered by a debtor to his creditor ordinarily constitutes an account stated as against the party accepting payment.

4. Account Stated ⇨6(1), 7

Where seller of meat, which spoiled when freezer went out of order, believed freezer company was liable and replaced spoiled meat with \$200 worth of other meat, and after buyers ordered additional meat seller sent them a bill showing a balance of \$14.30, and buyers sent seller a \$14.30 check which he cashed with notation that endorsement of check acknowledged receipt in full for price of meat less \$200 credit, an account was stated between the parties and payment and acceptance without objection discharged the alleged debt.

5. Account Stated ⇨8

A party accepting payment on an account stated by the debtor may not thereafter claim that the account was not paid in full.

6. Account Stated ⇨8

An account stated may be impeached for fraud or mistake.

7. Account Stated ⇨8

Where meat purchased from seller spoiled when freezer went out of order, and seller, who believed freezer company was liable, replaced spoiled meat with \$200 worth of other meat and an account of \$14.30 was stated between the parties after buyers ordered additional meat from seller, the mere fact that the freezer company refused to pay, without a showing that such refusal was justified, did not serve to establish that seller was mistaken in such belief and did not impeach account stated for mistake.

Irwin N. Howitt, Los Angeles, for appellants.

I. H. Prinzmetal, Beverly Hills, in proper.

PATROSSO, Judge.

Plaintiff instituted this action by filing a complaint containing three causes of action, each in the form of a common count: (1) book account; (2) account stated; and (3) quantum meruit, each, however, seeking recovery for the sum of \$200 for meat supplied by plaintiff's assignor to defendants under the circumstances now to be stated.

Defendants purchased an Amana Freezer from Metropolitan Food Plan (not a party to this action), for which a Mr. Beaumont was a salesman. Beaumont then directed defendant wife to Majestic Meat Packing Co. (plaintiff's assignor, hereinafter referred to as plaintiff), where she purchased and defendants paid for a quantity of meat which was stored in the freezer. There is no suggestion that anything was wrong with the meat when sold. About a month later the freezer went out of order and the meat therein was spoiled. Defendant wife thereupon telephoned Mr. Beaumont, who

thereupon requested Mr. Gaskin, a partner in Majestic Meat Packing Co., to go to defendants' house with him. While there is some conflict as to just what conversation took place between Mr. Gaskin, Mr. Beaumont (who was not called as a witness) and the defendants, Mr. Gaskin's testimony is to the effect that he and Mr. Beaumont told defendant wife "that she had her insurance policy, it would be a matter with the freezer company on the spoilage of food, if the proper forms were filled out and repairs were made. And we explained to her * * * the box was an eighteen cubic foot box, and it would only carry a \$200 insurance policy on the box, which we replace, and help her fill out the forms; after she had made all the necessary report (*sic*) on it, not to worry about it." Plaintiff thereupon removed the spoiled meat and replaced the same with two hundred dollars worth of other meat selected by defendants. At or about the same time, defendants ordered additional meat of the value of \$14.30. Subsequently plaintiffs rendered a statement to defendants, reading as follows:

"Replacement of spoiled meat	200.00
Smoked tongue	14.30
	214.30
Credit on meat	200.00
	14.30"

Following the receipt of this invoice, defendant Mr. Prinzmetal forwarded a check to plaintiff in the sum of \$14.30, which was cashed by the payee. This check contained the following notation: "Endorsement of this check acknowledges receipt in full for the following items: Your Inv. # 18810—\$214.30. Less credit \$200.00—\$14.30."

Defendants contend that as a result an account was stated between the parties in the sum of \$14.30, and that defendants having paid and plaintiff having accepted the same, the alleged debt sued upon was discharged. We agree, and accordingly are reversing the judgment.

[1-4] An "account stated" is a new contract having a previous indebtedness for its consideration. 1 Cal.Jur.2d p. 368, sec.

44. It arises where "transactions have occurred between the parties from which the relation of debtor and creditor has arisen, that thereafter one or both have rendered or made statements or declarations specifying definitely the amount due on account thereof, and thereupon there has been an agreement, express or implied, by the one who is the debtor, to the other, that a certain sum is due from him on such account, together with an express or implied promise to pay the same." *Bennett v. Potter*, 1919, 180 Cal. 736, 745, 183 P. 156, 160. Thus if a creditor renders to a debtor a bill or invoice reflecting a charge in a stated amount arising out of transactions previously had between them, and the debtor makes no protest as to the amount shown due, his silence is equivalent to express assent to the correctness thereof, and gives rise to an account stated, implying a promise upon the part of the debtor to pay the same and a correlative promise by the creditor to accept that amount shown in discharge of the obligation. Similarly the acceptance of payment of a balance shown to be due on an account rendered by a debtor to his creditor ordinarily constitutes an account stated *as against the party accepting the payment*. 1 Cal.Jur.2d p. 379; *Hansen v. Fresno Jersey Farm Dairy Co.*, 1934, 220 Cal. 402, 408, 31 P.2d 359; *Wallace v. Crawford*, 1937, 21 Cal.App.2d 394, 404, 69 P.2d 455. It has also been said that a debtor cannot destroy the legal effect of an account stated "by subsequently refusing to pay, nor can the creditor avoid its effect by refusing to accept the amount as the balance due". 1 C.J.S., *Account Stated*, § 43, p. 725; *Dolman v. Kaw Const. Co.*, 1918, 103 Kan. 635, 176 P. 145, 2 A.L.R. 67, 70-71.

It would indeed be a strange rule which declared that where a creditor sends a bill to his debtor an account stated arises if the latter makes no objection thereto, as a result of which he becomes obligated to pay the balance as thus shown, but that an account stated does not result where upon receipt of a bill from his creditor the debtor pays the amount shown as due thereon and the payment is accepted without objection by the creditor.

[5] Here the undisputed evidence not only shows the rendition of a bill by plaintiff to defendants showing a balance of \$14.30, but payment thereof by defendants by a check bearing the notation previously mentioned to the effect that endorsement of the same constituted a receipt in full. Indeed, it would appear that the check itself constitutes an account stated as against plaintiff who cashed the same under the rule announced in *Hansen v. Fresno Jersey Farm Dairy Co.* and *Wallace v. Crawford*, supra. A party accepting payment on an account stated by the debtor may not thereafter claim that the account was not paid in full. 1 C.J.S., *Account Stated*, § 51, par. h, p. 732.

[6,7] While it is true that an account stated may be impeached for fraud or mistake, there is no evidence of either here. According to the plaintiff's evidence, the defendants were assured by plaintiff's assignor that the replacement of the spoiled meat to the amount of \$200 was the responsibility of the freezer company if the proper forms were filled out, and the defendants were told not to "worry." It likewise is undisputed that the forms submitted to defendants by plaintiff's assignor were filled out by defendants, and by the assignor forwarded to the Amana Freezer Company. Why the claim was not paid by the freezer company does not appear. Upon the present record before us, it appears that plaintiff's assignor, when replacing the spoiled meat, looked for payment therefor, not to the defendants, but a third party (the freezer company), in the apparent belief that the latter was liable therefor. The mere fact, however, that the company refused to pay without a showing that such refusal was justified does not serve to establish that plaintiff's assignor was mistaken in such belief. If upon a retrial it should be made to appear that the refusal of the freezer company to make payment was justified by reason of the fact that it was not liable for any reason other than the fault of plaintiff's assignor, a different situation will be presented.

The judgment is reversed.

SHAW, P. J., concurs.

SWAIN, Judge.

I dissent.

As noted in the majority opinion, there is a conflict in the evidence as to what conversation took place at defendants' house, but there is testimony to support the implied finding that the defendants ordered \$200 of meat to replace that which was spoiled. The defendants claimed that it was to be replaced at the expense of Amana or its insurance carrier. The implied finding of the court is against this contention. There is no evidence that there was any connection between the freezer company and the meat company except as above stated. In fact, Gaskin of the meat company testified that he was not connected with the Metropolitan Food Plan at all.

We, therefore, have a freezer sold by one company and meat sold by another company. Up to this point there is no difficulty for us in the case. The complicating factors began to work when plaintiff's assignor sent the first invoice (Exhs. A and B) for the meat. This contained two items, "replacement of spoiled meat \$200" and "smoked tongue \$14.30." The invoice which was sent to the defendants (Exh. B) stated "credit on meat \$200," leaving a balance of \$14.30. The assignor's copy of the invoice (Exh. A) was the same, except that it stated, "credit on spoiled meat as per Irving Kornblum meat returned \$200." This notation was in the handwriting of assignor's accountant. Irving Kornblum was a partner in plaintiff's assignor. The \$14.30 for smoked tongue was paid by the defendants after receiving the original invoice. It was a separate order, having nothing to do with the replacement for the spoiled meat.

The question is: Did payment of the \$14.30 constitute an accord and satisfaction for the entire bill? My answer is "No." 1 C.J.S., *Accord and Satisfaction*, § 29, p. 502: "The payment by a debtor, and acceptance by the creditor, of a sum which is conceded by the debtor to be due and payable, or as to which there is no dispute or controversy, furnishes no consideration for the discharge of a disputed claim for an additional and distinct amount or item of liability for the payment, being nothing

more than the debtor admittedly owes, is neither a detriment to him nor a benefit to the creditor, and so does not constitute or effect an accord and satisfaction thereof, or of the entire account between the parties, in the absence of any new or additional consideration, even though such payment is tendered and accepted or receipted for as in full payment or settlement. The payment operates as a discharge of the items or amount paid only, and the creditor is entitled to maintain an action to recover the balance of his claim." 1 C.J.S., Accord and Satisfaction, § 32, p. 515: "Where there are two claims dependent on different facts, and one claim is undisputed and the other disputed, acceptance of payment of the undisputed claim does not bar the right to sue for and recover on the disputed claim." To the same effect is Sharp v. Conti, 1943, 57 Cal.App.2d 1007, 136 P.2d 99. See also 1 Cal.Jur.2d 255.

Appellants contend that the plaintiff sued on an account stated and is, therefore, limited to a claim of \$14.30 which was paid. Plaintiff did sue on an account stated but for \$200, not \$14.30. It does not appear whether the court decided that there was an account stated for \$200. The evidence would not support a decision that there was an account stated for \$200 as pleaded. We assume the case was decided on one or more of the other counts, both of which are supported by the evidence.

There was no consideration for the \$200 credit. Plaintiff's assignor was not to blame because the meat was spoiled. He was not in any way liable for replacing it. The court's implied finding is that he did not agree to replace the meat at his expense. There is no reason why the defendants should not pay for meat which they bought.

I would affirm the judgment, with costs to respondents.



